

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY.....1

I. A CLEAR, TAILORED REGULATORY SCHEME WILL PROMOTE THE CONTINUED DEVELOPMENT AND DEPLOYMENT OF VALUABLE IP-BASED VOICE SERVICES6

A. Only VoIP Services Meeting Specific Criteria Should Be Subject to the Commission’s Regulatory Framework.....6

1. As a General Matter, IP-Enabled Services Other than IP-Based Voice Services Should Remain Unregulated Interstate Information Services.....7

2. Only Certain IP-Based Voice Services Should Be Subject to Regulation At This Time.9

B. An Appropriate Regulatory Scheme Is Necessary to Promote the Cable Industry’s Development of Facilities-Based VoIP Services.....11

II. THE APPROPRIATE REGULATORY FRAMEWORK FOR VOIP COMPRISES CLEARLY DEFINED RIGHTS AND RESPONSIBILITIES.....15

A. VoIP Providers Should be Subject to Public Health, Safety and Related Responsibilities.....16

B. VoIP Providers Should Not be Subject to “Legacy” Telephony Requirements.....19

C. VoIP Providers Must Be Assured Of Certain Rights.....21

D. The Commission Has Authority to Tailor A Regulatory Scheme For VoIP.23

1. If VoIP is Classified as an Information Service, the Commission Retains Ancillary Jurisdiction to Impose Minimal Responsibilities on VoIP Providers.24

2. The Commission Has the Authority to Ensure VoIP Providers Have Necessary “Rights” Even if VoIP is an Information Service.....25

3.	If VoIP is Classified as a Telecommunications Service, the Commission Has Authority to Tailor a Minimal Regulatory Regime for VoIP Services.....	29
III.	THE FEDERAL GOVERNMENT SHOULD ASSERT PRIMARY JURISDICTION OVER VOIP IN ORDER TO PROMOTE ITS SPEEDY AND WIDESPREAD DEPLOYMENT	32
A.	The Commission Has the Authority to Preempt State Regulation of VoIP.....	32
1.	Preemption is Warranted in Order to Secure the Federal Policy Goal of Broadband Deployment.....	33
2.	The Commission Has Broad Authority to Preempt State Regulation of Information Services	35
3.	The Commission Has the Duty To Preempt State and Local Laws and Regulations That Have the Effect of Prohibiting the Provision of Interstate or Intrastate Telecommunications Service.....	38
B.	Tailored Preemption of Inconsistent State Regulation and All Local Regulation Is Required To Promote the Widespread Availability of VoIP.....	39
IV.	CATEGORIZING AND CLASSIFYING IP-ENABLED SERVICES	42
A.	NCTA’s Four-Prong Test Should Be Used to Categorize IP-Based Services Subject to Minimal Regulation.....	42
B.	Classifying VoIP Services: Information Services or Telecommunications Services.....	44
C.	VoIP Can Be Classified as an Information Service.....	45
D.	VoIP as a Telecommunications Service.....	46
	CONCLUSION.....	49

cable technology since 1996, cable operators are preparing – and in some cases, have begun – to provide innovative facilities-based VoIP services in many areas of the country. Analysts estimate that by year-end 2004 cable operators will have deployed VoIP in cable systems passing more than 24 million homes, and that number will rise to more than 95 million homes passed by year-end 2007.¹

This rulemaking proceeding was initiated to “examine issues relating to services and applications making use of Internet Protocol.”² There are myriad services and applications that fit that description. However, unlike many of the services that may fall under the rubric of “IP-enabled services,” which exist mostly on a drawing board, VoIP services are a reality and are rolling out even as this proceeding rolls on. While the technology appears robust, the economic and business models for VoIP deployment are still taking shape. Consumer acceptance, service features, and the competitive landscape are all unknowns.

The biggest unknown, however, is the regulatory model that will govern VoIP deployment. With VoIP now being provided in the marketplace, replacing this unknown with an appropriate regulatory framework is a matter of utmost urgency. There will be time enough for the Commission to address the regulatory treatment of other, yet-to-be-developed, IP-enabled services as they actually emerge in the marketplace and if they prove to be as important as traditional voice services to the lives of all Americans. Rather than pursuing a comprehensive answer for all possible IP-enabled services at this juncture, however, the Commission should focus its efforts on providing the regulatory certainty

¹ Kagan World Media, *Broadband Technology*, February 10, 2004, at 2.

² *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“*NPRM*”).

providers and potential providers of VoIP services need to make and execute their business decisions³ while preventing the establishment of competing and inconsistent regulatory regimes by state and local governments.

We therefore urge the Commission to establish a balanced framework comprising the rights and responsibilities of VoIP providers whose services meet the four-prong test described in the next section below. The rights of these VoIP providers include, among others:

- the right to interconnect and efficiently exchange traffic and control signaling with both IP and public switched telephone network (“PSTN”) entities on a peer-to-peer basis;
- the right to obtain telephone numbers, including numbers secured through number portability, to assign those numbers to VoIP customers, and to have them published in incumbent providers’ telephone directories and included in incumbent providers’ directory assistance databases;
- the right to access, at reasonable and nondiscriminatory rates, the facilities and resources necessary to provide VoIP customers with full and efficient 911/E911 services (*e.g.*, interconnection to incumbent E911 selective router switches; access to Master Street Address Guides; and the right to upload to Automatic Location Identification databases);
- the right, but not the obligation, to establish uniform, enforceable and efficient terms for carrier interconnection for all service types (*e.g.*, file access tariffs, subject to streamlined review);
- the right, but not the obligation, to establish uniform, enforceable and efficient terms for end user services (*e.g.*, file end-user tariffs and price lists, subject to streamlined review, for end user services);
- the right to be compensated fairly for terminating traffic delivered from other entities, in accordance with the results of an industry-wide review of payments for traffic termination and origination that specifically addresses VoIP service; and

³ As Brian Roberts, President and CEO of Comcast Corporation, recently testified: “VoIP can fundamentally and positively change telephone competition in America... but only if we can have a clear, strong deregulatory policy. The FCC has started down that path. And the legislation on VoIP introduced by Senator Sununu goes in the right direction. We sincerely hope that getting clarity on VoIP will not have to await a comprehensive rewrite of the Telecommunications Act. This is something that is needed sooner, rather than later.” Statement of Brian L. Roberts, President and CEO, Comcast Corporation, Before the Senate Commerce Committee, May 12, 2004.

- the right to draw from universal service mechanisms for high-cost/rural and low-income support.

VoIP providers meeting the four-prong test would also comply with the following responsibilities:

- the obligation to contribute to universal service programs, upon resolution of the outstanding universal service issues pending before the Commission;
- the obligation to compensate other network providers for the carriage of VoIP providers' traffic, under a rational and reformed intercarrier compensation scheme;
- the obligation to cooperate with law enforcement, including compliance with the Communications Assistance for Law Enforcement Act ("CALEA");
- the obligation to provide consumers access to 911/E911 capabilities and to collect and remit funding for state or municipal 911/E911 systems. (In turn, statutory and other liability limitations for the provision of 911/E911 services should also apply.); and
- the obligation to make services available to disabled consumers, in a manner consistent with Section 255 of the 1996 Act, and to collect funding for state and federal Telecommunications Relay Service ("TRS") systems.

Only regulations essential to preserving public health, safety and related concerns should be imposed on VoIP, however. Regardless of how VoIP is classified under the Communications Act,⁴ overregulation will almost certainly delay and frustrate the growth of this exciting new service.

VoIP offers the potential for realizing a central objective of the Telecommunications Act of 1996 – the introduction of facilities-based competition into the local voice services market.⁵ Nearly

⁴ As we discuss below, the relaxed regulatory regime espoused in these comments (which can accord a VoIP provider certain rights as well as responsibilities) can be achieved whether the service is classified as an information service or as a telecommunications service.

⁵ The Commission has explicitly found that "facilities-based competition serves the Act's overall goals." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17025 ¶ 70 (2003). Specifically, "[f]acilities-based competition better serves the goal of deregulation because it permits new entrants to rely less on incumbent LECs' facilities and on regulated terms for access and price. And it serves the goal of innovation because new facilities are more likely to have additional capabilities to provide new services to consumers and competitors' deployment of new facilities is likely to encourage incumbents to invest in their own networks.

eight years after enactment of the Act, meaningful facilities-based competition in the local phone services market remains a hope rather than a reality for the vast majority of residential consumers. Although some markets enjoy the benefits of facilities-based competition from companies who have taken the risk and made the investment, this is atypical. VoIP promises to change all of this by providing cable operators and other alternative providers to the incumbent local exchange carriers with a cost-effective and robust technology that enables them to compete head-to-head with the incumbents in the provision of voice services.

With the right regulatory framework, VoIP technology will increase industry investment, foster innovation, and provide consumers with attractive alternatives to plain old telephone service (“POTS”) and to other communications services. This framework should be applied equitably to all VoIP providers meeting the four-prong test, whether or not they own network facilities. Imposing greater regulatory burdens on providers that invest in networks could undermine the Commission’s goal of promoting facilities-based competition.

NCTA’s proposed approach, reflected in these comments and in the industry consensus policy paper entitled “Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition,”⁶ would encourage innovation, conserve regulatory resources, derive the greatest public benefits and provide the certainty in the marketplace that investors need in order to support the deployment of facilities-based VoIP services.

Facilities-based competition also increases the likelihood that new entrants will find and implement more efficient technologies, thus benefiting consumers. . . . Finally, facilities-based competition creates network redundancy, which increases reliability and enhances national security.” *Id.* at n.233 (internal citations omitted).

⁶ National Cable & Telecommunications Association, *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition*, at http://www.ncta.com/pdf_files/whitepapers/VoIPWhitePaper.pdf (Feb. 2004).

I. A CLEAR, TAILORED REGULATORY SCHEME WILL PROMOTE THE CONTINUED DEVELOPMENT AND DEPLOYMENT OF VALUABLE IP-BASED VOICE SERVICES

The cable industry applauds the Commission's decision to address the proper regulatory scheme for IP-enabled services and agrees that regulatory certainty can ensure that the full promise of these revolutionary new services and applications is fulfilled.⁷ The lack of a clear regulatory scheme, as the Commission has acknowledged on numerous occasions, will impede the investment critical to the continued development and deployment of new services.⁸ Consistent with the goal of promoting the growth of IP-enabled services, the Commission should adopt a carefully tailored scheme that imposes only the minimum necessary regulation. At least initially, VoIP is the only IP-enabled service warranting regulation.

A. Only VoIP Services Meeting Specific Criteria Should Be Subject to the Commission's Regulatory Framework.

As a threshold matter, the Commission must decide to what services and applications the regulatory framework it adopts will apply. It is premature to develop a regulatory framework for all IP-enabled services, or even all IP-based voice services, at this time. Rather, the cable industry believes

⁷ See *NPRM* ¶ 2.

⁸ See, e.g., *Allocation and Designation of Spectrum for Fixed Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz and 48.2-50.2 GHz Frequency Bands*, Second Report and Order, 18 FCC Rcd 25428, 25435 ¶ 15 (the regulatory certainty gained by FS and FSS operators should promote investment and deployment throughout the V-Band); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Services in the 2150-2162 and 2500-2690 MHz Bands*, Order, 18 FCC Rcd 15087, 15088 ¶ 2 (2003) ("We believe that promptly acting on . . . applications will provide for greater regulatory certainty and thereby facilitate continued deployment of broadband services and promote innovation and investment therein."); *2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13645 ¶ 83 (2003) ("Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions."); *The Boeing Company*, Memorandum Opinion and Order, 18 FCC Rcd 1405, 1412 ¶ 12 (2003) (regulatory certainty is "necessary for industry to rely upon . . . in making investments in new services.").

that the regulatory regime adopted by the Commission should be limited to only a specific subset of services that meet the four-prong test described below. That test requires, among other things, that the services represent a possible replacement for current telephone services.⁹ These services can be used like traditional telephone services, which, even when provided by competitive local exchange carriers, have always been subject to certain public health and safety, universal service, and related “social” responsibilities. While the term “VoIP” encompasses a wide variety of services ranging from voice-enabled instant messaging and gaming (such as Xbox Live) to services that improve upon POTS, few would argue that applications such as voice-enabled gaming should be regulated in the same manner as a service that looks more like a traditional telephone service.

Importantly, the framework we propose herein should be applied to all providers of services that meet the four-prong test, whether or not they also own the facilities used to deliver the services to consumers.¹⁰ Regulatory distinctions governing the treatment of VoIP should be based upon the *type of service* being offered rather than other factors, such as whether the service provider routes calls over the Internet or owns the facilities over which it routes calls. There is little justification for treating competitive providers of similar services delivered via VoIP differently.

1. As a General Matter, IP-Enabled Services Other than IP-Based Voice Services Should Remain Unregulated Interstate Information Services.

IP-enabled services other than those with a voice component are still in the developmental phase – or even not yet imagined. Attempting to devise regulatory schemes for these IP-based

⁹ We refer to such services below as “IP-based voice services” and, when used in these comments, references to “VoIP” mean such IP-based voice services unless otherwise indicated.

¹⁰ The Commission may need to consider additional factors in determining how to apply the regulatory scheme we describe in these comments to incumbent local exchange carriers.

applications is unnecessary and would constrain their innovative development, to the detriment of consumers seeking creative new service offerings. It would be appropriate, however, for the FCC to treat IP-enabled services without a voice component as interstate information services subject to exclusive federal jurisdiction. All IP-enabled services as the Commission defines them¹¹ offer the capability for retrieving, using, storing and interacting with information via telecommunications.¹² Employing the Internet Protocol and relying on the “worldwide network of computer networks” that constitutes the Internet, many of these services also function without regard to geographic boundaries. Just as the Commission’s assertion of plenary authority over enhanced services more than 20 years ago in *Computer II* fostered the growth and development of these services, the preemption of state and local regulation of non-voice IP-enabled services is the logical extension of this policy in the Internet era.

The Commission also should affirm its intent to leave such services unregulated at this time. Again, the rationale underlying its decision not to regulate enhanced services in its *Computer II* decision applies with equal force to many IP-enabled services today. The Commission determined there that “nonregulation” would benefit the public because under a hands-off policy “FCC regulations will not directly or indirectly inhibit the offering of these services, nor will our administrative processes be interjected between technology and its marketplace applications,” and providers would be “afforded tremendous flexibility because there is no restriction on the types of services they may provide, except those imposed by the demands of their customers.”¹³ The Commission also observed that under such a policy “services need not be artificially structured or limited so as to avoid transgressing a regulatory

¹¹ *NPRM* ¶ 1 n.1

¹² See 47 U.S.C. § 153(20) (defining “information service”).

¹³ *Second Computer Inquiry*, Final Decision, 77 FCC 2d 385, 429 ¶¶ 116-17 (1980) (“*Computer II*”).

boundary.”¹⁴ Establishing a foundation of “nonregulation” for IP-enabled services other than IP-based voice services would likewise enable these services to develop freely in the marketplace.

2. Only Certain IP-Based Voice Services Should Be Subject to Regulation At This Time.

While it is generally unnecessary and premature to develop a regulatory regime for IP-enabled services that do not yet exist or do not play the vital social and economic role of voice communications, IP-based voice services already exist in the marketplace. Providers of these voice services need Commission guidance regarding their rights and responsibilities and the appropriate role of state regulators. Not all such voice services warrant regulation, however. NCTA proposes that the Commission use the following criteria to determine if an IP-based voice service should be subject to the light regulatory regime proposed below:

- the service makes use of North American Numbering Plan (“NANP”) resources;
- it is capable of receiving calls from or terminating calls to the PSTN at one or both ends of the call;
- it represents a possible replacement for POTS; and
- it uses IP transmission between the service provider and the end user customer, including use of an IP terminal adapter and/or IP-based telephone set.

If an IP-enabled service (even one with a voice component) does not satisfy each of the first *three* prongs of this test, it should remain unregulated at this time. This test would properly exclude from regulation innovative services – even those that include voice components – that are not possible replacements for traditional legacy telephony services. For instance, IP applications such as voice communications overlaid on video gaming or video chat, which do not use NANP resources or have the

¹⁴ *Id.* at 429 ¶ 117.

ability to receive calls from or terminate them to the PSTN, would be shielded from unnecessary and inappropriate regulation so that they can develop most creatively.

Any VoIP service meeting all prongs of the four-pronged test would be subject to a minimal regulatory regime under which the service would enjoy appropriate rights and bear certain obligations necessary to preserve public health, safety, universal service and related public responsibilities.¹⁵

Services meeting the first three prongs of the test but not the fourth (*i.e.*, those lacking an IP-based connection to the end user), by contrast, would remain regulated as conventional telecommunications services.

While the proposed test would leave some IP-based voice services unregulated (*i.e.*, services that do not satisfy each of the first three prongs of the test), such regulatory restraint is not only entirely appropriate but essential. Cable companies and many others are only in the initial stages of developing – let alone deploying – a variety of services that might be described as IP-based voice services.

Creating a regulatory overhang, or even the threat of one, for services that are at the very early stages of development to resolve problems that do not yet (and may never) exist would discourage investment in such services and force offerings into categories and structures that are not consonant with market demand and technological developments. The Commission should employ instead the regulatory caution that it has repeatedly recognized is appropriate for nascent services and refrain from imposing

¹⁵ See Section II, *infra*. In addition to the cable VoIP offerings described herein, for instance, Vonage and AT&T's CallVantage would meet the four-prong test. It may also be appropriate to minimize the regulatory regime applicable to competitive local exchange carriers ("CLECs") utilizing circuit-switched technology. See n.19, *infra*.

any regulatory scheme on IP-based voice services that do not meet NCTA's proposed test until the necessity for and dangers of any such regulation can be more fully evaluated.¹⁶

B. An Appropriate Regulatory Scheme Is Necessary to Promote the Cable Industry's Development of Facilities-Based VoIP Services.

Establishing a clear regulatory scheme applicable only to the services that satisfy NCTA's proposed baseline test would encourage continued development and deployment of all kinds of VoIP services by cable and other providers and spur robust competition in the residential voice market. Cable operators will take full advantage of (and consumers will benefit from) the opportunities created if the Commission adopts NCTA's proposal in this proceeding. That is already clear from cable's aggressive pursuit of the opportunities presented by VoIP to date, notwithstanding the lack of regulatory certainty. Importantly, with an appropriately light regulatory environment, VoIP services delivered over broadband cable networks will, over time, provide wide scale residential voice competition that is both *facilities-based* and *sustainable*.¹⁷

VoIP represents a significant opportunity for residential voice competition because it provides an attractive technological approach for both those cable system operators that have already entered the

¹⁶ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3840 ¶ 316 (1999) ("We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation."); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, 2436-37 ¶ 74 (1999) ("[W]e need to be particularly careful about any action we take to promote broadband deployment, given the nascent nature of the residential market for broadband. At this time, the dimensions of broadband and the upper limits of market-based supply and demand are unclear.").

¹⁷ See Opening Remarks of Commissioner Kevin J. Martin at the FCC's Voice over Internet Protocol (VoIP) Forum, at 1 (Dec. 1, 2003) ("When confronted with such fundamental questions as those raised by VoIP, the Commission's paramount task is to facilitate market certainty and stability by setting out a clear regulatory framework. Regulatory certainty in this area should help continue to spur investment in facilities-based local competition and encourage the deployment of new services.").

voice market and those offering voice services for the first time. The potential exists – by harnessing the same IP technology that is the foundation of the Internet – for competitive providers to deliver voice services on a wide scale, providing residential consumers with real choice in facilities-based services.

Compared with circuit-switched voice service, VoIP promises lower (though still significant) rollout costs, increased flexibility, and more innovative and advanced services. VoIP allows a provider to avoid the huge capital expenditures and investments needed to purchase and install circuit switches, for example. Furthermore, VoIP uses data paths in which the cable industry has already invested. These existing paths facilitate easy software changes and additions to service packages, as well as innovative combinations of voice, data, and fax services.

Cable operators are employing a range of strategies to exploit the exciting promise of VoIP. For instance, cable operators will be able to purchase equipment from various vendors that will be interoperable as a result of the industry's vigorous efforts to date to ensure the standardization of equipment and technical specifications. The industry's research consortium, CableLabs, has developed a set of interoperable interface specifications ("PacketCable™") for delivering advanced, real-time multimedia services, including VoIP as well as multimedia conferencing, interactive gaming, and other multimedia applications. The VoIP specifications are written to do at a minimum what today's circuit-switched phone network does, from dial tone to ring tone. Unlike other VoIP specification efforts that address only individual portions of how to make an IP-based call, however, PacketCable addresses the entire journey.

In addition, individual cable operators have taken a variety of approaches in their deployment of their VoIP offerings and services. Armstrong Cable uses a resale strategy, reselling and rebranding

Vonage service. Cablevision's Optimum Voice service is available as an option to Optimum Online cable modem service subscribers and interconnects with the PSTN through an affiliated CLEC. Time Warner, Charter, and Cox allow subscribers to keep their current telephone numbers and, unlike many other providers such as Vonage or AT&T, do not require subscription to their (or any other) high-speed Internet access service. Cox and GCI position their services as complete replacements for traditional telephone service. Cox operates its own nationwide privately managed IP network, while GCI utilizes both IP- and UNE-based delivery mechanisms that are transparent to the end user. Some companies offer a service in which only the phone plugged into the media terminal adapter (MTA) becomes IP-enabled; others enable the entire home to be "lit-up" so that every existing phone jack may be used for IP-based voice service, not just the jack into which the MTA device is plugged.¹⁸

More specifically, cable companies have currently undertaken the following deployments of VoIP services:

- **Cablevision** launched Optimum Voice, a digital voice-over-cable service, in the fourth quarter of 2003 throughout its New York City metropolitan service area of more than four million homes (which includes the Bronx, part of Brooklyn, Long Island and the Lower Hudson Valley as well as southern Connecticut and northern New Jersey). Optimum Voice is currently the largest facilities-based VoIP deployment in the United States. At the end of the first quarter of 2004, there were 70,000 Optimum Voice subscribers. The service provides unlimited local, regional, and long distance calling across the U.S. (including Alaska and Hawaii) and Canada for a flat rate of \$34.95 per month. It includes five customer calling features (call waiting, caller ID, call return, three-way calling and call forwarding) and E911. The service also includes voicemail and an interactive web portal. Currently, Cablevision is offering Optimum Voice to its more than one million high-speed Internet service customers. Area code and phone number assignments are based on the location of the customer's residence.

¹⁸ Some cable operators, using their extensive local fleets and qualified technicians, will offer customers the convenience of full installation and support for home wiring used for IP-based voice services. Non-facilities based VoIP providers may find this difficult to do.

- **Time Warner Cable** has launched Digital Phone service in seven states: Kansas, Maine, Missouri, New York, North Carolina, Ohio and Texas. Time Warner plans to make Digital Phone operational throughout the majority of the Time Warner Cable footprint by the end of 2004. This means the company's Digital Phone product should be available to nearly its entire footprint of over 11 million subscribers and over 18 million homes passed. The service includes call waiting, caller ID and call waiting ID, access to E911, and the option of local number portability.
- **Cox Communications**, which has been delivering switched-circuit telephone since 1997 and serves more than one million residential customers with voice service, made its first deployment of VoIP service in December 2003 in Roanoke, VA – marking the 12th market in which Cox had introduced telephone service. Cox has said it will launch VoIP in several additional markets in 2004.
- **Comcast**, which had 1.26 million circuit-switched phone customers by the end of 2003, is testing VoIP in Coatesville, PA, and in 2004 intends to expand the Coatesville trial and launch additional trials in Indianapolis, IN and Springfield, MA. Comcast plans to have 50 percent of its plant enabled for VoIP service by the end of 2004, and 96 percent by the end of 2005. On May 26, 2004, Comcast announced its intention to make VoIP service available to its 40 million homes passed by the end of 2006.
- **Armstrong** has partnered with VoIP service provider Vonage to offer Zoom Phone service to cable customers throughout Armstrong's 11 cable systems, located in Maryland, Ohio, Pennsylvania, West Virginia, and Kentucky.
- **Charter** launched commercial VoIP service in September 2002 in Wausau, Wisconsin, has launched VoIP in Missouri and is now gearing up its marketing efforts. The service includes call waiting, caller ID and call waiting ID, access to E911, and the option of local number portability. In addition to expanding VoIP in its Wisconsin and Missouri footprints, Charter will launch VoIP service in several other markets in 2004, and will have VoIP available to 1,000,000 households passed by the end of 2004.
- **GCI** has begun deployment of a hybrid VoIP/circuit-switched service in Anchorage, Alaska, where it currently serves over 45 percent of the market, primarily via UNE-Loop. The service being deployed is based on PacketCable standards from the customer premises to a media gateway and then uses GCI's circuit-switched facilities. As GCI transitions customers to its own loop facilities, it will be able to reduce its use of the incumbent local exchange carrier's facilities.

Plainly, cable companies are using a variety of approaches to VoIP and are still refining their service offerings in response to customer feedback and preferences. The continued vibrancy and

diversity of the VoIP services described above, as well as of those VoIP services that have yet to be developed or deployed, depends upon the Commission's prompt adoption of a narrowly tailored regulatory regime.

II. THE APPROPRIATE REGULATORY FRAMEWORK FOR VOIP COMPRISES CLEARLY DEFINED RIGHTS AND RESPONSIBILITIES

The Commission should expeditiously design a regulatory structure for VoIP services meeting NCTA's four-prong test that is light enough to encourage VoIP deployment, while ensuring that providers discharge critical public health, safety and related responsibilities currently applicable to telephone providers, and furthers the pro-competitive, deregulatory goals of the 1996 Act. Any such regulation must be sparingly and cautiously imposed, however, so that VoIP providers, particularly those that finance and build infrastructure to enable delivery of these services in competition with established local exchange carriers, are not placed at a disadvantage vis-à-vis VoIP providers who build no facilities.

Specifically, regulations designed for legacy telephone providers operating in a monopoly environment generally should *not* apply to VoIP services meeting NCTA's four-prong test.¹⁹ Cable companies offering VoIP service (as well as other VoIP providers) should be subject only to those regulations essential to meet the key public health, safety, and other related responsibilities described below, and even those regulations must be adapted to the characteristics of VoIP technology. Indeed,

¹⁹ While it is clear that unnecessary regulation also creates a significant business problem for circuit-switched CLECs, the case against excessive Title II regulation of VoIP services is even more compelling. Circuit-switched telephony is an existing service, using proven technologies. By contrast, VoIP service uses nascent technologies that have yet to be deployed on any significant commercial scale, and which could present a host of as-yet-undetermined financial, technical, and operational challenges. Nevertheless, the development of a minimally regulated environment for VoIP services ought to provide a basis for revisiting – and reducing – the regulatory requirements that apply to traditional circuit-switched, facilities-based CLEC services.

all CLECs lack market power, and sound public policy (as well as the dictates of the 1996 Act) commands that *all* unnecessary regulation of telecommunications services should be avoided.

Protecting VoIP services from unnecessary regulation, however, does not require that important public policies be neglected. Even under a generally deregulatory regime, VoIP services can and should meet certain public policy responsibilities and requirements, as long as they are secured through the lightest possible regulation.²⁰

A. VoIP Providers Should Be Subject to Enumerated Public Health, Safety and Related Responsibilities.

VoIP providers should be required to abide by CALEA; to offer access to 911/E911 services; to provide access for the disabled; and to make appropriate contributions to universal service.

Specifically, providers of VoIP services meeting the four-prong test should have the following responsibilities, implemented in a manner appropriate to the technology:

- The obligation to cooperate with law enforcement, including compliance with CALEA;
- The obligation to provide consumers access to 911/E911 capabilities and to collect and remit funding for state or municipal 911/E911 systems. (In turn, statutory and other liability limitations for the provision of 911/E911 services should also apply.); and
- The obligation to make services available to disabled consumers, in a manner consistent with Section 255 of the 1996 Act, and to collect funding for state and federal TRS systems.²¹

²⁰ See Opening Remarks of Commissioner Michael J. Copps, Voice over Internet Protocol Forum, at 1 (Dec. 1, 2003) (“It’s no slam-dunk that the old rules even apply. But we do need to discuss the consequences of the proliferation of VoIP services on our important statutory objectives—universal service, homeland security, 911 services, accessibility by people with disabilities, and encouraging the build-out of advanced telecommunications services. We need to craft a space in which this technology succeeds because of its inherent ability, not due to regulatory arbitrage or exception.”).

²¹ These rules have already been extended beyond the conventional range of Title II-type services, and the same considerations may apply to VoIP service. See *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6421-22 ¶ 8 (1999) (“*Disability Access Order*”).

Regulators also should expect VoIP services that make use of NANP resources to contribute to universal service programs. The principle of universal service – ensuring that affordable telephone service is available to high-cost areas and low-income users – has long been a cornerstone of communications policy. Cable companies that offer telecommunications services subject to assessment currently pay into the fund, and it is reasonable to expect that VoIP services that make use of NANP resources should also pay into the fund.

However, the Commission should carefully consider whether it is appropriate to impose universal service contribution obligations on VoIP providers without resolution of several critical issues that the Commission is examining. These include whether the federal universal service fund is properly sized and funded; how high-cost support should be computed; how to designate “eligible telecommunications carriers”;²² and a review of the operations of the schools and libraries program (which the Commission had initially planned to conduct as part of a comprehensive universal service review in 2001, but which has not yet been initiated). As Florida PSC Commissioner Charles Davidson recently observed, the universal service fund “needs a business plan.... It shouldn’t be a program that just expands and becomes a new tax.”²³

We urge the Commission to develop promptly a comprehensive and coherent “business plan” for the universal service regime. It is critical that policymakers recognize the need to resolve these issues and in particular to modify the current universal service contribution mechanism, taking into

²² To the extent VoIP providers are not deemed common carriers, a statutory change may be necessary so that they can be eligible to receive universal service support.

²³ Communications Daily, May 5, 2004, at 7.

account how it should apply to VoIP services.²⁴ Under the current contribution mechanism, assessments are based on *interstate telecommunications* revenues. Applying this mechanism to VoIP service, however, would be fraught with difficulty. Most consumer VoIP services today are offered for a flat fee and do not allocate the fee between interstate and intrastate calls. Under the current universal service fund assessment scheme, arbitrary judgments would be required as to which portion of VoIP service revenue is interstate and which is intrastate. In addition, many VoIP providers are expected to offer bundled service packages that may include data, video and other offerings. Determining an appropriate allocation of interstate telecommunications revenues in a flat-rated, multi-service bundled offering would be even more difficult.

Elsewhere, NCTA has proposed adoption of a numbers-based contribution mechanism under which any service using NANP resources would be assessed on a per-number basis.²⁵ Under such a system there would be no need to distinguish, for universal service purposes, between various types of VoIP offerings; rather, VoIP services that use telephone numbers would be assessed, while those that do not use telephone numbers would not.²⁶

²⁴ See *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24955-57 ¶¶ 3-6 (2002) (“*Second Further Notice*”).

²⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Reply Comments of the National Cable & Telecommunications Association, at 14-15 (filed Apr. 18, 2003). Special access and private line services could be assessed in a manner which results in a contribution approximately equal to that of today. See Letter from Robert W. Quinn, Jr., AT&T Corp., to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (Oct. 22, 2003).

²⁶ VoIP providers meeting the four-prong test must be afforded nondiscriminatory access to universal service support. Any other approach would fail the competitive neutrality principle for universal service and discriminate against otherwise eligible providers based on technology.

Similar considerations apply to intercarrier compensation rules. There are many different rules – and many different prices – that apply to exchanges of traffic.²⁷ Those differences, in turn, dictate not only different prices per unit of traffic, but also which party pays. NCTA believes that the manner in which these rules apply to VoIP providers using the PSTN should be resolved as part of the Commission proceeding already underway concerning these issues.²⁸ Moreover, in a world of IP-based voice services, all network providers should have the same compensation opportunities on an equitable and non-discriminatory basis. While operators of the PSTN must be compensated fairly, there is no justification for according the PSTN any kind of “pride of place” in the compensation scheme.²⁹

In addition, *generally applicable* consumer protection rules that apply to all businesses should apply to VoIP service providers. Such requirements may include, but are not limited to, do-not-call and do-not-email rules, and rules regarding unfair and deceptive trade practices and consumer fraud, but would exclude legacy utility regulations, as discussed below.

B. VoIP Providers Should Not Be Subject to “Legacy” Telephony Requirements.

The Commission should not assume that imposition of other arguably “social,” telephony-specific; regulations should be imposed on these nascent services. Such requirements, developed to protect consumers from the monopoly utility in a single-provider environment, are unnecessary and

²⁷ Today, the exchange of traffic is governed by a hodgepodge of different rules depending, for example, on whether an ILEC is exchanging traffic with a neighboring ILEC, a CLEC, an interexchange carrier (“IXC”), a CMRS provider, or an information service provider, and also depending on whether the traffic is deemed to be “intrastate” or “interstate.”

²⁸ See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

inappropriate for competitive VoIP services meeting NCTA's four-prong test. Legacy telephony requirements – such as numerous regulations relating to billing, payment, credit and collection, and quality of service standards are inappropriate for competitors using nascent technologies that offer alternatives to incumbent providers.

Such requirements often impose substantial burdens that are unwarranted in the case of competitive, facilities-based VoIP services. For example, many states (and the Commission via its truth-in-billing requirements) have rules dictating the format and content of customer bills, rules regarding permitted forms of payment, the allocation of partial payments, in-person payment obligations, and rules regarding call center metrics, installation intervals and service establishment requirements. Marketplace forces, rather than prescriptive rules, can address these issues much more effectively for non-incumbent providers of VoIP services.

The application of traditional state telephone regulations risks encumbering VoIP services with a web of costly and potentially inconsistent rules that will inevitably deter potential market entrants from offering the services, especially since efficient multi-state rollout of VoIP will depend on new centralized ordering, provisioning, and billing systems. Encumbrances are also possible at the local level, where at least some communities argue that *all* services delivered over cable plant should be subject to separate and duplicative municipal fees, requirements for additional permits, quality standards, privacy rules, and the like.³⁰

²⁹ Cf. NPRM ¶ 61 (“We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways”).

³⁰ See, e.g., *Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Comments of Alliance of Local Organizations Against Preemption, at 27-31 (filed Jun. 17, 2002).

This local layer of regulation makes no sense when – as here – new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, without imposing any additional burden on rights-of-way. Local regulation of new services such as VoIP delivered over the cable plant would stifle those services, since cable operators today can be subject to dozens or even hundreds of local franchising authorities for their cable systems in a single state. Offering VoIP services would be immensely more difficult with dozens or hundreds of inconsistent locally applied regulations. As described below, such regulations should be explicitly preempted.

C. VoIP Providers Must Be Assured of Certain Rights.

VoIP providers must be assured of certain rights, regardless of their regulatory classification, in order to ensure the full deployment of existing and new VoIP services and applications. Granting these rights to VoIP providers meeting NCTA's four-prong test need not and should not influence the regulatory classification of the VoIP service.³¹

These rights include, but are not limited to, (1) the right to interconnect and efficiently exchange traffic and control signaling with both IP and PSTN entities on a peer-to-peer basis;³² (2) the right to obtain telephone numbers, including numbers secured through number portability, to assign those numbers to VoIP customers and to have them published in the incumbent telephone directories and directory assistance databases; (3) the right to access, at reasonable and nondiscriminatory rates, the facilities and resources necessary to provide VoIP customers with full and efficient 911/E911 services

³¹ Not all VoIP providers will need all of these rights. For instance, some VoIP providers interconnect to the PSTN through an affiliated CLEC. VoIP providers should not be required to exercise any of the rights they do not need, either as a condition of getting access to rights they do need or otherwise, nor should these rights should be imposed on VoIP providers as obligations.

³² This would include access to codes needed for network interconnection and traffic exchange with other providers and the PSTN, NPAC databases and capabilities, SS7 interconnection for call management between VoIP calls and the PSTN, and customer service records housed in ILEC/CLEC databases.

(*e.g.*, interconnection to incumbent utility E911 selective router switches, access to the Master Street Address Guide, and the right to upload to the Automatic Location Identification database); (4) the right, but not the obligation, to establish uniform, enforceable and efficient terms for carrier interconnection for all service types (*e.g.*, file access tariffs, subject to streamlined review);³³ (5) the right, but not the obligation, to establish uniform, enforceable and efficient terms for end user services (*e.g.*, file end-user tariffs and price lists, subject to streamlined review, for end user services); (6) the right to be compensated fairly for terminating traffic delivered from other entities, in accordance with the results of an industry-wide review of payments for traffic termination and origination that specifically addresses VoIP service; and (7) the right to draw from federal and state universal service mechanisms for high-cost/rural and low-income support.

Policymakers must also ensure that VoIP providers have the right to use rights-of-way, including pole attachments, ducts, and conduits at reasonable rates and under fair terms. VoIP services delivered by cable operators will normally be conveyed over pre-existing facilities already attached to poles, located in underground conduits or crossing rights-of-way. There will be few, if any, new poles placed or new trenches dug, and there will be few, if any, new wires attached to existing poles. Rather, VoIP services delivered by cable operators will be offered by simply changing the pattern of electrical and optical signals carried over existing physical facilities already in use for other purposes (*e.g.*, delivery of video entertainment and/or high-speed connectivity to the Internet), a change which will have no economic or physical impact on poles, conduits, or rights-of-way. There is no economic

³³ If an IP phone provider files a tariff specified in this section voluntarily, the IP phone service provider should be afforded all rights and protections of the filed tariff.

justification, therefore, for higher pole attachment fees or restrictive conditions relating to the provision of advanced communications services such as VoIP.

The imposition of higher pole attachment fees would result in an unearned windfall to those who control poles, and would unnecessarily and unjustifiably burden cable operators' VoIP services, putting cable operators at a competitive disadvantage vis-à-vis both the incumbents who usually control those essential facilities as well as non-facilities-based providers of VoIP services who use cable facilities – for free – to make their offerings available. Accordingly, policymakers must ensure that cable operators are not subject to additional or incremental assessments and fees for adding VoIP services to their existing video and Internet offerings.³⁴

D. The Commission Has Authority to Tailor a Regulatory Scheme for VoIP.

Much of the discussion about VoIP services has focused on how they should be classified for regulatory purposes. The assumption behind these discussions seems to be that VoIP service offerings first need to be assigned to a preexisting regulatory “box,” from which a variety of regulatory consequences will flow. Regardless of how the Commission classifies VoIP, however, it has the authority to establish the minimal regulatory regime described above, tailored to advance investment in and deployment of VoIP services while preserving critical health, safety, universal service and related obligations currently imposed on traditional telephony providers, and granting certain rights to VoIP providers. The Commission also should make clear that it will use its ancillary jurisdiction or its

³⁴ The Commission has statutory authority to establish an appropriate pole attachment rate for attachments by cable operators. Setting an appropriate rate would be an important part of creating a hospitable environment to encourage the deployment of cable's VoIP offerings. *See National Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 338-39 (2002).

authority to forbear (as well as its preemption authority) to achieve the minimal regulatory regime appropriate for VoIP regardless of the ultimate classification of those services.

1. If VoIP is Classified as an Information Service, the Commission Retains Ancillary Jurisdiction to Impose Minimal Responsibilities on VoIP Providers.

The Commission's general grant of authority in Section 4(i) of the Act allows it to exercise "ancillary" jurisdiction, but only where regulation would be consistent with and support an existing statutory responsibility.³⁵ As the Commission has recognized, regulation of information services is permissible, but "[a]ny regulation in this area must assess the merits ... of extending regulation to an activity" and whether such regulation is "necessary to protect or promote some overall statutory purpose."³⁶ Imposing the responsibilities described above on VoIP providers would meet this test.³⁷

The specific obligations proposed by NCTA all further specific statutory obligations.³⁸ For instance, disability access requirements have in certain circumstances already been extended beyond the conventional range of Title II-type services.³⁹ Imposition of 911/E911 requirements is also grounded in

³⁵ 47 U.S.C. § 154(i); *see, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 178, 178 (1968) (Commission has authority to accomplish what is "reasonably ancillary to the effective performance of the Commission's various responsibilities...").

³⁶ *Computer II*, 77 FCC 2d at 435 ¶ 132.

³⁷ If the Commission determines that VoIP services are telecommunications services under the Act, then it should create the same regulatory scheme described here, by forbearing from applying all common carrier regulations to VoIP services except those specifically described here.

³⁸ Extending these narrowly tailored statutory obligations to providers of VoIP services would also promote the continued development of Internet-based media and interactive computer services, remove barriers to investment, and promote competition in the telecommunications market, in fulfillment of the Commission's responsibilities under Sections 230 and 706 of the Act. 47 U.S.C. §§ 157 nt., 230. Neither these sections nor Section 4(i) empowers the Commission to impose regulations that are inconsistent with other provisions of the Communications Act, however.

³⁹ *Disability Access Order*, 16 FCC Rcd. 6417, 6421-22 ¶ 8 (1999); *see also In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, 19 FCC Rcd 5136, ¶ 35 (2004) (noting Commission's responsibility to examine the "availability" of advanced services for persons with disabilities under Section 706).

specific statutory directives.⁴⁰ Section 254(d) already empowers the Commission to require universal service contributions from non-common carrier providers of telecommunications.⁴¹ Similarly, CALEA's broad definition of telecommunications carrier^{42/} brings VoIP within the scope of that statute, but without requiring classification of VoIP as a telecommunications service for regulatory purposes.⁴³ Congress imposed these obligations on traditional local phone service providers in order to advance important public goals, and they should also be the responsibility of VoIP providers meeting NCTA's four-prong test, regardless of how VoIP is classified.

2. The Commission Has the Authority to Ensure VoIP Providers Have Necessary "Rights" Even if VoIP is an Information Service.

Classification of VoIP service under Title I does not preclude the Commission from granting necessary "rights" to VoIP providers. To the contrary, the Commission has long asserted the authority to order incumbent local exchange carriers to interconnect with information service providers and even provide ISPs with unbundled network elements. The enactment of the 1996 Act did not affect that authority.

⁴⁰ 47 U.S.C. §§ 251(e)(3), 615 nt; *see also* 47 U.S.C. § 151 (one purpose of the Commission is "promoting safety of life and property through the use of wire and radio communication"); *In the Matter of Amendment of Part 76 of the Commission's Rules to Extend Interference Protection to the Marine and Aeronautical Distress and Safety Frequency 406.025 MHz*, Report and Order, 19 FCC Rcd 7244, ¶ 9 (2004) ("Public safety is one of the most important concerns and responsibilities for the Commission").

⁴¹ 47 U.S.C. § 254(d).

⁴² 47 U.S.C. § 1001(8)(B)(ii).

⁴³ As NCTA demonstrated in its Reply Comments in response to the Petition for Declaratory Ruling filed by the Justice Department, FBI and DEA, CALEA's statutory language permits the Commission to treat VoIP providers as "telecommunications carriers" for purposes of CALEA even if they are not "telecommunications carriers" for purposes of the Communications Act. *United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Agency Joint Petition Concerning the Communications Assistance for Law Enforcement Act*, RM-18065, Reply Comments of the National Cable & Telecommunications Association at 6-11 (filed April 27, 2004).

Prior to 1996, using its Title II authority, the Commission ordered the Bells to interconnect with information service providers and provide them with unbundled access to network services in the *Computer III*⁴⁴ and *Expanded Interconnection*⁴⁵ proceedings. The Commission found in those proceedings that making interconnection with the Bell companies and access to their network services available to “all parties,” including non-carriers, would further its policy of promoting competition in the telecommunications marketplace⁴⁶ and would advance the public welfare by maximizing the availability of information services to the public.⁴⁷ The Commission determined that it has full authority to “order interconnection in the public interest” under Section 201 of the Communications Act.⁴⁸ It found that although the language of Section 201(a) refers to a duty to interconnect with “carriers,” it also had authority to order interconnection with non-carriers based on Section 201(a)’s requirement that common carriers “furnish communication service upon reasonable request” and Section 201(b)’s requirement that all charges, terms and conditions for service be “just and reasonable.”⁴⁹ This finding was “supported by the nondiscrimination provisions of the Act,”⁵⁰ as well as by Sections 1 and 4(i) of the Act, which authorize the Commission to regulate telecommunications so as to make communications service widely available.⁵¹

⁴⁴ *Third Computer Inquiry*, Report and Order, 104 FCC 2d 958, 1019-20 ¶ 113 (1986) (“*Computer III Phase I Order*”); *Computer III Further Remand Proceedings*, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8373-77, 8379-81, ¶¶ 18-26, 29-31 (1995) (“*Computer III Further Remand NPRM*”).

⁴⁵ *Expanded Interconnection with Local Telephone Company Facilities*, Order, 7 FCC Rcd 7369, 7403 ¶ 65 (1992) (“*Expanded Interconnection Order*”).

⁴⁶ *See, e.g., id.*

⁴⁷ *Computer III Further Remand NPRM*, 10 FCC Rcd at 8373 ¶¶ 18-19.

⁴⁸ *Expanded Interconnection Order*, 7 FCC Rcd at 7470 ¶ 216.

⁴⁹ *Id.* at 7472-73 ¶¶ 219-221.

⁵⁰ *Id.* at 7472-73 ¶ 221.

⁵¹ *Id.* at 7475 ¶ 226.

These provisions likewise empower the Commission to order incumbent local exchange carriers to interconnect with VoIP providers even if VoIP is classified as an information service. Inclusion of VoIP providers in any intercarrier compensation scheme flows logically from this authority.⁵² Significantly, nothing in the 1996 Act affected the Commission’s authority to impose interconnection and other related requirements on ILECs for the purpose of increasing competition and availability of information services. To the contrary, the very purpose of that Act is “to provide for a pro-competitive . . . national policy framework designed to accelerate rapidly . . . deployment of advanced telecommunications *and information technologies and services* to all Americans . . .”⁵³ Ensuring that VoIP providers can interconnect and exchange traffic with established telecommunications networks promotes the statutory goal of an interoperable network of networks that enables all Americans to communicate with one another regardless of what provider they use or the technology utilized by that provider,⁵⁴ and so falls within the Commission’s ancillary authority.

The Commission has sought comment on whether the 1996 Act, by establishing in Section 251 specific interconnection and related duties of local exchange carriers that are owed to providers of telecommunications services, somehow precludes the Commission from imposing the same or similar duties on carriers for the benefit of information service providers.⁵⁵ Clearly it does not. The detailed

⁵² *Id.* at 7472-73 ¶ 221 (“Our authority to order the Tier 1 LECs to provide expanded interconnection for special access to customers that are not carriers flows from the language in Section 201(a) requiring that common carriers furnish communication service upon reasonable request and the Section 201(b) requirement that all charges, terms and conditions for service be just and reasonable.”).

⁵³ H.R. Rep. No. 104-458 (1996), at 1 (emphasis added).

⁵⁴ *See, e.g.*, 47 U.S.C. §§ 201(a) (every common carrier has the duty to establish physical connections with other carriers), 251(a) (each telecommunications carrier has the duty to interconnect directly or indirectly with other telecommunications carriers).

⁵⁵ *Computer III Further Remand Proceeding*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6091-92 ¶¶ 94-96 (1998); Request to Refresh the Record, 16 FCC Rcd 5363, 5363 (2001).

interconnection and unbundling duties of Section 251 were not meant to override the ILECs' more general obligations "to establish physical connections" with any requesting carrier under Section 201 of the Communications Act.

Indeed, the Supreme Court has specifically rejected arguments that enactment of the 1996 Act limited the Commission's authority under Section 201, noting that such an argument would not make sense because "section 251(i) specifically provides that 'nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201,'" and that therefore, it "cannot plausibly [be] assert[ed] that the 1996 Congress was unaware of the general grant of rulemaking authority contained within the Communications Act."⁵⁶ Basic tenets of statutory construction dictate that Congress is presumed to be aware of how statutory provisions have been interpreted when it revises a statute; that any intention to alter those provisions must be made explicit; and that absent evidence of an explicit intent to the contrary, all provisions of a statute must be read to function harmoniously.⁵⁷ It would make no sense to read the 1996 Act – which was designed to *promote* competition in the telecommunications marketplace – in a manner that would preclude the Commission from fostering the provision of VoIP simply because it falls within the definition of information service.

Finally, the 1996 Act itself does not limit certain critical rights just to carriers. For instance, Section 251(e)(1) of the Act requires the Commission to "make . . . numbers available on an equitable

⁵⁶ *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999).

⁵⁷ See *Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (quoting *Anderson v. Pacific Coast S. S. Co.*, 225 U.S. 187, 199 (1912) and citing *United States v. Ryder*, 110 U.S. 729, 740 (1884)); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 420 (1986) (Congress must be presumed to have been aware of the interpretation of a statutory provision when it revises the law yet does not change that provision); *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 697 (1979) ("It is always appropriate to assume our elected representatives, like other citizens, know the law").

basis,” and does not restrict the availability of numbers solely to carriers. Holding that only telecommunications service providers have or should have interconnection and other rights essential to providing facilities-based competition – and thus, in effect, that only competitors classified as telecommunications service providers are assured the ability to exchange traffic with one another and with the established traditional telephone companies – could halt VoIP deployment in its tracks and thus stymie what Congress sought to accomplish in the 1996 Act.

3. If VoIP is Classified as a Telecommunications Service, the Commission Has Authority to Tailor a Minimal Regulatory Regime for VoIP Services.

If VoIP is classified as a telecommunications service, a number of “rights” and “responsibilities” will flow automatically from that designation. Even then, the Commission can still establish a minimally regulatory framework for VoIP that ensures continued growth and deployment because Congress in 1996 conferred upon the Commission considerable authority to forbear from applying any Title II requirement to a telecommunications carrier. Forbearance is not a new idea in communications policymaking. It was modeled on the Commission’s *Competitive Carrier* orders. Those orders tailored regulatory responsibilities according to the presence or absence of market power associated with a particular service. The Commission eliminated regulations for entities or classes of providers that had low market shares and no potential to acquire and to wield market power.⁵⁸ Obviously, facilities-based VoIP service providers, newly entering the market and competing against dominant 100-year-old

⁵⁸ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, First Report and Order, 85 FCC 2d 1, 3 ¶ 4 (1980) (“*Competitive Carrier*”). See also *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, Fifth Report and Order, 98 FCC 2d 1191, 1205-08 ¶¶ 19-23 (1984) (forbearing from most regulation of nationwide common carrier digital transmission networks (“DEMS”), holding that forbearance will help promote the entry and expansion of DEMS by relieving carriers of the costs and delay of required tariff filings and will help promote competition).

telephone service providers, *will have little or no ability* to engage in the abuses that full common carrier regulation is designed to prevent.

Under its Title II forbearance authority, the Commission is empowered and required to eliminate any statutory or regulatory requirement that applies to any telecommunications service or telecommunications service provider if: (1) the requirement is unnecessary to prevent unfair and unjust charges and practices, (2) enforcement of that requirement is not needed to protect consumers, and (3) forbearance would otherwise serve the public interest.⁵⁹ VoIP services offered by new entrants, especially in their initial phases, are ripe for Section 10 forbearance.⁶⁰ Such regulatory restraint is essential to promote investment, innovation, and widespread deployment.

The Commission has already signaled its comfort with this line of reasoning. In the *Cable Modem FNPRM*, the Commission suggested that forbearance from applying Title II regulations to cable modem service was appropriate “because cable modem service is still in its early stages; supply and demand are still evolving; and several rival[s] ... are still developing. For these same reasons [the Commission] tentatively conclude[s] that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory. As such, [the Commission] believe[s] that forbearance from the requirements of Title II and common carrier regulation is appropriate in this

⁵⁹ See 47 U.S.C. §160(a).

⁶⁰ Forbearance would be appropriate, for instance, with respect to entry and exit regulation, rate regulation, service quality requirements, the recordkeeping and similar obligations in Sections 211-213 and 215-220 of the Communications Act, TOCSIA, and pay-per-call rules.

circumstance.’⁶¹ The Commission may and should adopt the same rationale to justify forbearance from unnecessary Title II regulation of VoIP.

There are several observations about “forbearance” worth noting. First, this approach ordinarily presumes that Title II requirements and rules apply in the first instance, and then eliminates them one (or a few) at a time. The Commission should adopt a more flexible and deregulatory approach by coupling the notion of forbearance with the “nascent services doctrine”⁶² so as to identify only the Title II requirements appropriate to VoIP and forbear from the rest in accordance with the standards of Section 10. Such an approach would ensure that VoIP services are never subject to the full panoply of Title II-type regulations, but rather are subject, from the outset, only to those regulatory obligations that have been affirmatively determined to be necessary.

Second, forbearance can be slow; at the federal level, telecommunications service providers must apply for forbearance, either individually or as a class, and the Commission may take up to 15 months (during which time regulation continues) before a final decision is rendered.⁶³ This problem can, of course, be solved if the Commission takes action promptly, through this proceeding and through other appropriate steps, to conclude that forbearance from unnecessary Title II regulation is appropriate should VoIP ultimately be deemed to be a Title II service.

⁶¹ See *Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4847-48 ¶ 95 (2002).

⁶² The nascent services doctrine holds that regulators should exercise restraint when faced with new technologies and services, in order to facilitate the development of new products and services without the burden of anachronistic regulations, and in turn, to promote the goal of enhancing facilities-based competition. See Remarks of FCC Commissioner Kathleen Q. Abernathy before the Federal Communications Bar Association New York Chapter, *The Nascent Services Doctrine*, at 1-2 (July 11, 2002).

⁶³ See 47 U.S.C. §160(a).

Finally, Commission forbearance standing alone operates only to curtail interstate regulation but does nothing to address excessive and inconsistent intrastate phone regulations.⁶⁴ As discussed below, the Commission can and should address this problem by preempting inappropriate state regulation of VoIP.

III. THE FEDERAL GOVERNMENT SHOULD ASSERT PRIMARY JURISDICTION OVER VOIP IN ORDER TO PROMOTE ITS SPEEDY AND WIDESPREAD DEPLOYMENT

Widespread deployment of VoIP service depends not only on an appropriately tailored regulatory scheme, but also on the uniform national application of that scheme. Regardless of whether VoIP is treated as an information service under Title I or a telecommunications service under Title II, the Commission can and should assume primary jurisdiction over VoIP and other IP-based services and preempt efforts by states and local governments to regulate these services in a manner that would frustrate the goal of national broadband deployment.

A. The Commission Has the Authority to Preempt State Regulation of VoIP.

The Commission unquestionably has authority to preempt state and local regulation of VoIP services that are inconsistent with the federal regulatory scheme it establishes or that frustrate its goal of keeping VoIP largely unregulated in order to promote its speedy deployment.⁶⁵ The Supremacy Clause of Article VI of the Constitution establishes Congress's authority to preempt state law. The Supreme

⁶⁴ NCTA recognizes that a number of state public utility commissions also have the authority to forbear from regulating.

⁶⁵ *NPRM* ¶ 39.

Court has established that a federal agency acting within the scope of its Congressionally-delegated authority similarly holds the power to preempt state regulation.⁶⁶ Preemption may occur when:

- Congress expresses a clear intent to preempt state law;
- there is an outright or actual conflict between federal and state law;
- compliance with both federal and state law is in effect impossible;
- there is implicit in federal law a barrier to state regulation;
- Congress has legislated comprehensively and occupied the field; or
- the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.⁶⁷

Under these standards, Commission preemption of state and local regulation of VoIP is wholly appropriate whether VoIP is an information service or a telecommunications service.

1. Preemption is Warranted in Order Secure the Federal Policy Goal of Broadband Deployment.

While the Commission lacks jurisdiction over matters “for or in connection with” intrastate communication service,⁶⁸ the Supreme Court has recognized an “impossibility” exception to that rule when separation of the interstate and intrastate components of a service for jurisdictional purposes would frustrate a federal policy goal.⁶⁹ As a result, unless a service is “purely intrastate” or “it is practically and economically possible to separate interstate and intrastate components of a

⁶⁶ *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700 (1984).

⁶⁷ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368-69 (1986) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Free v. Bland*, 369 U.S. 663 (1962); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

⁶⁸ 47 U.S.C. §§ 151, 152(b). This restriction applies only if VoIP providers are found to be common carriers. See §§ 152(b), 153(10).

⁶⁹ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *California v. FCC*, 39 F.3d at 931 (9th Cir. 1994); *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (state authority over intrastate communications is limited “when the state’s exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication.”);

jurisdictionally mixed . . . service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed.”⁷⁰

VoIP is clearly not “purely intrastate.” To the contrary, the Internet and IP-based services are inherently interstate. In particular, the packet-switched nature of communications delivered using VoIP means that the service necessarily transcends geographic limits, because data packets transmitted over an IP network are sent according to the most efficient route available at the time and are not limited by state boundaries. Time Warner Cable, for example, services its Portland, Maine VoIP subscribers from a softswitch located in Syracuse, New York. NCTA’s member companies provide VoIP using regional – and even national – network architectures that in many cases utilize the same centrally-located routers and softswitches to route local as well as interstate and international calls. The packet-based nature of VoIP will make it increasingly difficult for a VoIP provider to identify and separate out calls by geography. Subscribers likewise are located in multiple states, and their communications can travel anywhere in the world.⁷¹ Additionally, they can access and use information stored on VoIP networks – such as retrieving voicemail and forwarding it to another user – from anywhere in the world.⁷² All of these elements establish a strong interstate component to cable’s provision of VoIP.⁷³

⁷⁰ *pulver.com Order*, 19 FCC Rcd at 3320 ¶ 20; see *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

⁷¹ *Cf. pulver.com Order*, 19 FCC Rcd at 3320 ¶ 20.

⁷² See *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1620 ¶ 9 (1992) (voicemail service was jurisdictionally mixed and could not be separated into interstate and intrastate components because it was “capable of receiving, and does receive, calls from out-of-state as well as in-state locations . . . from persons calling the voice mail customer, or from the customer calling to obtain messages recorded by the voice mail service” and “when the caller is out-of-state, there is a continuous path of communications across state lines between the caller and the voice mail service” that could not be severed).

⁷³ See *In the Matter of Amendments of Parts 2 and 22 of the Commission’s Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service*, Third Report and Order, 97 FCC 2d 900, 908 ¶ 15 (1984) (“*One-Way Paging Order*”) (services that function as “integrated communications systems” must be viewed as a whole for

Nor is it possible to separate the intrastate and interstate components of the service for regulatory purposes without thwarting important federal policy goals. While the “impossibility” exception must be narrowly tailored and the Commission has the burden of demonstrating the “impossibility” of allowing state regulation to co-exist with the federal scheme, “complete factual support is not required.” Rather, the Commission may legitimately depend on its “predictive judgment” regarding “what regulations will best support the development” of the service and determine that “its regulations will better serve that goal [of deployment] than would [a state] plan.”⁷⁴ As described below, this is a case in which the Commission can easily establish that “state regulation [of VoIP] would negate valid FCC regulatory goals,” and thus preemption of inconsistent or burdensome state regulation is both authorized and called for.⁷⁵

2. The Commission Has Broad Authority to Preempt State Regulation of Information Services

If VoIP is treated as an information service, there is longstanding authority for the Commission to assert federal supremacy. As the Commission itself recently noted, “federal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free

regulatory purposes even if divisible into different technical components) (citing *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980)).

⁷⁴ *California v. FCC*, 75 F.3d 1350, 1359 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996).

⁷⁵ See *California v. FCC*, 39 F.3d at 931; *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 368-69; *One-Way Paging Order*, 97 FCC 2d at 908 ¶ 15 (noting that even where a service involves some intrastate communications, the Commission may exercise jurisdiction over such communications when “state regulation of [the service] would impede the rapid development of this new, nationwide communications service as well as increase the carriers’ expense in providing this service” and finding that “preemption of state regulation over the entire [service] is necessary to fulfill the national policy promoting the development and implementation of this new service.”).

of regulation.”⁷⁶ Therefore, the Commission has consistently pursued “a general policy of deregulating information services” which “has led to the preemption of various efforts by states to regulate information services.”⁷⁷

Beginning with its *Computer Inquiry* proceedings, the Commission found that information services must remain free of state and federal regulations to promote the competitive growth of interactive computer services.⁷⁸ Courts have upheld the Commission’s right to preempt state regulations that would negate the Commission’s regulatory goals or otherwise frustrate the Commission’s purposes.⁷⁹ Significantly, Section 2(b)’s limitation on Commission jurisdiction over intrastate communications only applies to services “of any [common] carrier.”⁸⁰ Thus, it does not limit the Commission’s preemptive powers with respect to information services,⁸¹ at least those offered by entities that are not primarily common carriers.⁸²

⁷⁶ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Order, 19 FCC Rcd 3307, 3316-17 ¶ 16 (2004) (“*pulver.com Order*”).

⁷⁷ *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 204 (D.C. Cir. 1982).

⁷⁸ *See id.*; *see also Computer III Phase I Order*, 104 F.C.C.2d at 965-66 ¶ 7.

⁷⁹ *California v. FCC*, 39 F.3d at 932-33.

⁸⁰ 47 U.S.C. § 152(b). Under the Act, “carrier” has the same meaning as “common carrier.” 47 U.S.C. § 153(10).

⁸¹ *See pulver.com Order*, 19 FCC Rcd at 3318 ¶ 17 (noting the Commission’s broad authority to preempt state regulation of information services, especially given “the states’ already limited role with regard to information services”).

⁸² *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) (“The plain meaning of the language ‘of any carrier’ is that the statute applies to communications services provided by common carriers such as AT&T and the BOCs as distinguished from communications services provided by non-common carriers such as IBM.”); *NARUC v. FCC*, 525 F.2d 630, 647 (D.C. Cir. 1976) (Section 2(b) only has application to common carriers); *NARUC v. FCC*, 533 F.2d, 601, 607 (D.C. Cir. 1976) (because Section 2(b) “explicitly denies Commission jurisdiction over *intra* state *common carrier* operations,” court viewed the provision as an obstacle to preemption of intrastate communications by cable operators only insofar as the communication service at issue itself was provided on a common carrier basis) (emphasis in original).

The Commission's approach is reinforced – and commanded – by Congress's decision in Section 230 of the 1996 Telecommunications Act to declare that “the policy of the United States is . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”⁸³ VoIP and other IP-enabled services are precisely the type of “interactive computer services” whose development Congress wished to promote through regulatory restraint.

As the language of Section 230 makes clear, preemption is appropriate regardless of whether a particular VoIP service uses the public Internet or its own privately managed network. What is important about VoIP technology and services – and why their development should be encouraged – is that they enable users to send communications in IP format. The Internet – “at bottom, a collection of IP platforms” – is valuable and vibrant precisely because of the wide range of products and services linked to its underlying platforms.⁸⁴ The Commission's policy of promoting growth of Internet-based services and refraining from their regulation, therefore, applies equally to IP-based services that do not currently travel over the public Internet.

Basing preemption decisions on whether a particular VoIP service is Internet-based or not would also dangerously influence the future of the service and unfairly favor certain business models. VoIP technology is just emerging, and a valid regulatory scheme cannot be based on a snapshot look at the network route used to deliver the service at a particular point in time. The Commission should strive

⁸³ 47 U.S.C. § 230(b)(2) (emphasis added).

⁸⁴ See Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36 (filed Feb. 5, 2004) at 25-32 (arguing against creating “artificial distinctions based on whether an IP service provider is a network-based or an application-based provider”).

to treat all VoIP offerings that meet the four-prong test described above in the same manner, regardless of the underlying business model.

3. The Commission Has the Duty To Preempt State and Local Laws and Regulations That Have the Effect of Prohibiting the Provision of Interstate or Intrastate Telecommunications Service.

The Commission also has the authority under Section 253 – indeed, the duty – to preempt state and local regulation that interferes with the deployment of VoIP.⁸⁵ Section 253 requires the Commission to preempt state and laws, regulations, and rules that prohibit or may have the effect of prohibiting any entity from providing telecommunications services. Onerous or intrusive regulation of a newly developing telecommunications service could very well serve as such a barrier to entry in violation of Section 253.⁸⁶ Indeed, the Second Circuit has concluded that a regulatory scheme violates Section 253(a) when as a whole, it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment.”⁸⁷ Imposing inapposite legacy regulation designed for monopoly providers on providers of a newly emerging competitive service would fall within regulation prohibited by Section 253(a).

While Section 253 is directed at the elimination of barriers to the provision of telecommunications services, it arguably furnishes the Commission with the statutory basis necessary to exercise ancillary authority to preempt similar barriers to the provision of VoIP even if it is treated as an information service. To the extent VoIP is comparable to the voice offerings of traditional common

⁸⁵ 47 U.S.C. §§ 253(a), (d) (Commission “shall preempt” any state or local statute or regulation that has the effect of prohibiting the ability of an entity to provide an intrastate or interstate telecommunications service).

⁸⁶ See, e.g., *Bell Atlantic-Maryland, Inc. v. Prince George’s County*, 49 F. Supp. 2d 805, 815 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000).

⁸⁷ *TCG New York, Inc. v. City of White Plains*, 305 F.2d 67, 77 (2d Cir. 2002).

carriers, as it would be if it met NCTA's four-prong test, applying Section 253's preemption power to state and local laws that have the effect of prohibiting the provision of VoIP would further the statutory goal of removing legal barriers to the offering of such service regardless of its classification. The Commission's ancillary preemptive powers would presumably be as broad as its preemption authority under Title II.

B. Tailored Preemption of Inconsistent State Regulation and All Local Regulation Is Required To Promote the Widespread Availability of VoIP.

The rapid development and deployment of broadband services like VoIP will be achieved most effectively and efficiently by entrusting the Commission with the administration and implementation of this goal on a uniform, national basis.

There is widespread agreement that establishing the appropriate framework for encouraging broadband facilities and service is a national matter. President Bush has called for a policy that "encourages people to invest, not discourages investment" in order to bring "broadband technology to every corner of our country by the year 2007."⁸⁸ Such a policy can only be achieved at the national level. The Commission has likewise noted that keeping VoIP services that depend on high-speed Internet access unregulated "is consistent with the requirements of the Act" and with Section 706 in particular, which "require[s] the Commission to encourage deployment of advanced telecommunications capability to all Americans by using measures that 'promote competition in the local telecommunications

⁸⁸ Remarks of President Bush to American Association of Community Colleges Annual Convention, Minneapolis Convention Center, Minneapolis, Minnesota (April 26, 2004). Encouraging broadband deployment is not a partisan issue. See Remarks of John Kerry at Stanford University (Dec. 8, 2003), *available at* http://www.johnkerry.com/pressroom/speeches/spc_2003_1208.html ("We need a President who will see and seize the possibilities of the Broadband Revolution Today a visionary Federal government can build a bridge across the digital divide and bring the promise of broadband technology to rural and inner-city America.").

market.”⁸⁹ Finally, Chairman Powell has emphasized the importance of regulating VoIP at the federal level, noting with respect to the jurisdictional nature of VoIP services that “I don’t know whether it’s Internet or telephone, but I know it’s not local.”⁹⁰ He added that the Commission, not the states or localities, is the principal regulatory authority for VoIP services and should be the “first in line to set the initial regulatory environment” for VoIP services.⁹¹

State and local regulation of VoIP would frustrate the Commission’s ability to achieve these goals. If state and local governments are allowed to impose their own, inconsistent regulations on VoIP services, there is a serious risk that such burdensome, piecemeal regulation would form a patchwork of unmanageable rules that inevitably would raise costs and slow deployment. Complying with this hodgepodge of state and local regulation would likely require modifications to billing systems, customer service practices, training and protocols, and product offerings that would not necessarily reflect or satisfy customer demand and would inevitably undercut the Commission’s primary policy objectives.

As the Commission has recognized, even where state and local regulation produces no “outright conflict” with federal regulation, state or local action (or the potential for such action) justifies Commission preemption if that regulation would be inconsistent with the Commission’s decision to leave a service unregulated or minimally regulated.⁹² Courts have upheld Commission preemption of state regulation where complying with more stringent state requirements could discourage deployment and availability of new services.⁹³ The same reasoning applies here, where state and local regulation of VoIP

⁸⁹ *pulver.com Order*, 19 FCC Rcd at 3318-20 ¶¶ 18-19.

⁹⁰ *Wireline*, Communications Daily, Dec. 10, 2003, at 9.

⁹¹ *Id.*

⁹² *pulver.com Order*, 19 FCC Rcd at 3318-19 ¶ 18.

⁹³ *California v. FCC*, 39 F.3d at 933.

could hinder its rapid and widespread development. As noted above, there are multiple legal bases for the preemption of such state and local regulation.

For these reasons, NCTA does not believe that there are “categories of IP-enabled services that can be regulated at both the state and federal level without interfering with valid Commission policy.”⁹⁴ Rather, all IP-enabled services meeting NCTA’s four-part test⁹⁵ should be regulated nearly exclusively at the federal level. There may be limited areas in which states can regulate these services without frustrating the nation’s broadband goals, such as ensuring appropriate public health and safety and consumer protection, under laws of general applicability, but that authority should be strictly limited. As noted above, such protection, tailored to consumer expectations of VoIP service, is no different than that afforded consumers of any business – and not unique to consumers of IP voice services.

There is also one other important role for states that the Commission cannot and should not ignore: the states’ unique ability to oversee carrier-carrier interconnection disputes.⁹⁶ Whether IP voice services are found to be Title I or Title II services, the PSTN facilities with which IP voice providers will interconnect will continue to operate under Title II regulation. States should not be preempted from overseeing interconnection to such facilities. The Commission is simply not equipped to handle interconnection disputes, while the states have experience and established procedures that can be brought to bear in a timely fashion.

⁹⁴ *NPRM* ¶ 41.

⁹⁵ As discussed above, those IP-enabled services not meeting the test should not be regulated at all.

⁹⁶ There may be other areas (*e.g.*, state universal service) where states can play a role not inconsistent with the federal regulatory regime.

IV. CATEGORIZING AND CLASSIFYING IP-ENABLED SERVICES

In the *NPRM*, the Commission asks a number of questions about the proper categorization and classification of IP-enabled services.⁹⁷ By “categorization,” the *NPRM* means “ways to distinguish services that might be viewed as replacements for voice telephony (and which thus raise social policy concerns relating to emergency services, law enforcement, access by individuals with disabilities, consumer protection, universal service, and so forth) from other services (which do not appear to raise these same regulatory questions to the same extent).”⁹⁸ With respect to regulatory “classification,” the Commission asks, among other things, for guidance on “the appropriate statutory classification for each category of IP-enabled services identified....”⁹⁹

A. NCTA’s Four-Prong Test Should Be Used to Categorize IP-based Services Subject to Minimal Regulation.

NCTA’s four-prong test addresses the Commission’s request for a means to distinguish IP-enabled services that warrant some modicum of regulation, albeit minimal. By contrast, none of the *NPRM*’s criteria for categorization of IP-enabled services will achieve the goal of widespread deployment of IP-based voice services with minimal regulatory involvement.

Although the *NPRM* suggests several new means of distinguishing among and classifying VoIP and other IP-enabled services,¹⁰⁰ the Commission need not and should not undertake the complex task of formulating a new analytical approach. Rather, the Commission’s time-tested approach – firmly grounded in the plain language of the Communications Act – provides sound analytical tools for

⁹⁷ *NPRM* ¶¶ 35-44.

⁹⁸ *Id.* ¶ 36.

⁹⁹ *Id.* ¶ 43.

¹⁰⁰ *Id.* ¶ 37.

determining the appropriate regulatory classification of VoIP services and does not prevent the Commission from making any necessary distinctions among different VoIP applications.

In particular, a “layered” model that distinguishes among the facility, protocol and application layers of a service does not, by itself, offer any guidance on whether or how a given layer should be regulated. In the absence of a finding of market failure, for instance, there is no justification for uniform regulation of the physical layer on a common carrier basis. Nor should providers be relegated to the provision of certain layers but not others.

The other factors proposed by the Commission to draw distinctions among IP-enabled services could actually frustrate the widespread deployment of VoIP. Examining just the “functional equivalence [of an IP-enabled offering] to traditional telephony,” for example, rather than applying the specific factors proposed by NCTA, would lead to broad, subjective inquiries and unpredictable results – and therefore would have a dampening effect on stability and investment, precisely the opposite result of what the Commission seeks to accomplish. Tying the test to factors such as whether the service is interconnected with the PSTN and uses the North American Numbering Plan – or the four-prong test NCTA has proposed – would be a more objective approach, but even then would be useful to distinguish only those services that should be subject to *some* regulation. Once a service is found to meet the four-prong test – and thus may validly be subject to some light regulation at this time – the Commission still must determine *how* and under what authority to regulate it.

Basing regulatory categorization decisions solely on “substitutability” for traditional telephony – an approach distinguishing between services that are used in lieu of, rather than in addition to, traditional telephony – would be similarly vague and impracticable. How the service is used or viewed would

likely differ from subscriber to subscriber and might change frequently over time even for a particular subscriber. A true understanding of how subscribers viewed the service would require significant analysis – of all other services (*e.g.*, landline phone, wireless phone, etc.) used by subscribers; for which service the VoIP service was meant to be a substitute; of what attributes a particular service had to have before it was viewed in the market as a substitute, etc. It would be nearly impossible to draw valid regulatory distinctions based on such a fluctuating and difficult to obtain body of data. At a minimum, such an approach would occupy months – or even years – of the Commission’s time, and VoIP deployment would suffer in the meantime.

Finally, distinguishing among VoIP services based on whether they offer peer-to-peer communications or rely on a provider’s centralized services would negatively influence and affect the future development of these services. If regulatory consequences, good or bad, are attached to a particular business model, providers are bound to structure their service offerings to account for those consequences. At a time when VoIP and other IP-enabled services are just emerging in the marketplace, service providers should be free to structure the service that best meets the needs of their subscribers. Any regulatory approach must avoid hampering this flexibility, or the service will be unable to succeed in the market.

B. Classifying VoIP Services: Information Services or Telecommunications Services.

It is usually assumed that classification of a VoIP service as a “telecommunications service” means that it will be subject to a wide range of traditional Title II requirements, and that classification of a VoIP service as an “information service” means that it will be entirely unregulated. As we have shown

above, neither assumption is correct, or especially helpful in establishing appropriate rules for VoIP services.

VoIP services have characteristics of both telecommunications and information services as those terms are defined in the Communications Act. Arguments can be – and have been – made in support of classifying VoIP services as either Title I information services or Title II telecommunication services.¹⁰¹ The more important point, as noted above, is that under either classification the Commission can and should adopt a minimal and tailored regulatory regime for VoIP.

C. VoIP Can Be Classified as an Information Service.

Classifying VoIP service as an information service would establish a presumption against regulation, while allowing the Commission to strike the balance of rights and responsibilities for VoIP outlined above. Chairman Powell has observed that policymakers should “build from a blank slate up as opposed to from the myriad of telecommunications regulations down.... [I]t is a nasty, entangled litigious exercise to start from a phone company world of regulation and work your way down this way, rather than to try to say, no, this is something new.”¹⁰² The presumptively deregulatory nature of such a classification is also consistent with Chairman Powell’s observation that VoIP should “evolve in a regulation-free zone.”¹⁰³

¹⁰¹ VoIP clearly is not a cable service. It is neither the “one-way transmission to subscribers” of video programming nor an “other programming service.” 47 U.S.C. § 522(6). Thus, Title VI regulation of the service at the state or local franchising level is inappropriate. The Act clearly limits state and municipal regulatory authority over cable operators under Title VI to franchising authority over cable services. 47 U.S.C. §§ 541-543. There is no authority for the proposition that a service may be “construed to be” a cable service for franchising purposes when classified otherwise for other purposes. *NPRM* ¶ 70.

¹⁰² See Remarks of FCC Chairman Michael K. Powell at the Meeting of the Technology Advisory Council, at 2 (Oct. 20, 2003).

¹⁰³ Remarks of FCC Chairman Michael K. Powell at the FCC Forum on Voice Over Internet Protocol, at 1 (Dec. 1, 2003).

VoIP offers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” and thus fits within the definition of “information service” established by Congress.¹⁰⁴ As discussed above, cable operators often offer their VoIP subscribers a service that provides far more than the basic transport of telephone calls. Rather, those cable VoIP subscribers receive transport intertwined with the ability to receive and view voicemails, e-mails and faxes; retrieve myriad stored information, such as voicemails; and use this information in any way they like, such as by forwarding a message to another cable VoIP subscriber or customizing greetings for different callers, all as part of the same service. Cablevision’s Optimum Voice service, for example, allows subscribers to listen to voice mail, manage the settings on many of the calling features, and check their call history via an interactive web portal.

Some VoIP customers can also use their service for purposes unrelated to traditional telephony communications, such as playing voice-enabled video games. Such capabilities, often involving significant subscriber direction and interaction, reach far beyond the pure transport function of a telecommunications service. In addition to furnishing these capabilities as part of their VoIP service, facilities-based VoIP providers like cable operators also undertake end-to-end quality of service monitoring. Such factors would support an information service classification.

D. VoIP as a Telecommunications Service

Classifying the four-prong VoIP services as telecommunications services offers a second pathway to regulating those services because of their similarity to traditional Title II telephony services.

¹⁰⁴ 47 U.S.C. § 153(20). As noted above, this analysis extends to all IP-based services.

Using Title II as the starting point for VoIP regulation would carry some risk, however, as Chairman

Powell recently suggested:

We cannot contort the character of the Internet to suit our familiar notions of regulation. Do not dumb down the genius of the net to match the limited vision of a regulator. The Internet has character[istics] and attributes that should be recognized and accepted, not ignored or brushed aside as inconvenient, or irrelevant. To regulate the Internet in the image of a familiar phone service is to destroy its inherent character and potential. Governments are almost always about geography, jurisdiction and centralized control. The Internet is unhindered by geography, dismissive of jurisdiction, and decentralizes control.¹⁰⁵

More important than the starting point for establishing the regulatory framework for VoIP is the outcome of this proceeding. Even if cable's VoIP services were classified as telecommunications services, the results we urge – a minimal regulatory regime where VoIP providers have critical rights and responsibilities – can be obtained. As discussed above (*supra*, Section II(D)(3)), using its authority to forebear from unnecessary regulation and to preempt inappropriate state and local regulation, the Commission can fashion a regulatory regime under Title II suitable to facilitate the timely deployment of VoIP services.

If doing so, the Commission must remember that the very nature of VoIP technology means that there are many alternatives to cable as a means of providing VoIP. ILECs, CLECs, wireless carriers, and other broadband service providers can and have begun to offer VoIP service. Among the numerous examples, Regional Bell Operating Company Qwest¹⁰⁶ and interexchange carrier/CLEC

¹⁰⁵ Remarks of Michael K. Powell, Chairman, Federal Communications Commission at the National Press Club, Washington, D.C., *The Age of Personal Communications "Power to the People,"* at 1 (Jan. 14, 2004).

¹⁰⁶ See http://www.qwest.com/about/media/pressroom/1,1720,1386_archive,00.html.

AT&T¹⁰⁷ are marketing residential VoIP services and facilities-based CLEC Cavalier Telephone is partnering with a regional VoIP service provider Phonom.¹⁰⁸

Perhaps more significantly, the revolutionary nature of VoIP eliminates the need to police the relationship between VoIP service providers and cable operators that has historically been at the root of common carrier regulation of the telephone industry. Indeed, the most successful purveyors of VoIP to date – entities like Vonage, Net2Phone and pulver.com – have few if any facilities of their own. Cable modem customers can access those providers and their services by using their broadband connections, and they are unhindered in doing so.¹⁰⁹ As Chairman Powell has noted, “the case for government imposed regulations regarding the use or provision of broadband content, applications and devices is unconvincing and speculative” and lacks the “weighty and extensive evidence of abuse” that must precede such an imposition.¹¹⁰ Even if VoIP is classified as a telecommunications service, therefore, the Commission must tailor its regulations to the unique characteristics of the VoIP service market.

¹⁰⁷ See <http://www.callvantage.com>.

¹⁰⁸ See <http://phonom.com/about/partners.php>.

¹⁰⁹ Some of these providers are also partnering with cable companies and others as an alternative means of delivering service, but such partnerships are not necessary for IP-enabled service providers to build a customer base.

¹¹⁰ Remarks of Michael K. Powell at the Digital Broadband Migration: Toward a Regulatory Regime or the Internet Age Conference, University of Colorado School of Law, Boulder, Colorado, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 4 (Feb. 8, 2004).

CONCLUSION

For the foregoing reasons, the Commission expeditiously should adopt the minimal regulatory regime for IP-based voice services meeting the four-prong test discussed in these Comments. By doing so, the agency can spark a new era in U.S. facilities-based voice competition. Cable's provision of VoIP promises to be a breakthrough, facilities-based offering that can redeem the promise of the 1996 Act. Getting the regulatory environment right for cable operators (and others) and ripe for investment, and doing so without delay, should be the Commission's mission in this proceeding.

Respectfully submitted,

/s/ **Daniel L. Brenner**

Richard L. Cimerman
Senior Director
State Telecommunications

Daniel L. Brenner
Neal M. Goldberg
National Cable & Telecommunications
Association
1724 Massachusetts Avenue, NW
Washington, D.C. 20036

Howard J. Symons
Tara M. Corvo
Christopher R. Bjornson
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

May 28, 2004