

WRITTEN STATEMENT

Of

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on

Voice over Internet Protocol (VoIP)

Before the

Subcommittee on Commercial and Administrative Law

Committee on the Judiciary

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**Summary of Written Statement of
Robert Pepper**

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Voice over Internet Protocol services and applications are dramatically expanding beyond the limited functionality of traditional voice telephone service and, at the same time, challenging the traditional economic and regulatory structures that have governed the traditional telephone industry for more than a century.

The Commission, as indicated in the Notice of Proposed Rulemaking (“NPRM”) in the IP-Enabled Services proceeding, believes action to clarify the regulatory regime applicable to VoIP is crucial to the future of electronic communications and America’s place as the leading innovator in the field. In discussing the Commission’s work in this area, it is important to recognize that VoIP is much more significant than simply an alternative way to make a telephone call: (1) the technology is radically different from traditional voice telephony; and (2) it is a radically different way of doing business. To say that VoIP is just another way to make a phone call would be like saying that Amazon.com is just another way to sell books. Internet applications change the way certain functions are performed, but also change the way service providers relate to consumers.

Voice is gradually becoming little more than one application of many over a multiuse digital broadband network, and thus is gradually becoming less like a standalone service and more like an add-on to something else a consumer can buy from multiple sources. Indeed, the majority of VoIP applications, including voice instant messaging and talking to players of live interactive games, look nothing like traditional plain old telephone service.

These are fundamental changes transforming voice communications and the telecommunications market, and the Commission is examining them in its NPRM and in petitions about VoIP. The Commission has begun to examine this area because parties are asking it for clarity as they bring VoIP to market, and also because their plans, and future investment and innovation, might be hampered by burdensome and conflicting regulations that could result as different states begin to assert jurisdiction in this area.

In response to the NPRM, the Commission received over 150 comments and 86 reply comments from a wide variety of sources such as VoIP applications providers; high technology companies; state public utility commissions; public interest advocacy groups; 911 administrators; local exchange carriers; interexchange carriers; rural carriers; and Internet service providers.

The Commission has already issued two orders related to VoIP, resolving petitions for declaratory ruling filed by Pulver.com and AT&T. As the Commission moves forward with considering the NPRM in the IP-Enabled Services Proceeding, the Commission is also considering petitions related to VoIP filed by Vonage, Level 3, SBC and Inflexion, and is considering questions related to VoIP in its universal service contribution, intercarrier compensation, and upcoming CALEA proceedings.

The Commission's decisions regarding VoIP will have the farthest-reaching consequences of anything the Commission will consider in the near future. The Commission is considering nothing less than the future of electronic communications for today's and future generations. Consumers, the many industries that rely on information technology and advanced communications in their business, the telecommunications, computer and software industries, and the investment community are all counting on the Commission to get it right.

The Commission, however, is constrained by the Act, which divides the world into regulated telecommunications services and unregulated information services. When dealing with revolutionary new technologies we need to start from the perspective of how to best create the world we all want to live in, rather than applying tired regulations quickly being rendered obsolete. While the Commission has some ability to fine tune treatment of new technologies given its discretion and the flexibility granted to it by Congress, the Commission's latitude is still limited by the Act. If you believe that VoIP and other new technologies are transforming the telecommunications market in ways that cry out for new regulatory approaches, you may need to consider whether the tools the Commission has today are appropriate for the task.

In the meantime, the Commission will continue forward, and the guidance and leadership of Congress is crucial to the success of its process. On behalf of the FCC, I want to thank you, Mr. Chairman, for calling this hearing, and we look forward to working with you and other members on these issues.

**Written Statement of
Robert Pepper
Chief, Policy Development
Federal Communications Commission**

Good morning, Mr. Chairman and distinguished members of the Subcommittee. It is my pleasure to come before you today to discuss services and applications that use voice over Internet Protocol (“VoIP”), and the status of our examination of VoIP at the Federal Communications Commission (the “FCC” or the “Commission”).

I. The Importance of VoIP

Voice over Internet Protocol services and applications are dramatically expanding beyond the limited functionality of traditional voice telephone service and, at the same time, challenging the traditional economic and regulatory structures that have governed the traditional telephone industry for more than a century.

The FCC has pending before it a number of proceedings initiated by petitioners about VoIP, and has initiated a broad examination of issues related to VoIP, as well as other Internet Protocol (IP) based services. As an introduction to the status of these proceedings, it is helpful to discuss why the emergence of VoIP raises important issues, why the Commission, as indicated in the IP-Enabled Services Notice of Proposed Rulemaking (“IP-Enabled Services Proceeding”), is examining the best way to establish a minimally regulated environment for VoIP, and why prompt action to clarify the regulatory regime applicable to VoIP is crucial to the future of electronic communications and America’s place as the leading innovator in the field.

A. VoIP is Changing the Nature and Business of Voice Communication

VoIP is seen by some as simply a new technology for transmitting a traditional voice telephone call. This purely functional view, sometimes referred to as the “if it quacks like a duck, it’s a duck” argument, is short-sighted for two reasons.

VoIP Technology is Radically Different From Traditional Voice Telephony. First, the functional view ignores the fact that VoIP technology is merely an application that rides over the public Internet, or over dedicated data networks, just like any other application. On these public or private data networks the bitstream created by a VoIP application is no different than any other bitstream on that data network – it can be incorporated into other bitstreams, modified or enhanced by simply changing server or client software. Thus, voice can now be easily combined with data and video in ways that cannot be done over the traditional network. Adding enhancements to voice, or incorporating voice to other applications, is merely a question of adding a new feature in the next software release. With VoIP, consumers can easily change their service selections or add function and enhanced features simply by logging on to their VoIP application provider’s website, or by choosing a new provider with more attractive features. And, by the way, the majority of voice over IP applications look nothing like traditional plain old telephone service. Some of these include voice instant messaging or the ability to talk to opponents while playing a game across the Internet on XBox Live.

VoIP is a Radically Different Way of Doing Business. The second reason why a purely functional approach is short-sighted is that it is a new way of doing business. As my colleague, Jeffrey Carlisle has noted, saying VoIP is just another way to make a phone call is like saying that Amazon.com is simply a new way to sell books, without any broader consequences for markets or consumer behavior. E-commerce is much more than that. It changed the market for books, and everything else, by opening a truly worldwide market to any retailer who could attach a server to the Internet, or any individual who could open an E-Bay account.

Similarly, VoIP changes the business of telecommunications by allowing data networks to carry voice communications at comparable levels of quality to the traditional circuit-switched

network, but to do so more flexibly and efficiently. VoIP changes the dynamics of the market for telecommunications services in three ways.

First, VoIP transforms voice from the primary service provided by a common carrier into just another application on the network. On traditional telephone networks, voice was delivered over a dedicated network that required a well-capitalized infrastructure and service provider that traditionally was a protected monopoly. In the future, the voice application – in fact, all applications – will be separated from the physical transmission network. Anyone can attach a server to the Internet, anywhere in the world, to allow two people – or three, four, five or a hundred – to talk to one another, just as anyone can connect a server to the Internet to provide email, file sharing, or other applications. The implications for how voice services are marketed and purchased are dramatic. No longer is the monopoly provider the gatekeeper for innovation. Rather, innovation in telecommunications can come from any entrepreneur, small company or enterprise that can connect to the network. This is the consequence of moving voice communications to the Internet, where intelligence is on the edge of the network instead of a tightly controlled core.

With these kinds of developments, saying that a VoIP application is merely another way of making a phone call is like saying that the automobile is just another way of going someplace in your horse and buggy. VoIP means that voice may no longer be a dedicated service for which consumers pay a separate monthly bill. VoIP may be part of your wireless phone service, as it already is with many push-to-talk services; it may be bundled together with video and data service that you buy from your cable, telephone, satellite or power company; or you may buy it from dozens of providers over the Internet; or you may simply have it as part of a software package that you buy for some other purpose. Most likely, you will acquire it in all of these

different ways. When VoIP separates the voice application from the physical network, the question will no longer be whether consumers will benefit from competition in the voice market. Clearly, they will. Rather, competition in voice will no longer be an issue, because voice will become an almost free add-on to something else you buy from multiple sources.

In this respect it is useful to compare the evolving voice market to email. Email appears to be “free,” but email application providers thrive in a market where intense competition drives innovation. Advances in email provided by Google, Yahoo! and Hotmail become headline news. Consumers can acquire email applications from their ISP, select web-based mail from third parties supported by advertising, outsource mail services, or operate email servers on their own networks. In the same way, consumers will benefit from a market for voice applications thriving with competition, innovation and choices suited to their needs at significantly reduced costs – but with significant rewards for agile and smart companies capable of delivering the best service.

The second way VoIP is changing telecommunications markets is that it accelerates the migration to all digital, multiuse broadband infrastructures. Whatever the benefits of separating the voice application from a dedicated infrastructure, there still need to be companies capable of building and maintaining the digital infrastructure over which applications ride. For most, if not all, markets in the United States, infrastructure will no longer be the monopoly domain of the traditional telephone network. Instead, an entire range of broadband technologies, including DSL, cable modem, licensed and unlicensed wireless broadband, Ultra Wide Band, satellites and broadband over power line will provide connectivity. When networks provide transmission, and are not tied to a single application like voice or video, networks become highly substitutable and competition increases dramatically, resulting in significant benefits for consumers. Additionally, the offering of demand-creating applications such as VoIP promotes deployment and adoption of

broadband facilities, which in turn promotes further development of VoIP and other Internet applications. Thus, applications and broadband create a virtuous cycle that will result in significant benefits for American consumers and the American economy as a whole.

The third way VoIP changes telecommunications markets is that it internationalizes voice communications. Just like many other applications provided over the Internet, it doesn't matter where the provider is located – a server providing a VoIP application could be down the street, or in the next state, or it could be in Ukraine, the UK, India, or, as is currently the case with Skype, in Estonia. A voice application provided on a server located in a foreign country, with the customer in the U.S. using nothing more than software downloaded from the Internet and purchasing a broadband connection from a third party, looks very different from the service provided by traditional phone companies. This fundamental shift in how the voice application is provided has obvious implications for what regulations, if any, are imposed on VoIP providers and who decided and/or enforces any regulation. Federal or state regulators need to recognize that it may be very difficult to enforce requirements and unwarranted burdensome regulation will place VoIP providers in this country at a competitive disadvantage to VoIP providers located in relatively less regulated countries, and that, if providers are driven abroad, we will lose desirable jobs in the high technology sector.

Much of what I have described is a look into the reasonably foreseeable future. But VoIP is already changing the market's dynamics, even though it has not yet become ubiquitous. In 1998, VoIP generated less than 0.2% of the world's international voice traffic. In 2002, VoIP generated 10.4%, and, in 2003, is estimated to have generated 12.8%. Recently, Cablevision announced that it would provide a bundled package of digital cable TV, high speed Internet, and unlimited local and long distance calling for \$90. If you consider what consumers pay for digital

cable and broadband in the marketplace today, at this price, the voice service is essentially free. This is exactly what one would expect when voice, which uses relatively little bandwidth, is provided over a high bandwidth connection.

There are other indications that VoIP, while only gradually making its way into the public consciousness, is nevertheless growing at an increasing pace. A report released last month by the Pew Internet & American Life Project and the New Millennium Research Project estimates that approximately 14 million Americans have already made some sort of voice communication over the Internet. Skype, an Internet-based VoIP service that allows its members to speak to one another with crystal clarity for free over a peer-to-peer network connection, has been downloaded over 15 million times by users around the world.

B. Why Take Action Now?

The FCC has long relied on a policy of limiting regulatory intrusion on the Internet and applications provided over it. The Commission could have waited and raised the question of how VoIP is regulated at some point in the future, after it matured. At the end of 2003, incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”) served over 181 million access lines in the United States, and even at astronomical growth rates it will be some time before VoIP services and applications constitute a significant portion of the U.S. voice market. But there are two factors pressuring for Commission attention and, by implication, legislative action.

First, industry players are deploying these applications today, and are bringing their questions to the Commission. VoIP only started to become more widely used in the domestic market within the last several years. Thus, beginning in September 2002, a variety of companies from across the telecommunications industry – VoIP applications providers, ILECs, data

companies and interexchange carriers (“IXCs”) – filed petitions with the Commission seeking clarification regarding regulatory treatment of VoIP.¹ The petitions filed over the last two years demonstrate the need for clarification and a measure of certainty on important regulatory questions, especially since it is uncertain how the FCC is going to rule in this very new environment.

Second, because of the important traditional role state public utility commissions play in regulating intrastate telecommunications, states have now begun to look at these questions, raising the possibility of differences among state regulatory regimes, and between various state and federal regulatory regimes. Some state commissions have decided to wait until this service further develops or until the FCC acts. But others have moved forward to examine VoIP, and some, such as Minnesota and New York, have already taken steps to classify VoIP applications as regulated telecommunications services. Federal courts in both states have stayed the effectiveness of these rulings. Nevertheless, companies offering VoIP are dealing today with multiple attempts to apply potentially inconsistent regulatory regimes, with the imminent prospect of more to come. This uncertainty and potentially conflicting regulatory regimes is an impossible position for companies wanting to provide VoIP service on a national basis.

It is not surprising, therefore, that while there is investment capital that would fuel even further innovation in this high tech area, there is hesitance to bring this capital to market while the regulatory regime remains unclear. While this might be said of any number of areas of telecommunications law, it is particularly true of VoIP, given that much of the innovation in the area is coming from small companies and entrepreneurs who are most vulnerable to shortages of investment capital. Therefore, the FCC has begun to examine this area not because it is looking

¹ The Commission did receive a petition regarding VoIP services as early as 1996, and received another following the release of its 1998 report to Congress regarding universal service, often called the “Stevens Report.” There was

for something to do, or because it is interested in any way in regulating the Internet. Rather, the FCC has begun to examine this area because of the demonstrated need for clarity because of the very real possibility that deployment of this new technology will be hampered by burdensome and conflicting regulatory requirements.

II. The IP-Enabled Services Proceeding

On March 10, 2004, the Commission released its Notice of Proposed Rulemaking (“NPRM”) on IP-Enabled Services, docket number 04-36 in order to address the need for the Commission to provide clarity to consumers, industry and the investment community. This NPRM asked commenters to tell the Commission how it could best craft a regime for VoIP and other IP enabled services that would encourage innovation and ensure that the benefits of this technology could reach consumers.

The NPRM discusses how VoIP will change how voice service is delivered to business and residential customers, and then asks whether the Commission can best serve the public interest by continuing its policy of minimal regulation of the Internet and applications provided over it. It asks for comment on how the Commission could determine whether a service using VoIP is a regulated telecommunications service or an unregulated information service under the 1996 Act: Should the Commission establish the line at the point where VoIP technology interfaces with the public switched telephone network? Should the Commission use a purely functional approach that makes the distinction based on whether the given service is a replacement for traditional telephony? Should the Commission use a test that examines whether the service substitutes for traditional telephony as determined by a traditional market analysis? Should the Commission instead adopt a layered approach, view VoIP purely as an application riding over a network, and thus regulate applications very lightly while applying a more stringent

not, however, any consequential activity following these petitions.

regime to facilities? And what impact should it have on the Commission's analysis that VoIP can be provided via peer-to-peer services that simply connect two users, as opposed to the centrally managed networks used by traditional service providers? In the case of traditional service providers, there is an entity to regulate that, presumably, has some control over and information about the calls routed over its network. In the peer-to-peer case, consumers communicate directly with one another, and aside from assisting in linking the participants, the provider of the peer-to-peer application may have little or no control over the call.

Related to the question of classification, the NPRM asks how the Commission might best achieve a minimally regulated environment. If classified as an information service, the service is nevertheless subject to the Commission's general jurisdiction to regulate all interstate and international communications by wire and radio. Alternatively, even if a service is classified as a telecommunications service, Congress has directed the Commission to forbear from enforcing its own regulations or the requirements of the statute if enforcement is not necessary to protect consumers, ensure against unjust, unreasonable or unreasonably discriminatory practices, or protect the public interest.

The NPRM goes on to solicit comment as to jurisdiction. It notes the Commission's recent order in response to a petition for declaratory ruling filed by Pulver.com regarding Free World Dialup – as described in the petition, a free peer-to-peer application facilitating voice communication between members of a closed group, which does not interconnect with the public switched telephone network. The Commission's Order, released on February 19, 2004, held that Free World Dialup was an information service subject to federal jurisdiction. The Pulver.com order further held that state regulation treating Free World Dialup like a regulated telecommunication service would most likely be preempted given the Commission's finding and

an explicit Congressional policy against burdening the Internet with unnecessary federal and state regulation. The NPRM acknowledges that the *Pulver.com* Order only addressed one type of VoIP, and asked about the extent to which the reasoning in the case can be applied to other types, such as VoIP applications that interface with the public switched telephone network.

Having solicited comment on how the Commission should classify VoIP, and who should have jurisdiction as to whether to regulate VoIP, the NPRM then asks what regulations, if any, should apply, and develops an important distinction. The NPRM asks whether economic regulations such as entry, exit, tariff and accounting rules designed to protect against the power of a monopoly provider of services, with control over the bottleneck facility of the wire into the consumer's home, have any application in an environment where consumers can choose any number of applications providers, and use those applications over multiple networks. If technology has redressed the imbalance in power between customers and providers by lowering barriers to entry and allowing the consumer to choose his or her service provider, and change that choice easily, does this type of legacy economic common carrier regulation continue to have any relevance, at least as regards VoIP providers? Certainly, precedent indicates that where competitive choice is possible, lower regulatory burdens are justified. This has been the case with cellular providers, which are not subject to many of the common carrier requirements that might otherwise apply to them. It has also been the case with nondominant wireline providers. The NPRM solicits comment on these issues.

Traditional economic common carrier regulation is distinguished from requirements that can be characterized as social obligation regulation. These are requirements that, as a society, we have decided should apply broadly to any provider of voice services, as opposed to only those providers that have a dominant market position. Thus, even if a provider of voice is not

dominant, we still believe that it is important that its customers have access to emergency services. Even if the market for voice services is changing in fundamental ways, it is still a basic goal of the Communications Act to ensure that all Americans have access to service at affordable prices. One might say that free voice service would achieve that goal. But if it is necessary to first purchase some form of broadband service, then it may be necessary to examine how we understand universal service and support for it may need to change over time. The social obligations raised in the NPRM and related proceedings include emergency service via the 911/E911 system, access to telecommunications by people with disabilities, universal service, and authorized law enforcement access to electronic communications – important societal goals that should not be compromised as the market changes. But the NPRM recognizes that the ways to achieve these goals are likely to change as the result of widespread VoIP adoption. Thus, while it makes clear these goals continue to be important, the NPRM also asks how the Commission can best achieve them in the new environment, acknowledging both the difficulties and opportunities presented by new technology.

III. Comments on the IP-Enabled Services Proceeding

The response by the public to the NPRM has provided the Commission with a rich record, and features original and thought-provoking analyses of the issues. By May 28, 2004, the date for filing of initial comments, the Commission had received over 150 sets of comments. And, by last count, the Commission has received 86 reply comments by the July 14 filing date. These comments and replies have come to the Commission from a wide range of sources, indicating the broad interest this proceeding engenders not only among industry actors, but across American society as a whole. These sources include:

- multiple public utility commissions, and two organizations representing state commissioners, the Federation for Economically Rational Utility Policy and the National Association of Regulatory Utility Commissioners;
- county 911 administrators;
- the Department of Homeland Security and the Department of Justice;
- groups involved in studying and advocating public policy as it relates to high tech issues, such as the Electronic Frontier Foundation;
- public interest groups representing specific groups of consumers, such as AARP, the American Foundation for the Blind, Communication Service for the Deaf, the National Consumer League and the Ad Hoc Telecommunications Users Committee;
- trade groups representing the interests of telecommunications and high tech industries, including the Telecommunications Industry Association, CTIA, NCTA, the Information Technology Association of America, and the High Tech Broadband Coalition;
- cable TV providers, including Cablevision, Time Warner, and Comcast;
- wireless providers, including Nextel, Cingular, Ericsson, and T-Mobile; and
- Internet Service Providers;
- many well-known high technology companies such as Microsoft and Cisco;
- local exchange carriers, both incumbent and competitive, as well as their trade associations;
- rural telephone companies, as well as their trade associations; and
- numerous VoIP application providers, such as 8X8, Net2Phone, Skype, Pulver.com, Callipso, Dialpad, Vonage, and the Voice on the Net Coalition.

The commenting parties have, by and large, acknowledged the significant changes that VoIP technology will bring. They differ, however, as to the specific regulatory implications of that change.

A number of commenters, largely state commissions and rural incumbent local exchange carriers (“rural ILECs”), argue that if VoIP provides the functional equivalent of a voice call, then it should be regulated in the same way as traditional voice telephony. Others argue for a multi-factor test to determine whether a service should be regulated or not. For example, the National Cable Television Association argues that a VoIP application should be subject to the same regulation as telecommunications service providers if the following applies: (1) it makes use of 10 digit numbers under the North American Numbering Plan; (2) it is capable of receiving calls from the public switched telephone network at one or both ends of the call; and (3) it represents a possible replacement for traditional telephone service. However, NCTA also argues that if a service meeting all of these criteria also uses IP protocol between the service provider and the consumer, including use of an IP terminal adapter and/or IP-based telephone set, it should be subject to minimal regulation. Still others, such as AT&T, SBC, many of the high technology companies and software providers, and all VoIP application providers, argue that functional approaches or factor approaches are doomed to obsolescence as technology develops, and that the Commission should instead broadly classify services using IP technology, or at least those reaching or leaving the customer in IP format, as information services.

Another strain of comments advocates a layered approach to regulation. These commenters argue that the primary benefit of using IP to transmit voice is that it allows industry to move from using networks that are optimized for and dedicated to a single function, voice, to a network capable of delivering multiple functions. Therefore, regulation should reflect the fact

that services and applications are no longer tied to the physical infrastructure. If dozens or hundreds of competing services and voice applications are provided over the infrastructure layer, there is little or no justification for continued common carrier regulation at those levels. Rather, they argue that the focus of common carrier regulation, if any, should be on underlying facilities, where issues of market power might still exist.

Interestingly, differences on classification among commenters did not necessarily translate to differences over jurisdiction. Some rural ILECs, their trade organizations, many of the commenting state commissions and NARUC argue that VoIP applications, if they are classified as telecommunications services, can and should be regulated at the state level. Other rural ILECs, the Federation for Economically Rational Utility Policy, and virtually all companies interested in offering VoIP applications, whether ILEC, IXC, CLEC, VoIP provider or other high tech company, have argued that VoIP applications are inherently interstate – that it is impossible to determine geographic end points for calls when customers can use VoIP applications from anywhere in the world, that IP networks ignore domestic and international boundaries when transporting bits, thus rendering the intrastate/interstate distinction meaningless, and that the Internet and services provided over it have always been considered to be subject to federal jurisdiction only.

With regard to whether economic common carrier regulation should apply, high tech companies and VoIP application providers overwhelmingly also agreed that there is no need for it. Many commenters that argued some VoIP applications should be classified as telecommunication services, nevertheless, also argued that they should be subject to federal jurisdiction only and that the Commission should forbear from applying economic common carrier regulation. The Illinois Commission, while arguing that state and federal regulation

should coexist, with preemption only applying to state requirements that are inconsistent with federal requirements, nevertheless thought that extension of traditional utility regulation to emerging IP-enabled services was unwarranted. Some state commissions and many commenting rural ILECs concluded that VoIP applications should be subject to the same level of regulation as traditional voice providers, although America's Rural Consortium pointed out that this parity could be achieved through federal preemption of state regulation of voice service and removal of regulations from both VoIP and traditional providers.

There was general agreement among the commenters that universal service, 911 and other social obligations of this type will continue to be important in the new environment. There was, however, disagreement as to how best to achieve these goals. VoIP application providers and many of the technology-oriented trade groups tended to argue that obligations like access to 911 should only be made mandatory over time in response to a market failure, and that there has already been significant progress through voluntary industry action. They also argued that universal service and access charges should not apply until broader reforms to these systems are completed, as otherwise the Commission would impose unsustainable systems on a new technology. Others argue for mandatory application of these requirements, with most commenters focusing on specific areas: groups involved with advocating for disabilities access argue that mandatory disabilities access requirements should apply; some incumbent and rural ILECs that receive support from the Universal Service Fund and access charges argue that these obligations should apply pending changes in the system.

The Commission has received a wealth of comments that truly represent views across the spectrum.

IV. Recent Actions

In addition to our work on the IP-Enabled Services Proceeding, the Commission also is working on several petitions regarding VoIP in addition to recently resolved petitions.

The Commission recently resolved the following petitions:

- *Pulver.com*. As previously mentioned, on February 19, 2004, the Commission released an order resolving a petition for declaratory ruling filed by Pulver.com. In that order, the Commission found that Pulver.com's Free World Dialup Service was neither telecommunications nor a telecommunications service, but was instead an information service subject to federal jurisdiction, and that state regulation conflicting with this classification would most likely be preempted. This order was significant in terms of clearly establishing that Internet-only voice applications would be treated very much like any other applications traveling over the Internet: as being unfettered by federal or state regulation.
- *AT&T*. On April 21, 2004, the Commission released an order resolving a petition for declaratory ruling filed by AT&T. In this order, the Commission denied AT&T's request to exempt from access charges its use of VoIP in providing voice service where AT&T only used the technology to transport calls that originated and terminated on the public switched telephone network, and did not provide any enhanced functionality, cost savings, or net protocol conversion for the end user. This transport was carried out as part of AT&T's conventional service offerings and was transparent to the consumer. The Commission, by issuing this decision, did not prejudge the application of access charges to other types of VoIP service, which are still subject to consideration in both the IP-

Enabled Services Proceeding and the Intercarrier Compensation docket. Thus, this decision was explicitly limited to the factual circumstances described by AT&T.

Petitions pending before the Commission are as follows:

- *Vonage*. On September 22, 2003, after the Minnesota Public Service Commission ruled that Vonage's service was a regulated telephone service under state law, Vonage filed a petition for preemption of this decision. Subsequently, Vonage obtained a reversal of this decision from a federal district court. An appeal of that court decision to the United States Court of Appeals for the Eighth Circuit is pending, while Vonage's preemption petition is still pending before the Commission.
- *Level 3*. On December 23, 2003, Level 3 filed a petition for forbearance, requesting that the Commission forbear from applying access charges to calls that originate or terminate as Internet protocol calls on one end, with the other end originating or terminating over the public switched telephone network. Level 3 excluded from its petition those areas served by rural ILECs as defined in section 251(f)(1) of the Communications Act. The twelve month deadline for Commission action in this proceeding is December 23, 2004, with a possible extension of three months beyond that date.
- *SBC*. On February 5, 2004, SBC filed a petition for forbearance asking the Commission to find that services and applications provided over Internet protocol platforms are information services subject only to federal jurisdiction, and as such to forbear entirely from applying Title II common carrier regulation to such services. The twelve month deadline for Commission action in this proceeding is February 5, 2005, with a possible extension of three months beyond that date.

- *Inflexion*. On February 27, 2004, Inflexion filed a petition for declaratory ruling, asking the Commission to find that calls made to or from Inflexion's VoIP service in areas that it characterizes as underserved are exempt from access charges. Inflexion's definition of underserved areas incorporates areas served by rural ILECs that Level 3 explicitly declined to cover in its petition.

In addition to the IP Enabled NPRM, these petitions also present opportunities to resolve specific questions related to VoIP. In addition, many of the issues that relate to universal service and intercarrier compensation are being considered by the Commission in other proceedings. Moreover, the Commission expects to release in the near term a Notice of Proposed Rulemaking addressing issues regarding VoIP and the Communications Assistance for Law Enforcement Act ("CALEA") raised by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Agency in their recently filed petition for rulemaking. Consideration of VoIP issues will not delay broader resolution of those dockets, and the Commission hopes to move expeditiously on all fronts.

V. Conclusion

The Commission is very aware that VoIP is leading to significant developments in telecommunications markets challenging traditional industry economics as well as traditional regulatory institutions and processes. Perhaps most importantly, from the perspective of a regulator, VoIP is changing the nature of the relationship between consumers and providers. It would be irresponsible, as well as counterproductive, for any regulator to impose obsolete regulations reflexively, simply in order to protect a legacy regime. The examples of mobile wireless service and the Internet are perhaps most instructive in this respect. In both cases, the technologies have developed free of many of the regulatory requirements and regimes applicable

to traditional monopoly common carriers, notwithstanding long and hard fought battles to impose such requirements. Indeed, it took an Act of Congress before the FCC could preempt counterproductive state regulation of cellular service. Today, the American consumer and economy are far better off because of the deregulatory course that helped these two industries develop, innovate, expand and now touch millions of lives, bringing considerable benefits to consumers, and generating substantial economic growth. All without traditional common carrier utility regulation.

The Commission's decisions regarding VoIP will have the farthest-reaching consequences of anything the Commission will consider in the near future. The Commission is considering nothing less than the future of electronic communications for today's and future generations. Consumers, the many industries that rely on information technology and advanced communications in their business, the telecommunications, computer and software industries, and the investment community are all counting on the Commission to get it right. It also is not an overstatement to say that the world, also, is watching how the U.S. decides to treat these services. Telecommunications regulators and policy makers in other countries want to know whether the United States will create an environment that is conducive to growth and investment in innovation, or an environment where the United States becomes mired in reflexive, legacy regulation and regulatory processes that stifle progress.

Clearly, I believe we should look forward rather than backwards. When dealing with revolutionary new technologies we need to start from the perspective of how to best create the world we all want to live in, rather than applying tired regulations quickly being rendered obsolete. The Commission, however, is constrained by the Act, which divides the world into regulated telecommunications services and unregulated information services. While the

Commission certainly has some ability to fine tune treatment of new technologies given its discretion and the flexibility granted to it by Congress, the Commission is still constrained by this structure. If you believe that VoIP and other new technologies are transforming the telecommunications market in ways that cry out for new regulatory approaches, you may need to consider whether the tools the Commission has today are appropriate for the task.

In the meantime, the Commission will continue forward, and the guidance and leadership of Congress is crucial to the success of its process. On behalf of the FCC, I want to thank you, Mr. Chairman, for calling this hearing, and we look forward to working with you and other members on these issues.