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June 4, 2004

Secretary of the PSC  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

**FILED**

**JUN 07 2004**

Re: Voice Over Protocol

**Missouri Public  
Service Commission**

Dear Sir or Madam:

Enclosed for filing with the Commission in the above-referenced case is an original of the Filing of Comments and Comments for Covad Communications Company.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Karin L. Bergmann  
Legal Assistant

KLB

FILED

JUN 07 2004

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of an Investigation of Voice )  
Over Internet Protocol. )  
)

Case No. TW-2004-0324

Missouri Public  
Service Commission

**DIECA COMMUNICATIONS, INC. d/b/a COVAD COMMUNICATIONS COMPANY**  
**FILING OF COMMENTS**

Comes now Dieca Communications, Inc. d/b/a Covad Communications Company  
("COVAD") an Intervenor/Participant in this investigation docket and pursuant to 4 CSR  
240.090 files a copy of the Comments it filed with the FCC on May 28, 2004, in response to the  
FCC's Notice of Proposed Rulemaking (NPRM) in WC Docket No. 04-36.

Respectfully Submitted,



Leland B. Curtis, #20550  
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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was served upon the parties identified in the attached service list on this 4<sup>th</sup> day of June, 2004 via e-mail.

  
Leland B. Curtis

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

**FILED**

**JUN 07 2004**

**Missouri Public  
Service Commission**

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Petition of SBC Communications, Inc.,	)	
For a Declaratory Ruling Regarding	)	
IP Platform Services	)	
	)	
Petition of SBC Communications, Inc.,	)	WC Docket No. 04-29
For Forbearance from Application of	)	
Title II Common Carrier Regulation to	)	
IP Platform Services	)	

**COMMENTS OF COVAD COMMUNICATIONS**

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## TABLE OF CONTENTS

I.	Introduction.....	1
II.	The Right Model for Innovation and Competition in IP Based Services Includes Diversity in Both the Transmission and Application Layers .....	5
	A. Competition in the Application Layer.....	6
	B. Competition in the Transmission Facilities Layer .....	8
	C. Covad's Nationwide Rollout of VoIP Services.....	12
III.	The Statutory Framework for IP Enabled Services.....	15
	A. Classification of IP Enabled Services .....	15
	B. Jurisdictional Considerations .....	17
IV.	Specific Regulatory Requirements.....	22
	A. Public Safety .....	24
	B. Carrier Compensation.....	26
	C. Universal Service.....	28
	D. Consumer Protection and Economic Regulation .....	31
V.	Conclusion .....	34

## **I. Introduction**

Covad Communications, by its attorneys, herewith respectfully submits its comments in response to the Notice of Proposed Rulemaking (*NPRM*) released on March 10, 2004, by the Commission seeking comment on issues relating to IP enabled services, or services and applications making use of Internet Protocol (IP), including but not limited to Voice over IP (VoIP) services.<sup>1</sup> In these comments, Covad also responds to the petitions of SBC Communications, Inc., for clarification and forbearance with respect to “IP Platform” services.<sup>2</sup> Covad supports the Commission’s efforts to determine the regulatory treatment appropriate for IP enabled services.

The Commission’s interest in determining the appropriate framework for IP enabled services is particularly timely. Broadband transmission services capable of supporting robust and diverse IP based services are achieving critical mass and have substantial momentum. The Commission’s broadband deployment data show that increasing numbers of consumers and businesses are adopting broadband services, at last count to the tune of nearly 24 million homes and businesses.<sup>3</sup> To date, however, the “transmission layer” for broadband services has been entirely dominated by the two incumbent facilities based providers, the cable companies and the incumbent telephone companies (“ILECs”), by virtue of their control of bottleneck last mile facilities. At the

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<sup>1</sup> See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 19 FCC Rcd 4863 (rel. Mar. 10, 2004) (*NPRM*).

<sup>2</sup> See Petition of SBC Communications, Inc., For a Declaratory Ruling Regarding IP Platform Services, in WC Docket No. 04-36, filed Feb. 5, 2004; and *Wireline Competition Bureau Extends Comment Deadlines for SBC’s “IP Platform Services” Forbearance Petition*, WC Docket No. 04-29, Public Notice, DA 04-899 (rel. Mar. 30, 2004).

<sup>3</sup> See *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at 2 and Table 1 (December 2003).

same time, after nearly a decade of rapid innovation in IP based data services via the Internet and the World Wide Web, we are witnessing the first glimmerings of new voice service competition and innovation originating in the "applications layer" of IP based services, with the launch of facilities agnostic Voice over Internet Protocol services by established companies like AT&T, and upstarts like Vonage in the consumer segment and Gobeam, soon to be merged into Covad, in the small and medium business market.

By "doing no harm" to IP based data services in the application layer, the Commission has supported and spurred tremendous innovation, and vigorous competition. As the Commission's NPRM recognizes, the Commission has historically followed "an established policy of minimal regulation of the Internet and the services provided over it."<sup>4</sup> Covad supports the Commission's continued adherence to this established policy. Generally, as the Commission has previously recognized, competition in the provision of services and applications offered over the public Internet has obviated the need for market regulation by the Commission beyond the underlying transmission layer. For example, the Commission's *Computer Inquiries* applied a regime of minimal regulation for enhanced services, separate and distinct from its substantial market regulation of the underlying basic services which were dominated by the Bell companies. This regulatory regime created the right conditions for a robustly flourishing competitive market for enhanced services, eventually to include the proliferation of numerous competitive Internet Service Providers.<sup>5</sup> The Commission's policies promoted competition in upstream markets for information services and applications by shielding them from the competition regulation

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<sup>4</sup> See NPRM at para. 2.

<sup>5</sup> See "The FCC and the Unregulation of the Internet," Jason Oxman, Federal Communications Commission Office of Plans and Policy, Working Paper No. 31, at 7-18 (1999) (available at <http://www.fcc.gov/osp/workingp.html>).

and economic regulation it needed to apply in the downstream market for transmission services. This regulatory model has also now been codified by Congress, in the 1996 Telecommunications Act's distinct treatment of unregulated information services versus significantly regulated telecommunications services and facilities. Covad believes that this regulatory model continues to offer the paradigm most favorable to ensuring competition and innovation in the provision of information and telecommunications services, such as the IP enabled services and broadband transmission services at the heart of the Commission's current *NPRM*.

Not surprisingly, incumbent owners of facilities comprising the "transmission layer" of IP based services, which were built under various state granted monopolies, will proclaim that the only way to ensure innovation is to deregulate the transmission layer entirely, so that these companies are "freed" to invest in the advanced facilities needed to support innovation in IP based voice and data services. Covad respectfully submits that rapid innovation in IP based services will not be well served by monopoly or duopoly control of the transmission layer.

*Taken together*, introduction of advanced facilities in the transmission layer, along with innovation in the application layer, hold the potential to revolutionize telecommunications services over the next decade. Whether motivated by a desire to limit competition or a rational calculus of the best means to maximize their own business opportunity and revenues, incumbents have not traditionally been the best leaders of revolutions, and are unlikely to be the best leaders of the IP revolution. In this case, the incumbent phone companies are sorely conflicted by the potential loss of revenues from legacy voice and data services. While cable companies have made much of their plans for



VOIP, a duopoly environment will necessarily limit their incentives to aggressively compete and innovate.

In contrast, the pro-competitive regime provided in the 1996 Telecommunications Act, which ensures access to legacy monopoly loops and capabilities in the nation's telecommunications infrastructure, provides the means for many smaller, and often nimbler and more entrepreneurial, companies to marry innovations in the transmission layer with innovative application layer offerings, to drive an ever more rapid spiral of innovation. Moreover, with this competitive spur, the incumbents are far more likely to deliver on their promises of future investment in advanced IP based transmission facilities. Without diverse sources of facilities based competition, which must necessarily make modest use of legacy monopoly loops and facilities, the transmission layer of IP based services in the next several years will likely hearken back to the early years of the automotive industry, as best summed up in Henry Ford's famous dictum: "you can have any color car you want, so long as it's black."

In these comments, Covad respectfully submits its suggested framework for the minimal regulation of IP based services and applications riding atop broadband transmission services. Covad believes the 1996 Act's existing classifications of "information services" versus "telecommunications services" continue to offer the most sensible approach for regulatory classification of these exciting new services and applications. Covad urges the Commission to affirm its existing precedent treating unregulated information services as jurisdictionally interstate. In the era of the World Wide Web, such jurisdictional treatment has never been more applicable.

Covad also respectfully submits its suggestions for the manner in which new IP enabled services such as VoIP should address vital social policies, for example, public safety and universal service. Covad believes that the “layered” network model, first set out in the Commission’s *Computer Inquiries* and subsequently codified in the 1996 Act, offers the most sensible model for determining the network layers at which such social obligations should apply. Furthermore, notwithstanding the potential for the Commission to claim authority to regulate such social obligations under its ancillary jurisdiction, Covad believes it is premature for the Commission to explore the outer boundaries of its ancillary jurisdiction as applied to IP based services and applications. Rather, at this early juncture in the development of the market for IP based services like VoIP, Covad believes that the Commission’s role should be to encourage and oversee the industry as it works towards developing solutions to meet these vital social policy objectives.

## **II. The Right Model for Innovation and Competition in IP Based Services Includes Diversity in Both the Transmission and Application Layers**

Covad believes that the future for IP enabled services will best be realized with a mix of suppliers and products integrating underlying layers of broadband transmission facilities with overlying layers of IP enabled services, as well as third party innovators offering stand alone IP enabled services riding above separately obtained broadband transmission services. As discussed below, the Commission will realize this future by ensuring robust downstream competition in access to and provision of broadband transmission facilities, to ensure similar upstream competition among IP enabled services. Current market conditions, and the natural incentives of the dominant incumbents, are insufficient to ensure robust competition and innovation as IP based services proliferate.

### **A. Competition in the Application Layer**

At this initial stage in the development of VoIP services, third party VoIP application providers (i.e., VoIP providers that do not operate broadband transmission facilities) have had some initial success in developing the marketplace for VoIP services. For example, in a few short years, Vonage has grown its subscriber line count to more than 100,000 consumers and small businesses across the nation.<sup>6</sup> AT&T recently announced its own entry into the VoIP marketplace with its CallVantage Service.<sup>7</sup> AT&T plans to enter 100 major markets by year's end, and expects to sign up 1 million consumers and businesses for CallVantage services by year-end 2005. Covad is greatly encouraged by the early success of these efforts to provide stand alone VoIP services.

Notwithstanding these successes, however, Covad believes that competition among VoIP services in the application layer alone is not sufficient to truly unlock the promise of IP based voice and other services. This is because third party VoIP providers do not own or operate the underlying transmission facilities over which their services are offered. Indeed, as Banc of America Securities recently wrote,

Because they have no legacy voice business, the virtual carriers, like Vonage, have every reason to press ahead aggressively... But they have significant risks long term. The current regulatory arbitrage from which they benefit (namely the ability to circumvent access charges and the USF), may go away eventually; they have little brand awareness or reputation; they can't bundle multiple services; and they are at the mercy of the infrastructure provider to maintain the plant sufficiently; and, at least today, they can't offer a quality of service (QoS) guarantee.<sup>8</sup>

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<sup>6</sup> See "Vonage Becomes First Broadband Telephony Provider To Activate 100,000 Lines," Press Release, Vonage, Feb. 2, 2004.

<sup>7</sup> See "AT&T Ushers In New Era in Communication With Launch of AT&T CallVantage Service - New Jersey," Press Release, AT&T, March 29, 2004 (available at <http://www.att.com/news/item/0,1847,12989,00.html>).

<sup>8</sup> See "Straight Talk on VoIP," David W. Barden, et al., Banc of America Securities Equity Research, April 15, 2004, at 4.

Not surprisingly, the next logical conclusion was that, in the future, “vertically integrated providers should dominate” the marketplace for VoIP services.<sup>9</sup>

Some have speculated that the development of competition in the information services layer, e.g. competition among third party VoIP applications, obviates the need for competition among multiple providers of facilities-based broadband transmission. Covad believes, however, that the development of a marketplace for VoIP services does not mean that transmission service providers will simply become suppliers of a “dumb pipe” over which other service providers offer enhanced IP based services and applications. Rather, as Merrill Lynch recently wrote, control over and operation of underlying broadband transmission facilities will confer significant advantages to service providers offering integrated transmission and VoIP services, such as:

[the abilities] to control the quality of service, leverage existing customer relationships and take advantage of their on-the-ground field service networks to assist with customer installation.<sup>10</sup>

According to Merrill Lynch’s report, “the quality-of-service issue is potentially critical”:

We suspect that many customers will not care, or would pay only a modest premium for QoS assurances based on the performance that competing services are delivering today. But this could change if network congestion increases with VoIP take-up – or if the cable operators take steps to restrict or disadvantage competing VoIP services.<sup>11</sup>

The “disadvantages” that virtual operators of stand alone VoIP services will face are very real. The simple ability to integrate a facilities-based transmission service with VoIP services will allow integrated service providers to (1) use packet prioritization techniques;

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<sup>9</sup> See *id.*

<sup>10</sup> See “Everything Over IP,” Glenn Campbell, et al., Merrill Lynch Research Report, March 12, 2004, at 19 (available at [http://www.vonage.com/media/pdf/res\\_03\\_12\\_04.pdf](http://www.vonage.com/media/pdf/res_03_12_04.pdf)).

<sup>11</sup> See *id.*

(2) charge higher prices for high speed data service and lower prices for add-on VoIP service; and (3) charge a price premium for real-time communications.<sup>12</sup>

These advantages highlight the limitations of competition in the application layer alone. Competition in the underlying transmission facilities layer will become increasingly more important over time in ensuring the competitiveness of upstream IP based services and applications like VoIP. In other words, to preserve and extend the competition being created by third party providers of IP enabled services, it will become increasingly more important to preserve and extend competition in the underlying provision of broadband transmission services. As discussed below, Covad believes that such robust competition in the broadband transmission facilities layer will help ensure that the exciting innovation being witnessed today in the provision of third party IP enabled services like VoIP will continue unabated.

#### **B. Competition in the Transmission Facilities Layer**

Amidst all the hype over the broadband future and new technologies, the underlying reality is stark. In most areas of the country Covad remains the only provider of broadband access services left to compete with cable and ILEC broadband. According to the Commission's latest data, the incumbent telephone companies and cable providers control more than 93% of the nation's broadband access lines.<sup>13</sup> Moreover, many end users lack a choice even amongst this limited set of two providers – for example, cable providers have historically focused their network deployment in residential areas, leaving

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<sup>12</sup> See *id.* at 22.

<sup>13</sup> See *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 5 (December 2003). Specifically, out of a total of 23,459,671 high-speed lines (over 200kbps in at least one direction), RBOCs served 7,266,765 lines, other ILECs served 948,828 lines, and cable providers served 13,684,225 lines.

most businesses with the incumbent telephone company as their only broadband option. Most importantly, large incumbents with substantial investments in existing facilities are unlikely, left to their own devices, to be aggressive innovators in disruptive technologies like VOIP. Moreover, this duopoly creates decidedly suboptimal competitive incentives. Under duopoly or even worse monopoly conditions, the Commission can expect two things to happen: (1) incumbent providers, with the inherent advantages that control over their broadband transmission facilities allows, are incited to squeeze third party VoIP providers out of the market, raise their costs to make them uncompetitive, or coopt them by acquisition; and (2) incumbent providers will refrain from aggressively competing with each other, to avoid provoking predatory responses in each other's core businesses (voice and video).

Clearly, the incumbent telephone companies have every incentive to avoid cannibalizing their core circuit-switched voice businesses with VoIP services:

SIP threatens to strand the Bells' core network... VoIP customers bypass, obsolete and strand the Public Switched Telecom Network (PSTN).<sup>14</sup>

Given nearly \$150 billion invested in circuit-switched telephone plant,<sup>15</sup> it is easy to see why incumbent telephone companies have severely conflicting incentives in rolling out VoIP: "the Bells will be reluctant to cannibalize themselves..."<sup>16</sup> The Bells' history in deploying DSL technology is instructive. As is now widely acknowledged, the incumbent phone monopolies were slow to deploy ADSL precisely because it threatened to cannibalize lucrative, legacy monopoly services such as ISDN, T1, and second line

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<sup>14</sup> See "SIP Happens: How VoIP Technology 'Re-unbundles' Telecom," Scott Cleland, et al., Precursor Telecom and Media Research, Apr. 12, 2004.

<sup>15</sup> See *id.*

<sup>16</sup> See "Straight Talk on VoIP," *supra* n. 8, at 4.

telephone service. Thus, years after cable modem services had entered the Internet access marketplace, incumbent phone company ADSL deployment remained extremely limited, and was priced at around \$69.95. No wonder, then, that residential ADSL deployment stood at only 115,000 lines when the Commission enacted line sharing in 1999. Only when the Commission opened the incumbent monopoly networks to data competitors through line sharing did prices drop, availability increase, and residential ADSL deployment begin to take off – today, to the tune of nearly seven thousand percent.<sup>17</sup>

The cable industry also has conflicting incentives. Viewed simplistically, cable providers should have every incentive to aggressively roll-out bundles of VoIP and broadband transmission. After all, “[r]elative to the Bells, [cable’s] major advantage is obviously that it doesn’t have a legacy voice business it needs to protect.”<sup>18</sup> Viewed in the broader context of their own legacy monopoly, however, the picture is much murkier. Under duopoly conditions, the ILECs and cable providers have every incentive not to aggressively compete in each others’ core businesses:

[W]e think cable operators are wary of being too successful... the chief risk is that being too successful in VoIP could induce the Bells to be more aggressive in the data and video businesses (such as ratcheting up marketing activity and price pressure). To put it another way, we think cable operators want to be successful with VoIP only up to the Bells’ threshold of pain; maximizing the value of VoIP may not maximize the value of the cable business if it invokes a predatory response...<sup>19</sup>

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<sup>17</sup> See Letter from Jason Oxman, Covad Communications, to Marlene Dortch, Federal Communications Commission, in WC 01-338 (dated November 20, 2002), Attachment “Declaration of Steven E. Siwek and Su Sun,” at 10-13. See also *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at 2 and Table 1 (December 2003).

<sup>18</sup> See “Straight Talk on VoIP,” *supra* n. 8, at 5.

<sup>19</sup> See *id.*

[W]e think cable regards the potential Bell threat as much larger [than virtual carriers like Vonage] and we think it is highly unlikely to risk baiting the Bells with an aggressive push into VoIP just to preempt what it regards as a smaller threat.<sup>20</sup>

Indeed, alongside the flurry of press announcements announcing cable operators' ambitious future VoIP rollout plans is a note of caution:

Most are wary of using big, new capital expenditures to take on entrenched local phone giants, such as Verizon, while they are also spending heavily on fancy, new set-top boxes and cable modems. "To dislodge a competitor that large takes a lot of money, and cable operators are still loaded with debt," says Richard Nespola, CEO of telecom consultant TMNG. "Investors would not jump for joy."<sup>21</sup>

This economic reality highlights another limitation of duopoly competition in the IP transmission layer. To the extent that the cable industry does pursue VOIP services, this is no guarantee that the industry will make further investments to optimize their transmission networks for VOIP. They may merely elect to provide VOIP services on a "best efforts" basis utilizing their existing internet access capabilities. In this scenario, cable companies would not drive any significant transmission layer innovation, but would simply be "virtual" voice carriers, like Vonage, over their own networks.

In light of these competitive and marketplace realities, Covad believes that the only way to ensure rapid rollout of VoIP and other IP enabled services, and to maximize innovation, is to ensure continued robust competition in the underlying layers for broadband transmission services. This enables competitive entrants – like Covad, with its new GoBeam assets – to aggressively roll out integrated packages of broadband transmission and IP enabled services, unburdened by the need to "protect" a legacy core business in video or circuit-switched voice. Furthermore, such competition will dramatically improve the prospects of a robust wholesale market developing for broadband

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<sup>20</sup> See *id.* at 6.

<sup>21</sup> See "Cable Poised to Offer Phone Service – Just Not So Fast," USA Today, May 27, 2004.



transmission services to third party providers of IP enabled services. After all, as demonstrated by the Commission's previous line sharing rules, competition in the transmission layer enabled hundreds of independent ISPs to voluntarily purchase broadband access services from a willing provider – Covad. In the absence of such wholesale competition, third party providers of IP enabled services will be left only to purchase from two very reluctant wholesale suppliers – namely, incumbents with legacy core businesses to protect.

### **C. Covad's Nationwide Rollout of VoIP Services**

The Commission's inquiry into the appropriate framework for regulating IP enabled services could hardly be timelier. Already, increasing numbers of consumers and businesses are using services like VoIP as substitutions for legacy "plain old telephone service," or POTS. In March of this year, Covad announced its own plans to enter into the VoIP marketplace through its acquisition of VoIP provider GoBeam Inc., a privately held provider of VoIP services.<sup>22</sup> Covad acquired GoBeam in a transaction valued at \$48 million,<sup>23</sup> and subsequently raised \$125 million in new capital in part to fund its rollout of VoIP telephony services across Covad's national footprint.<sup>24</sup> These developments in Covad's business plan are emblematic of the extraordinary business opportunity afforded by VoIP services for new telecommunications entrants like Covad. Indeed, the U.S. VoIP

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<sup>22</sup> See "Covad Signs Agreement to Acquire GoBeam to Accelerate Voice Over Internet Protocol (VoIP) Launch," Press Release, Covad Communications, March 3, 2004 (available at [http://www.covad.com/companyinfo/pressroom/pr\\_2004/030304\\_news.shtml](http://www.covad.com/companyinfo/pressroom/pr_2004/030304_news.shtml)) (*GoBeam Announcement*).

<sup>23</sup> See *id.*

<sup>24</sup> See "Covad Communications Group Announces First Quarter 2004 Results," Press Release, Covad Communications, May 17, 2004 (available at [http://www.covad.com/companyinfo/pressroom/pr\\_2004/051704\\_news.shtml](http://www.covad.com/companyinfo/pressroom/pr_2004/051704_news.shtml)) (*Covad 1Q 2004 Announcement*).

market has been forecasted to grow to more than five million subscribers by 2007, a five-fold increase over 2002 levels.<sup>25</sup> Furthermore, the Internet Protocol-PBX market, which has just under 100,000 lines today, is expected to grow to more than 1.7 million lines by 2007.<sup>26</sup> Covad expects its acquisition of GoBeam to close by mid-year 2004,<sup>27</sup> after which it plans to roll out VoIP services using GoBeam's assets throughout Covad's 100 markets. Thus, as Covad's acquisition of GoBeam makes clear, Covad is poised to participate fully in the coming boom of VoIP services.

Covad is particularly excited by the revolutionary enhanced features that VoIP services make possible, in comparison to the relatively limited feature sets available with legacy POTS services. Currently, GoBeam offers a comprehensive suite of business-focused VoIP solutions to accommodate varying customers' needs.<sup>28</sup> These solutions include a full-feature hosted PBX solution that offers advanced PBX capabilities without the need to install PBX hardware at the customer location. In addition, each user receives a unique phone number and an associated GoBeam "Dashboard" to manage incoming and outgoing phone calls through a computer. The Dashboard, GoBeam's interactive Web-based interface, allows users to consolidate their multiple phone numbers with a single personal telephone number so callers reach them wherever they are. GoBeam's VoIP service includes a personal virtual fax number to handle all incoming faxes; a unified visual mailbox to manage voicemail and faxes like e-mail; and robust call logs and integration with Microsoft Outlook, allowing users to make and return calls from their PC.

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<sup>25</sup> See *GoBeam Announcement*, *supra* n. 22.

<sup>26</sup> See *id.*

<sup>27</sup> See *Covad 1Q 2004 Announcement*, *supra* n. 24.

<sup>28</sup> See *GoBeam Announcement*, *supra* n. 22.

GoBeam's VoIP services also include easy to use web collaboration and voice conferencing tools. Covad is excited by the prospect of integrating GoBeam's portfolio of VoIP services with its own broadband transmission services, and expanding a full suite of voice and data services across Covad's nationwide footprint.

Covad's entry in the VoIP marketplace through its acquisition of GoBeam shows that the 1996 Act's provisions unbundling ILEC transmission facilities work as intended – by promoting real facilities-based competition. Access to unbundled ILEC transmission facilities has enabled Covad to build the leading nationwide facilities-based broadband network, reaching the top 100 markets in the nation and passing nearly 45 million homes and businesses in 35 states. Covad purchases access to unbundled transmission facilities (loops and interoffice transport) from the ILEC to reach customers from its own broadband facilities, including Digital Subscriber Line Access Multiplexers (DSLAMs), IP routers, and ATM switches collocated in over 1800 ILEC central offices across the nation. Now, with its acquisition of GoBeam, Covad is well-poised to use its broadband transmission facilities to compete in the ILECs' core mass market and enterprise legacy voice businesses, by offering enhanced broadband transmission features, such as quality-of-service and service level guarantees, in conjunction with its VoIP services. Furthermore, as a wholesale provider of broadband transmission services to hundreds of independent ISPs, Covad is well poised to expand its portfolio of wholesale broadband transmission offerings to third party providers of IP enabled services, thereby enabling them to enhance their own independent offerings of IP enabled services like VoIP. In sum, Covad's entry into the VoIP marketplace shows that unbundling rules truly do work to promote facilities-based innovation and competition.

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The marketplace for IP based services and applications like VoIP is already booming, and only shows continuing promise. Like the Commission, Covad acknowledges and welcomes this impending boom of IP based services and applications. Furthermore, Covad believes itself well poised to help propel the shift from legacy, voice-centric circuit switched transmission services to the broadband transmission services of the future. Covad also believes, however, that the best means of ensuring the “new environment of increased consumer choice and power”<sup>29</sup> sought by the Commission is to ensure the continued availability of competitive last-mile transmission services.

### **III. The Statutory Framework for IP Enabled Services**

The Commission seeks comment on the appropriate classification of various IP-enabled services “to ensure that any regulations applied to such services are limited to those cases in which they are appropriate.”<sup>30</sup> Covad believes that the existing statutory framework in the 1996 Telecommunications Act, as well as the Commission’s implementing rules and regulations, already provide the appropriate legal framework for the classification of IP-enabled services and the underlying transmission services over which they are offered.

#### **A. Classification of IP Enabled Services**

As the Commission’s *NPRM* recognizes, the Commission has long distinguished between “basic” and “enhanced” service offerings, subjecting basic services to common

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<sup>29</sup> See *NPRM* at para. 2.

<sup>30</sup> See *NPRM* at para. 35.

carrier regulation under Title II of the Act.<sup>31</sup> By contrast, although the Commission subjected enhanced services to its federal jurisdiction, it also exempted them from common carrier regulation, thereby creating a minimally regulated space for enhanced services.<sup>32</sup> As the Commission's *NPRM* further recognizes, the 1996 Telecommunications Act codifies the Commission's distinct regulatory regimes for basic versus enhanced services. Specifically, as the Commission has concluded, and the courts have agreed, the 1996 Act's "telecommunications service" definition was "intended to clarify that telecommunications services are common carrier services."<sup>33</sup> By contrast, the 1996 Act did not establish any particular entitlements or requirements with regard to providers of "information services,"<sup>34</sup> a category the Commission has made clear includes all the services previously considered to be "enhanced services."<sup>35</sup>

It is no accident that the Commission's distinction between regulated basic transmission services and unregulated enhanced information services has lasted so long – to date, nearly a quarter century since the Commission first elucidated this distinction in its *Computer II Final Decision*. It is also no accident that this distinction, such a rousing success in spurring the early development of a robustly competitive ISP marketplace,<sup>36</sup> was subsequently codified by Congress in the 1996 Telecommunications Act. The distinction between a regulated transmission layer of telecommunications services and an unregulated

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<sup>31</sup> See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 428, para. 114 (1980) (*Computer II Final Decision*).

<sup>32</sup> See *Computer II Final Decision*, 77 FCC 2d at 432-35, paras. 125-132.

<sup>33</sup> See *Cable & Wireless, PLC*, Order, 12 FCC Rcd 8516, 8521, para. 13 (1997); see also *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999).

<sup>34</sup> See 47 U.S.C. § 153(20).

<sup>35</sup> See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956-57, para. 102 (1996).

<sup>36</sup> See *supra* n. 5.

layer of information services riding atop has never been more applicable than in an era of packet-based underlying data transmission networks. Indeed, the Commission has previously recognized that packet switched telecommunications services – such as frame relay or ATM – are basic telecommunications services under the *Computer II* framework.<sup>37</sup> The distinction between regulated underlying telecommunications services and unregulated information services has ensured that the Commission's competition and economic regulations are limited to telecommunications services offered over bottleneck transmission facilities, where such regulation continue to make a great deal of sense. Meanwhile, information services bearing competitive characteristics like low barriers to entry and low market concentration have not been subjected to such regulation, but instead have been allowed to flourish in a minimally regulated space.

Accordingly, Covad urges the Commission to make clear that IP enabled services like VoIP services fall within the well-established category of information services, that in turn travel over underlying telecommunications services consisting of broadband transmission facilities. As such, IP enabled services, such as VoIP services, are unregulated information services falling under Title I of the Communications Act. By contrast, the underlying transmission services over which IP enabled services are offered are telecommunications services regulated under Title II of the Communications Act.

## **B. Jurisdictional Considerations**

Covad believes that the appropriate jurisdictional framework for IP enabled services and the underlying transmission services over which they are offered is a federal

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<sup>37</sup> See, e.g., *Independent Data Communications Manufacturers Ass'n Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

framework, based on their inherently interstate character. As explained below, Covad believes there is ample support in the Commission's legal precedents to support such an approach. Just as important, Covad believes that it is crucial at this early stage in the development of the marketplace for IP based services and applications that the Commission promote a single, unified federal regulatory framework. It is critically important that new entrants rolling out innovative new IP enabled services have the regulatory certainty that a single national regulatory framework will provide. Rather than devoting resources and personnel to navigating the shoals of widely varying regulatory regimes in each state, providers of IP enabled services should be freed to devote their resources to rolling out new products.

Accordingly, Covad believes that the Commission should exercise the lead role in developing the regulatory framework for IP enabled services. Covad feels it is important, however, that states maintain their traditional role of oversight over local conditions in the telecommunications marketplace in their respective jurisdictions. Covad views the development of a marketplace for IP enabled services not as an opportunity to rob state jurisdictions of their traditional authority, but rather as the opportunity for the development of a new partnership between federal and state jurisdictions in promoting the development of new IP based services and applications. For example, there will likely be appropriate roles for state commissions to play in ensuring that critical social obligations are met in the provision of IP based services and applications. Furthermore, there will always be a continuing role for state commissions under the 1996 Telecommunications Act in overseeing the conditions for local competition in their states, including administering the Act's local competition provisions for facilities used to provide Title II broadband services.

That being said, it is critical that the Commission take the lead role in developing the regulatory framework governing IP enabled services, to ensure the availability of a single consistent, national regulatory framework. Covad believes the Commission's existing precedents already squarely address the appropriate jurisdictional treatment of IP based services and applications. Specifically, the Communications Act already clearly grants the Commission exclusive federal authority over interstate communications,<sup>38</sup> including interstate information services.<sup>39</sup> Furthermore, the courts have upheld the Commission's federal jurisdiction over the offering of jurisdictionally interstate information services,<sup>40</sup> upholding Commission orders preempting state commission attempts to regulate such jurisdictionally interstate communications.<sup>41</sup> These principles have a long history in the Commission's legal precedents. In *Computer II*, the Commission concluded that the "efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if [enhanced services] are free from public utility-type regulation."<sup>42</sup> The Commission therefore preempted States from imposing regulation in this area. This order – which applied to State regulation of enhanced services provided by both carriers and non-carriers – was affirmed by the D.C. Circuit in *Computer and Communications Industry Association v. FCC*.<sup>43</sup> Thus, there is

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<sup>38</sup> See 47 U.S.C. § 152(a).

<sup>39</sup> See 47 U.S.C. § 153(22) (defining interstate communications).

<sup>40</sup> See *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994) (when state regulations would negate national policy, the Commission may preempt state regulations.).

<sup>41</sup> See *id* at 932. See also *Petition For Emergency Relief And Declaratory Ruling Filed By The BellSouth Corporation*, 7 FCC Rcd 1619, 1620, para. 7 (*BellSouth MemoryCall*) (preempting order of the state public utility commission because of its impact on a BellSouth jurisdictionally mixed information service).

<sup>42</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, 541 n.34 (1981).

<sup>43</sup> 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 461 U.S. 938 (1983) ("*Computer II*").



ample legal support for the Commission's exclusive jurisdiction over interstate information services, including IP based services and applications.<sup>44</sup>

There is also little question that IP based services and applications offered over jurisdictionally interstate packet-switched telecommunications networks are themselves jurisdictionally interstate in nature. For example, in its recent declaratory ruling regarding Pulver.com's Free World Dialup service, the Commission made clear that, whether or not the Commission applied its historical "end-to-end" analysis, Pulver.com's Internet-based VoIP service was clearly jurisdictionally interstate in nature. Under the Commission's end-to-end analysis, Pulver.com's service would be determined to be interstate in nature under the Commission's "mixed use" doctrine: "Where separating interstate traffic from intrastate traffic is impossible or impractical, the Commission has declared such traffic to be interstate in nature."<sup>45</sup> Furthermore, even apart from the Commission's end-to-end analysis, the Commission found that Pulver.com's service was clearly jurisdictionally interstate:

Because FWD facilitates its members' ability to contact any of its other members worldwide, to communicate with more than one at any given time, and because these members' physical locations can continually change, it is evident that the capabilities FWD provides its members are not purely intrastate capabilities.

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<sup>44</sup> Although the *California I* decision called into question the Commission's authority to exert jurisdiction over carrier-provided intrastate information services, the Commission's claim of exclusive jurisdiction over all interstate and non-carrier provided information services remains valid law. See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C.2d 958, 1126 (1986), *recon.* 2 FCC Rcd 3038 (1987), *further recon.* 3 FCC Rcd 1135 (1988), *second further recon.* 4 FCC Rcd 5927 (1989), *vacated California v. FCC*, 905 F.2d 1217 (9<sup>th</sup> Cir. 1990), *cert. denied*, 514 U.S. 1050 (1995). ("Computer III Orders").

<sup>45</sup> See *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, at para. 22 (Feb. 19, 2004) (*Pulver.com Order*). See also *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, n.7 (1989) (*MTS/WATS Market Structure Separations Order*) (the Commission found that "mixed use" special access lines carrying more than a de minimis amount of interstate traffic to private line systems are subject to the Commission's jurisdiction because traffic on many such lines could not be measured without "significant additional administrative efforts").

Moreover, it would be impractical to determine whether there was any intrastate component to FWD given the fact that FWD's information service as provided to its members occurs solely within the confines of the Internet.<sup>46</sup>

It is also imperative that the Commission affirm its existing precedents that the underlying broadband telecommunications services over which IP enabled services are offered fall exclusively under the Commission's federal jurisdiction. As the Commission has previously declared, such transmission services are jurisdictionally interstate in nature under the Commission's end-to-end analysis. Under this analysis, the Commission considers the "continuous path of communications," beginning with the inception of a call to its completion, and has rejected attempts to divide communications at any intermediate points between providers. Applying this analysis to GTE's ADSL service, the Commission concluded it was jurisdictionally interstate in nature.<sup>47</sup> Specifically, the Commission declined to separate GTE's ADSL service into two components – an intrastate telecommunications service (provided in this instance by GTE) and an interstate information service (provided by an ISP). Rather, the Commission found that GTE's ADSL service was jurisdictionally interstate in nature, deeming it appropriate to "analyze ISP traffic as a continuous transmission from the end user to a distant Internet site."<sup>48</sup>

...we conclude that more than a de minimis amount of Internet traffic is destined for websites in other states or other countries, even though it may not be possible to ascertain the destination of any particular transmission. For these reasons, we conclude that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed-use facilities rule.<sup>49</sup>

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<sup>46</sup> See *Pulver.com Order* at para. 20.

<sup>47</sup> See *GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22468, para. 5 (1998) (*GTE ADSL Order*).

<sup>48</sup> See *id.* at para. 20.

<sup>49</sup> See *id.* at para. 26.

In summary, Covad believes that the Commission should make clear that IP enabled services as well as the underlying telecommunications services over which these services are offered are inherently interstate in nature, and subject to exclusive federal jurisdiction. This both conforms with decades of Commission legal precedent, and best promotes the development of a single, national regulatory framework promoting investment in the rolling out of new IP based services and applications like VoIP. That being said, Covad views the development of a marketplace for IP enabled services not as an opportunity to rob states of their traditional role, but rather as the opportunity to develop a new federal-state partnership governing this new marketplace. In particular, as consumers and business increasingly migrate to IP enabled services like VoIP, states will play a critical role in administering the 1996 Act's local competition provisions to ensure that end users retain the ability to choose from multiple, competing providers of broadband transmission services. It is critical, however, that the Commission take the lead in developing this regulatory framework at the federal level, to ensure the availability of a consistent national regulatory regime.

#### **IV. Specific Regulatory Requirements**

As discussed above, Covad believes that the appropriate regulatory regime for IP enabled services riding over broadband telecommunications services is to regard them as minimally regulated information services under Title I. The Commission's traditional common carrier regulation is more appropriately limited to the underlying broadband transmission services enabling such IP based services and applications, for example, Covad's broadband transmission services. The panoply of traditional common carrier concerns (economic regulation, competition regulation and social policy objectives) is

most appropriately addressed at the level of the underlying transmission facilities over which simple common carrier data transmission is being offered, rather than at the information services offered over such data transmission services.

Notwithstanding the general appropriateness of such a regulatory framework, it is clear that, in the future, combinations of IP based information services and underlying broadband transmission services will increasingly substitute for legacy telecommunications services. For example, as discussed above, even today combinations of VoIP services (Title I information services) and broadband transmission (Title II common carrier services) are increasingly being substituted for legacy circuit switched telephony service (Title II common carrier service). Accordingly, as the Commission's *NPRM* recognizes, a number of the Commission's traditional regulatory concerns are implicated in this transition from a legacy Title II service architecture to new service architectures combining services falling under both Title I and Title II.<sup>50</sup>

Covad believes it imperative for the industry to adjust to these changes while making sure that vital traditional social policy objectives continue to be met by the next generation of Title I and Title II service architectures. In many instances, Covad believes that such traditional social policy objectives can be met by the existing application of Title II regulation at the broadband transmission layer – for example, as discussed below, the equitable application of existing universal service contributions to all broadband telecommunications services. By contrast, in some cases these social policy objectives can only be met by the providers of IP based services and applications themselves (e.g., 911 capability for VoIP services). Covad believes that it is premature at this juncture, however,

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<sup>50</sup> See *NPRM* at paras. 45-78.

for the Commission to invoke any ancillary jurisdiction to enact specific regulatory requirements for IP based services and applications under Title I of the Act. Rather, Covad believes that the industry is working towards developing and deploying solutions that enable new IP based services and applications to continue meeting traditional social policy objectives. For example, as discussed below, existing VoIP applications already offer 911 emergency calling, and industry participants are working jointly on improving and standardizing those capabilities. Accordingly, while Covad acknowledges the Commission's limited ancillary jurisdiction to regulate information services under Title I of the Communications Act,<sup>51</sup> Covad urges the Commission to refrain from invoking this limited jurisdiction at such an early stage in the development of the marketplace for IP enabled services.

#### **A. Public Safety**

Covad believes that there is promising evidence that the Commission's traditional public safety objectives can be met without enacting new regulatory requirements covering Title I information services. For example, even today, VoIP providers like Vonage commonly provide 911 emergency dialing capability to their customers.<sup>52</sup> Moreover, Vonage is not alone in attempting to meet these critical public safety policy objectives. Last December, the National Emergency Number Association (NENA) and the Voice on the NET (VON) Coalition, of which Covad is a member, announced a voluntary agreement on approaches to provide VoIP subscribers with basic 911 service, and to work together to

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<sup>51</sup> See, e.g., *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (declaring Commission authority in this area "well settled").

<sup>52</sup> See "Vonage Lets You Dial 911," Product Feature web page, available at [http://www.vonage.com/features\\_911.php](http://www.vonage.com/features_911.php). See also "Intrado and Vonage DigitalVoice Partner to Provide Emergency Calling Solution," Press Release, Vonage, March 25, 2003 (available at [http://www.vonage.com/corporate/press\\_index.php?PR=2003\\_03\\_25\\_0](http://www.vonage.com/corporate/press_index.php?PR=2003_03_25_0)).

develop solutions for enhanced 911 functionality.<sup>53</sup> Because of these ongoing developments, Covad agrees with the Commission's suggestion that there is not yet a need for direct regulation by the Commission in the area of 911 emergency calling for VoIP services.<sup>54</sup> Rather, Covad believes that the Commission's encouragement and leadership in the formulation of industry solutions to emergency calling will effectively achieve the Commission's social policy objectives.

Likewise, in the area of law enforcement access to IP enabled services, industry standards setting bodies have been working on developing solutions enabling law enforcement access to packet-mode technologies and overlying information services. The Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS) recently announced their release of published standards for lawfully authorized electronic surveillance, in a revised version of the "J-standard" (J-STD-025-B).<sup>55</sup> According to their announcement, "The details of the solution for the cdma2000 packet data system are included in the standard, as are normative references for Voice over Packet (VoP) for Wireline Telecommunications Networks and Universal Mobile Telecommunications System/General Packet Radio Service (UMTS/GPRS)..."<sup>56</sup> Their work, now culminated in a published standard, demonstrates that the industry standards setting process is working in developing lawful intercept solutions for law enforcement access to packet-mode technologies and overlying information services. For the reasons Covad has already expressed in its recent comments objecting to the

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<sup>53</sup> See "Public Safety and Internet Leaders Connect on 911," Press Release, VON Coalition and NENA, Dec. 1, 2003, available at [http://www.von.org/usr\\_files/VOIP%20press%20release%20FINAL%20112803](http://www.von.org/usr_files/VOIP%20press%20release%20FINAL%20112803)).

<sup>54</sup> See *NPRM* at para. 56.

<sup>55</sup> See "TIA and ATIS Publish Lawfully Authorized Electronic Surveillance Standard (J-STD-025-B)," Press Release, Mar. 19, 2004, [http://www.tiaonline.org/media/press\\_releases/index.cfm?parelease=04-26](http://www.tiaonline.org/media/press_releases/index.cfm?parelease=04-26).

<sup>56</sup> *Id.*

Department of Justice's Petition for Rulemaking on CALEA requirements, Covad believes there is no need for the Commission to expand CALEA beyond the domain of underlying telecommunications services. As Covad's previous comments demonstrate, the combination of CALEA's assistance capability requirements applied to underlying broadband telecommunications services with the separate ability of law enforcement to intercept and access information services provides law enforcement with sufficient means of conducting lawful intercept activities.<sup>57</sup> Covad intends to comment more extensively on these issues in response to the Commission's expected Notice of Proposed Rulemaking addressing CALEA implementation for packet-mode services.<sup>58</sup>

#### **B. Carrier Compensation**

Consistent with the regulation of IP enabled services like VoIP services as minimally regulated Title I information services, Covad believes that the Commission should generally refrain from imposing legacy access charge regulations on VoIP services. The Commission's recent decisions on the VoIP services provided by AT&T and Pulver.com, respectively, sketch out two different poles in the spectrum of IP based voice telephony service models, applying access charge regulation to the former but not the latter.<sup>59</sup> Covad believes that, notwithstanding the Commission's determination with respect to AT&T's phone-to-phone VoIP service,<sup>60</sup> many services falling between these two poles constitute information services that are not subject and should not be subjected

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<sup>57</sup> See Comments of Covad Communications in RM-10865, filed April 12, 2004.

<sup>58</sup> See *NPRM* at n. 158.

<sup>59</sup> See *Pulver.com Order*, cf. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (April 21, 2004) (*AT&T VoIP Petition*).

<sup>60</sup> See *AT&T VoIP Petition*, *supra* n. 59.

to the Commission's legacy access charge regime. Covad believes, for example, that many popular VoIP service architectures in use today, comprised of SIP-based customer premises equipment transforming voice into packet data carried by underlying broadband transmission services, constitute information services not subject to the Commission's access charge regime. Accordingly, Covad urges the Commission to affirm this existing understanding, and make clear that the vast majority of popular VoIP service architectures, such as SIP-based VoIP services, are not telecommunications services, and are most certainly not interexchange telecommunications services subject to the Commission's legacy access charge regime.

Even to the extent the Commission remains uncertain about the classification of some IP based services and applications as information services, Covad believes the Commission should nonetheless refrain from attempting to impose legacy access charge regimes on services like VoIP. The Commission has on previous occasions acknowledged that the existing access charge regime remains subject to inefficiencies and implicit subsidies. For example, as the Commission stated in adopting the *CALLS Order*, it merely created "a transition to a more economically rational approach to access charges" – not the "perfect, ultimate solution."<sup>61</sup> As a result, for some time now the Commission has been examining new intercarrier compensation regimes to replace the existing system of above-cost access charges.<sup>62</sup> Accordingly, Covad believes that, to the extent the Commission does decide that some types of IP based services and applications are indeed telecommunications services rather than information services, the Commission should

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<sup>61</sup> See *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12973-74 (2000) (*CALLS Order*).

<sup>62</sup> *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*).



refrain from imposing legacy access charge rules on these services. Rather, the Commission should only incorporate these new services into the wider intercarrier compensation framework after completing comprehensive reform of that larger framework, to ensure that any access arrangements applied to new IP enabled services are economically rational and based on forward-looking costs.

### **C. Universal Service**

Covad believes that the existing regulatory framework for federal universal service largely already accommodates the transformative effects that IP enabled services will have on the telecommunications industry. Specifically, all providers of interstate telecommunications services must pay contributions to federal universal service, including providers of interstate broadband telecommunications services.<sup>63</sup> Thus, to the extent that consumers and businesses migrate from legacy circuit switched telephony services to combinations of broadband transmission services and IP based services and applications, the sufficiency of the federal universal service fund can be assured by making sure that the underlying providers of the broadband telecommunications services over which IP based services and applications are offered make equitable contributions to the federal universal service fund.

Unfortunately, the Commission has not yet concluded its ongoing efforts to reform the federal universal service mechanism to ensure that all providers contribute equitably. Today, Covad pays millions of dollars into the federal universal service fund for the broadband transmission services it sells to its wholesale ISP customers. By contrast, cable operators pay nothing into the federal universal service fund for the broadband cable

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<sup>63</sup> See 47 U.S.C. § 254(d); see also 47 C.F.R. § 54.706.

modem services they provide to end users. The Commission has had pending before it for two years a proceeding examining the regulatory classification of wireline broadband Internet access services.<sup>64</sup> In its notice opening that proceeding, the Commission stated:

...the Commission concluded in the *Report to Congress* that facilities-based ISPs that provide no stand-alone telecommunications services could be required to contribute to universal service under its permissive authority, but the Commission declined to exercise its permissive authority at that time... [W]e believe it is now the appropriate occasion to investigate, among other things, the questions that remain unanswered by the *Report to Congress*. Specifically, we ask whether broadband Internet access providers that supply last-mile connectivity over their own facilities should be required to contribute to universal service based upon their self-provisioning of telecommunications.<sup>65</sup>

Having posed this question, the Commission has not answered it – now, for more than two years. In the meantime, providers of cable modem broadband Internet access services continue providing service without paying universal service contributions based on their revenues from such service.<sup>66</sup> The Commission should end this regulatory disparity, and act now to ensure that all providers of broadband transmission services, including those providing Internet access services with an integrated facilities-based broadband transmission component, contribute equitably into the federal universal service fund.

The Commission asks whether it should invoke its permissive authority under 47 U.S.C. § 254(d) to require universal service contributions from providers of IP enabled

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<sup>64</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd 3019 (2002) (*Broadband NPRM*).

<sup>65</sup> See *id.* at para. 74 (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*)).

<sup>66</sup> In the *Cable Modem Declaratory Ruling*, in a determination now vacated by the 9<sup>th</sup> Circuit, the Commission classified cable modem services as information services, but declined to address the issue of whether federal USF contributions would be assessed based on revenues from cable modem services. Instead, the Commission indicated that this issue would be resolved in the still pending *Wireline Broadband NPRM* proceeding. See *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, 17 FCC Rcd 4798, at para. 110 (2002) (*Cable Modem Declaratory Ruling*), vacated in part in *Brand X Internet v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003).

services.<sup>67</sup> As discussed above, Covad believes there is no need for the Commission to take this step. This is because, if the Commission were to rationalize the existing universal service mechanism, all providers of broadband transmission services would be subject to universal service fund contributions based on their underlying broadband telecommunications service component. Until the Commission makes these long overdue reforms, however, the Commission certainly should not in the meantime impose federal universal service fund contribution obligations on providers of IP enabled services. The Commission must not impose an admittedly broken federal universal service funding mechanism on providers of IP based applications and services who have not heretofore been subjected to such contribution obligations. Rather, the Commission should take this opportunity to finally act on the open universal service issues it has now had before it for two years.

On a more long-term note, the Commission should not labor under the illusion that the current federal universal service funding mechanism can withstand the onslaught of new services and applications combining information service layers of IP enabled services with underlying layers of broadband telecommunications services. In the future, broadband transmission capabilities will become increasingly vital to the economic life of the nation, particularly rural areas. Covad urges the Commission not to relegate the new 21<sup>st</sup> century information infrastructure to 20<sup>th</sup> century universal service. Accordingly, Covad urges the Commission to seriously examine the application of universal service high cost support for broadband services. Absent the availability of such support for broadband telecommunications services, the Commission should not adopt rules imposing

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<sup>67</sup> See *NPRM* at para. 64.

universal service contribution requirements on the IP based services and applications riding over those broadband services.

#### **D. Consumer Protection and Economic Regulation**

Covad believes that the statutory framework it has laid out above sufficiently addresses the Commission's social policy objectives related to consumer protection and economic regulation of services offered to the public. Specifically, as Covad has articulated, IP enabled services rely on the provision of an underlying broadband telecommunications service to customers. The traditional common carrier consumer protections embodied in Title II of the Act<sup>68</sup> will be faithfully met so long as they remain applied to the broadband telecommunications services underlying IP enabled services. This balance between regulation and deregulation assures that the underlying provider of transmission services meets vital social policy objectives with respect to end users, while the providers of overlying IP enabled services remain free to innovate without bearing the burden of common carrier regulations.

Similarly, the Commission's policy objectives with respect to economic regulation and competition regulation of common carriage services can be met if the corresponding laws and regulations are applied and limited to the provision of underlying broadband telecommunications services. For example, the Commission's dominant/non-dominant carrier regime, currently the subject of an ongoing Commission proceeding,<sup>69</sup> would only

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<sup>68</sup> As the Commission's *NPRM* explains, such obligations include but are not limited to CPNI restrictions (section 222), authority for transmission of communications (section 214), slamming and cramming prohibitions (section 258), and Truth-in-Billing (sections 201 and 258). See *NPRM* at paras. 71-72.

<sup>69</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (*Incumbent LEC Broadband Notice*).

impose economic regulation on the telecommunications services of those underlying broadband transmission service providers who exercise market power. Similarly, the statutory provisions in section 251(c)(3) requiring the unbundling of incumbent LEC transmission facilities would create the right conditions for vigorous competition among multiple providers of facilities-based broadband telecommunications services.<sup>70</sup> In so doing, these regimes attempt to create a “level playing field” for competition among multiple providers of underlying broadband telecommunications services. In turn, competition in underlying transmission services creates the conditions for robust competition among upstream providers of IP enabled services, thereby obviating the need for economic regulation or competition regulation of IP enabled service providers.

Notably, even SBC’s Petition for Declaratory Ruling and its separate Petition for Forbearance acknowledge that a determination to forbear from applying Title II regulation to IP enabled services will not relieve incumbent LECs of their obligations to provide access to unbundled network elements used to provide broadband transmission for IP enabled services. SBC states:

...[N]o matter what services an ILEC might provide over given facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the standards of section 251(d)(2)... Thus, to the extent the Commission retains unbundling obligations for xDSL-capable loops, as an example, that obligation would survive a determination that IP platform services offered over that loop are unregulated.<sup>71</sup>

Thus, SBC’s petition for forbearance implicitly endorses the regulatory framework Covad proposes, namely applying Title II regulatory obligations (e.g., unbundling) to the underlying broadband transmission over which IP enabled services like VoIP are offered,

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<sup>70</sup> See 47 U.S.C. § 251(c)(3).

<sup>71</sup> See Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29, filed Feb. 5, 2004, at 9.

while creating a minimally regulated space for the IP enabled services themselves under Title I. Although this framework seems to obviate the need for forbearance at all with respect to IP enabled services, it appears that SBC has filed its petition as an alternative in the event the Commission finds that Title II regulation is applicable to IP enabled services.<sup>72</sup> It does appear, however, that if the Commission adopts the regulatory framework for Title II underlying broadband telecommunications services versus Title I IP enabled services that Covad proposes herein, the need for action on SBC's forbearance petition will become moot.

Thus, Covad believes that application of the Commission's traditional Title II common carrier regulations only to the underlying broadband telecommunications services over which IP enabled services are offered will remain faithful to the vital social policy objectives inherent in those regulations. At the same time, limiting the application of these regulations only to the underlying transmission services, and refraining from applying them to the overlying IP enabled services, will preserve the conditions for vibrant competition and innovation amongst providers of IP enabled services like VoIP.

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<sup>72</sup> See *SBC Forbearance Petition* at 2.

## **V. Conclusion**

Covad respectfully submits that the regulatory framework already set forth in the Commission's existing legal precedents already provides the appropriate framework for the regulatory classification of IP enabled services. Under this framework, the Commission should continue to treat underlying broadband transmission services as telecommunications services regulated under Title II of the Communications Act, creating a zone of minimal regulation under Title I for the overlying IP enabled services riding over Title II broadband telecommunications services. In particular, under this framework the Commission should continue to vigorously enforce the provisions of the 1996 Telecommunications Act requiring the unbundling of local transmission facilities to facilities-based competitive providers of broadband telecommunications services.

Furthermore, although Covad, as a new entrant into the VoIP marketplace, believes that it is imperative for service providers to meet crucial social policy objectives like 911 emergency calling, Covad also believes it is highly premature for the Commission to invoke its ancillary Title I jurisdiction to meet such policy objectives. Rather, Covad believes that the existing Title II framework applied to underlying broadband telecommunications services will largely ensure that the Commission's traditional social policy objectives are met. Furthermore, the Commission should allow industry collaboration like the recent NENA/VON initiative to develop industry solutions for providers of IP enabled services to meet vital social policy objectives, for example 911 calling for VoIP services. Covad believes that this policy approach will provide the best balance between promoting and preserving the traditional common carrier policies in the

Communications Act, while creating the zone of minimal regulation most conducive to competition and innovation in the provision of IP enabled services.

Respectfully submitted,

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