

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

IP-Enabled Services

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WC Docket No. 04-36

Comments of the ICORE Companies

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TABLE OF CONTENTS

I. INTRODUCTION.....2

II. CATEGORIZING IP-ENABLED SERVICES.....2

III. JURISDICTIONAL CONSIDERATIONS.....7

IV. CARRIER COMPENSATION AND UNIVERSAL SERVICE.....9

V. CONCLUSION.....13

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The consulting firm of ICORE, Inc. (ICORE), on behalf of a number of small, rural incumbent local exchange carriers (ILECs),¹ offers these comments in the above-captioned proceeding. ICORE provides a variety of consulting, regulatory and network-related services to many of the nation's smallest, most rural ILECs.

¹ ILECs participating in this filing include: Baraga Telephone Company, Baraga, MI; Bloomingdale Home Telephone Company, Bloomingdale, IN; Citizens Telephone Corporation, Warren, IN; Cooperative Telephone Company, Victor, IA; Doylestown Telephone Company, Doylestown, OH; Dunbarton Telephone Company, Dunbarton, NH; Harmony Telephone Company, Harmony, MN; Hot Springs Telephone Company, Kalispell, MT; Ironton Telephone Company, Coplay, PA; Le-Ru Telephone Company, Stella, MO; Lexcom Communications, Lexington, NC; McClure Telephone Company, McClure, OH; Nortex Communications, Muenster, TX; Nova Telephone Company, Nova, OH; Pennsylvania Telephone Company, Jersey Shore, PA; Richmond Telephone Company, Richmond, MA; Ronan Telephone Company, Ronan, MT; Summit Telephone Company, Fairbanks, AK; Swayzee Telephone Company, Inc., Swayzee, IN; Sycamore Telephone Company, Sycamore, OH; Van Horne Coop. Telephone Company, Van Horne, IA; West Liberty Telephone Company, West Liberty, IA; Yukon-Waltz Telephone Company, Yukon, PA.

I. INTRODUCTION

The Commission's Notice of Proposed Rulemaking on IP-Enabled Services² is of crucial importance to small, rural ILECs. It will determine whether these carriers will be properly compensated for use of their facilities to originate, terminate or otherwise transport Voice over Internet Protocol (VoIP) toll traffic under the Commission's lawful access charge and Universal Service rules.

The following comments will demonstrate that VoIP toll services are both the exact functional equivalent of, and directly substitutable for, traditional circuit switched toll. Such offerings are therefore telecommunications, rather than information, services, and are subject to the jurisdiction of this Commission, as well as its long standing rules and regulations.

These interstate telecommunications services, which almost universally use ILEC facilities for origination and termination, are subject to the Commission's access charge and Universal Service compensation rules, in just the same manner as are competing circuit switched toll services.

II. CATEGORIZING IP-ENABLED SERVICES

The Commission asks for comments "regarding how, if at all, we should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate."³

It appears that a two part test to determine the categorization of IP-enabled services, including VoIP services, will be required.

² WC Docket No. 04-36, FCC 04-28, 69 FR16193, March 29, 2004. (Notice).

³ Id, at 35.

First, it must be determined whether the offering in question is a telecommunications service, or an information service. This will allow the Commission to exercise its proper regulatory authority. If the service is deemed telecommunications, the Commission will be able to treat the service in a manner consistent with similar telecommunications services.

Either, or both, of two categorization methodologies suggested by the Commission – functional equivalency and substitutability⁴ – would provide an almost foolproof framework for categorizing of IP-enabled services.

If applied so as to look at specific services in terms of what they provide, what they do, what they replace or compete against, what services or facilities of others they use, and what their benefits are, the tests of functional equivalency and substitutability will be invaluable in categorizing IP-enabled services.

In other words, if these tests consider specifically what these service are and do – not just the fact that the Internet plays some role in their application – then these services can be categorized in a rational manner. The service itself, rather than the underlying technology, should determine the appropriate categorization. This is certainly the case with VoIP services.

Despite its portrayal as some new, unique, life altering technology, VoIP toll service as presently offered by most VoIP providers is just that – toll service. While the Internet has spawned, in other areas, wondrous and breathtaking new services that would not be possible without it, VoIP toll is not one of them.

VoIP toll is not some ground breaking, never-before-attempted venture made possible only by the advent of the Internet. It is, rather, traditional long distance

⁴ Notice, at 37.

telecommunications service using the Internet, at least in part, instead of the circuit switched network.

The Telecommunications Act confirms this. Congress has defined “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” (47 U.S.C. §153 (51)). In turn, the term “telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

Here, there is no change in the form or content of the information as sent and received. The person speaking on one end of the call uses his or her voice to transmit the information. The called party on the other end of the call hears that same voice with the same information. A VoIP call is simply a voice call carried through a transmission medium that involves the Internet. It does not entail anything more complicated than that.

VoIP toll is simply the latest advancement in Long Distance service, which over the years has seen the introduction of many revolutionary technologies (including microwave transmission, satellite transmission, and fiber optics) but has always been treated as Long Distance service. VoIP toll is an alternate, parallel form of toll transmission, one which may ultimately replace the existing circuit switched network. But VoIP toll – like electronic, digital and soft switches, or microwave, satellite and fiber optic transmission facilities – is just the latest of many methods of delivering long distance telephone calls.

VoIP toll is thus the functional equivalent of traditional circuit switched toll. This Commission, in its 1998 Report to Congress, stated that “the classification of service under the 1996 Act depends on the functional nature of the end-user offering.”⁵ Here, the end user offering is exactly identical to circuit switched toll, even though the underlying transmission technology is different, at least in part.

When services offered by LECs and IXCs, which are classified as telecommunications services, can be replaced with services using VoIP technology, then the substitute services must also be classified as telecommunications under the Commission’s functionality test.

VoIP toll providers offer direct substitute services – replacement services – for circuit switched toll, but continue to argue that their offerings are somehow not telecommunications services. The Commission must repudiate these arguments, and find that services which provide direct substitutes for each other cannot be subject to different regulatory treatment.

As an identical end user offering, and a directly substitutable service, VoIP toll is the functional equivalent of circuit switched toll. By both tests – functional equivalency and substitutability – VoIP toll is a telecommunications service.

Both the functional equivalency and substitutability criteria separate the underlying technology, i.e., the Internet, from the specific service which uses it. The goodness of these two tests lies in that very ability to separate the specific service from its underlying technology.

⁵ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11543 (1998 Report).

The Internet has spawned a whole host of services, from the mystical to the mundane, and from the omnipotent to the ordinary. In the regulatory world, the Commission must not give preferential treatment to everything Internet, just because in other applications the Internet is responsible for wondrous things. Where it is being used simply to provide traditional services using a new technology, these services must be regulated consistently with their competition.

Service categorization based on functional equivalency and substitutability is an extremely viable method of separating the service from the technology, and of determining whether that service is telecommunications or information.

In the case of VoIP toll, this first test – based on functional equivalency, or substitutability, or both – clearly proves VoIP toll to be a telecommunications service. This gives the FCC authority to treat it as such.

Now, the second test must be applied, to determine whether and how this telecommunications service uses the services and facilities of other carriers. This test is at least as important as the first, as it will determine the form or forms of compensation that will be paid by – in this case – the VoIP toll providers to other carriers whose services and facilities they use.

The Commission touches on this concept when it offers “Interconnection with the PSTN and Use of the North American Numbering Plan” as one of its suggestions for categorization.⁶

Similar to functional equivalency and substitutability, this is a very effective method of service categorization. It not only validates the fact that a service like VoIP toll is a telecommunications service – after all, it uses the PSTN in the same manner as

⁶ Notice, at 37.

circuit switched toll – but it also recognizes the real world condition that VoIP toll imposes costs on other carriers.

Here again, the Commission must resist the temptation to afford preferential treatment to VoIP, simply because it is derived in part from the Internet. Instead, the Commission must look at the specific service – clearly a toll telecommunications offering – which uses the facilities of other carriers variously for origination, termination and transport.

The fact that VoIP uses in part a new transmission technology – the Internet – must not exempt it from paying other carriers for use of the PSTN. As explained more fully below, VoIP must pay access charges and universal service fees in exactly the same manner as any other toll provider.

III. JURISDICTIONAL CONSIDERATIONS

The Commission does not have to assert jurisdiction over the entire Internet, or all IP-enabled services. Instead, it must consider each specific service in terms of functional equivalency and direct substitutability, as well as the use of other carriers' facilities, as outlined above.

These criteria clearly demonstrate that current VoIP-PSTN offerings are telecommunications services. Further, they are primarily interstate toll services over which the Commission has longstanding jurisdiction.

To the extent that VoIP providers also hold themselves out as a total replacement for traditional ILEC or CLEC services, states must also be given jurisdiction. That is, if the VoIP provider claims to be a replacement for local exchange services, it should be

held to the same functional equivalency, substitutability, and use of facilities tests as VoIP toll services.

If, in fact, it is determined that the VoIP carrier is offering – or attempting to offer – local exchange services in direct competition with existing ILECs or CLECs, it must be held to the same state regulatory standards. Otherwise, customers lured by a new technology and cheaper rates will end up with inferior service.

VoIP providers, before they are allowed to offer their local exchange services as a complete replacement for traditional ILEC or CLEC services, must have the ability to offer everything required of these traditional providers, including E-911. VoIP carriers must be held to the same service standards, tariff requirements, emergency procedures, and other social obligations as the incumbent providers.

There is absolutely no justification for regulators to allow – or encourage - a supposedly superior technology to offer inferior services.

ILECs have invested billions of dollars to build the massive infrastructure of the public switched telephone network (PSTN). They have met, over many years, all of the Commission's basic universal service requirements. They have been required by law or regulation to incur, in recent years, the very real and substantial costs of everything from E-911 service, to CALEA to LNP.

If these functions are so important to society, why – simply because their services use a different transmission mode – would VoIP providers be exempt from these critical obligations?

In fact, one of the main functions of regulation in the 21st century should be to protect consumers from those carriers that would offer inferior services under the guise of grand new technologies. The FCC and the state commissions must have jurisdiction over VoIP services to ensure that they are fairly represented, compete honestly, perform as advertised vis-à-vis existing services, and meet all of the responsibilities imposed on other carriers with which they compete.

IV. CARRIER COMPENSATION AND UNIVERSAL SERVICE

As explained above, VoIP-PSTN toll is a telecommunications service. It is both the exact functional equivalent of, and a direct substitute for, traditional circuit switched toll. Further, it uses the PSTN to originate and terminate, and in some cases to transport, its long distance traffic.

Because it is a toll telecommunications service that uses the facilities of other carriers, VoIP toll must pay access charges.

Some would argue that – because it uses the Internet for a portion of its transmission – VoIP toll should be exempt from access charges. Others argue that Reciprocal Compensation arrangements should apply. But there are absolutely no grounds for these arguments.

A favorite argument for exempting VoIP toll from access charges is that access charges are a temporary mechanism, to be replaced by Reciprocal Compensation arrangements for the long term.

Stripped down to its plain meaning, this argument says, “Access charges may be replaced someday. So why bother with them now?”

This premise ignores the fact that it may be years before access charges are melded into some unified intercarrier compensation regime, if ever. It ignores the fact that billions of dollars in access charges are billed each year from access providers to circuit switched toll providers, and that billions of tax dollars in turn flow to federal coffers.

It totally ignores the fact that right now, today, access rules and regulations form the only lawful mechanism by which toll providers must compensate access providers for the use of their facilities.

And, most importantly, it ignores Section 251(g) of the Telecommunications Act of 1996, plus Parts 51.701(b)(1) and 69.5(b) of the Commission's own Rules. These Congressional mandates and FCC Rules require VoIP toll to adhere to the same access provisions as any other toll service.

But VoIP providers want to avoid their legal obligation to pay access charges when their toll services use the originating, terminating and transport facilities of ILECs and others. What easier way to sweep the Commission's long-standing access rules and regulations under the rug, than suggesting that because they may one day be replaced, they are not relevant now.

There are, in the industry today, two separate and distinct forms of compensation mechanisms relative to the interexchange of traffic between carriers. Access charges apply when toll providers use the originating, terminating and transport facilities of access providers. Reciprocal compensation arrangements apply to other types of traffic exchanged, e.g., between ILECs and CLECs, or ILECs and wireless providers. Both forms of compensation have been prescribed by this Commission.

But the VoIP industry would have its toll traffic totally misclassified and made exempt from access charges, simply because those access charges may be replaced by reciprocal compensation arrangements in the future. ICORE fails to see any relevance in this argument.

VoIP toll traffic must be properly classified and treated under existing rules and regulations, not by what might be. It is toll, and access charges lawfully apply, despite what may or may not happen to access in the future. When, or if, access charges become part of a unified intercarrier compensation regime, where the present reciprocal compensation arrangements and access charges are merged, VoIP toll – just like circuit switched toll – can be easily moved to the new system.

The trivialization of lawful access charge rules and regulations, which have governed compensation between access providers and toll providers for over 20 years – and may continue for several more – should have no bearing on the Commission’s decision in this proceeding.

The Commission’s long standing access charge rules clearly apply to this traffic, and there is no reason for the Commission to forbear from such application.

In fact, to apply access charges to circuit switched toll, but to exempt from access, or to apply intercarrier compensation rates to its exact functional equivalent – VoIP toll – is illegal and discriminatory. To classify toll service providers differently, based solely on the technology used in part to transmit those toll messages, would be not only discriminatory, but arbitrary and capricious as well.

The use of VoIP technology does not reduce the costs incurred by the ICORE companies and other small ILECs in providing access services for this traffic. The costs

of small ILECs to originate and terminate toll calls over the ILEC network are exactly the same, whether other providers involved in carrying other portions of these calls use the circuit switched network or the Internet network.

Access charges must not be a function of, or dependent on, the nature of the technology used by the toll carrier to transmit the toll traffic on its way to or from the ILEC. Rather, access charges must fairly and equitably compensate ILECs for the use of their facilities to originate and terminate a call over the ILEC network, independent of the type of network used by the toll carrier in handling other portions of the call.

The disparate regulatory treatment of VoIP toll and circuit switched toll discriminates not only against carriers providing exactly the same access services to both, but against carriers providing circuit switched toll as well. Access carriers would be deprived of applying their lawful access rates for the origination and termination of VoIP toll, the same toll service to which they apply full access rates when offered by a circuit switched provider.

Similarly, those circuit switched toll providers would pay to use the originating and terminating facilities of access providers. VoIP toll providers, which use these identical facilities in exactly the same way, would do so for free, or at a substantial reciprocal compensation discount. This would amount to prejudicial regulatory treatment.

The VoIP traffic discussed in these comments cannot be carried without the PSTN. ILECs have invested heavily – for the good of all telecommunications consumers – in the PSTN. To exempt one set of consumers – those of VoIP providers – from paying

lawful access charges, shifts those costs to all other consumers in a discriminatory manner.

Access charges are lawful. They must be applied in a fair and equitable manner, so that all carriers and consumers are treated equally.

For the very same reasons as enumerated herein, VoIP providers must pay Universal Service fees in exactly the same way as traditional telecommunications providers. The Commission's Universal Service rules must be applied as fairly and equitably as its access charge rules.

IV. CONCLUSION

The Commission must separate the concept of the Internet from the specific, real world services which simply use some portion of Internet technology.

VoIP-PSTN services must be treated for regulatory purposes according to what they actually are, and what they actually do. They must not be placed above traditional telecommunications services in the regulatory hierarchy, based solely on their partial use of the Internet.

VoIP services are the functional equivalent of, and directly substitutable for, traditional services. They use the facilities of other carriers in exactly the same manner.

As such, they are telecommunications services which are subject to access charges and Universal Service payments.

Respectfully submitted,
ICORE, Inc.

A handwritten signature in black ink, appearing to read "J. Reimers". The signature is fluid and cursive, with a large initial "J" and "R".

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