

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

WC Docket No. 04-36

In the Matter of IP-Enabled Services

**REPLY COMMENT BY THE INTERGOVERNMENTAL ADVISORY
COMMITTEE TO INITIAL COMMENTS SUBMITTED BY THE MICROSOFT
CORPORATION AND OTHERS**

**Respectfully submitted on behalf of
FCC INTERGOVERNMENTAL
ADVISORY COMMITTEE**

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Summary

The Intergovernmental Advisory Committee (“IAC”), on behalf of tribal, state, and local authorities, submits its Reply Comment to the previously filed Comments of Microsoft Corporation and others in an attempt to offer a balanced and effective approach to deployment of IP-enabled services; a rapidly emerging critical infrastructure.

The current telecommunications and information technology infrastructures are not yet fully integrated. With the deployment and migration to IP-enabled services those applications will soon be integrated and converged into a seamless network of voice and data services.

However, because the emergence of the Internet and convergence of IP-enabled services were not contemporaneous with formation of the Telecommunications Act of 1996 the impact of IP-enabled services on regulatory frameworks must now be addressed.

In its Reply Comment, the IAC advocates that the Federal Communications Commission adopt a broad, flexible and forward looking approach applicable across all present and future enabling technologies and services. In order to effectuate such a regulatory framework, the IAC offers guiding principles to protect and to promote tribal, state, and local government authorities and to protect consumers while fostering growth and innovation in IP-enabled services.

The IAC’s Reply Comment offers the following guiding principles: universal service and deployment, public safety and homeland security, disability access and consumer protection, public interest capacity set aside, rights of way management, fair and reasonable compensation, and alternative dispute resolution.

Introduction

After multiple failures and frustrations, in 1894 Italian inventor Guglielmo Marconi finally developed a technology that could be used to send communications through air at distances of a hundred yards. Marconi was already a century ahead of the rest of the world as his nascent invention is now credited with being a gateway for the development of many technologies that now occupy our everyday lives, everything from the television to the cellular phone.¹

Learning of Marconi's breakthrough, Alexander Graham Bell, who invented the telephone some 26 years earlier, exclaimed: "It's an impossibility."² Seeing no use for the technology, the Italian government scoffed at Marconi's offer of the right of refusal for the technology.³

It is exactly those types of responses that lead to inventions of that kind being considered to represent what historians and writers refer to as "disruptive technologies", categorized that way for their ability to change the face of industries, methodologies and the larger societies in which we live.⁴ Undoubtedly Bell was concerned about the disruption Marconi's invention would cause to his own place in telecommunications history as well as the likely disruption to continuing investments necessary to the industry he helped create.⁵

As technologies and the resulting services continue to evolve and emerge, new disruptions arise. Now with the constant buzz about and daily coverage of IP-enabled technologies and services no government would turn down a first right of refusal. It is clear therefore, that IP-enabled technologies and services have already become disruptive forces both across industry and government regulatory schemes alike. Having received no offers of first refusal to the IP-enabled services, the Intergovernmental Advisory Committee ("IAC")⁶, on behalf of tribal, state, and local governments submits this Reply

¹ Joab Jackson, Disruptive technologies, available at <http://washingtontechnology/news/17-20/cover-stories/19859-1.html>.

² The First Electronic Church of America – Guglielmo Marconi, available at <http://securehosts/fecha/marconi.htm>

³ *Id.*

⁴ Generally speaking, "disruptive technology" comes in different "forms or shapes", but they share one common characteristic: they are inconsistent with existing business models either gradually eroding existing markets or causing rapid impact and disruptions to even well-managed and established structures. The challenge is how to formulate a flexible business model to channel the disruptive impact into positive energy. *See generally, Clayton M. Christensen, The Innovator's Dilemma* (1st HarperBusiness Essential. ed. 2003)

⁵ *Id.*

⁶ Intergovernmental Advisory Committee, ("IAC"), established by the Federal Communication Commission (the "FCC" or "Commission"), is designated to advise the Commission on a range of telecommunications issues affecting tribal, state, and local interests. Its predecessor, Local and State Government Advisory Committee (LSGAC), has been a significant source of information and guidance to the Commission. *See In the Matter of Modification of Subpart G, Section 0.701 of the Commission's Rules*, Order, FCC 03-180 (Adopted July 17, 2003, released August 11, 2003).

Comment in an attempt to offer a balanced and effective approach to deployment and regulation of IP-enabled services.⁷

Background

The current telecommunications and information technology infrastructures are not yet fully integrated. Telephones, televisions, radios, computers, fax machines and the internet are used by hundreds of millions of people everyday to receive, store, process, perform and transmit data, text, voice, sound and images individually and collectively, in homes and businesses worldwide. With the deployment and migration to IP-enabled services, however, those once separated gears, gadgets, services and applications will soon be integrated and converged into “a truly global network providing instantaneous connectivity to individuals and services ...”.⁸

Because the emergence of the Internet and convergence of IP-enabled services were not contemporaneous with formation of the Telecommunications Act of 1996 (the “1996 Act”), the 1996 Act neither “fully reflects nor anticipates” the impact of IP-enabled services on the regulatory scheme that it created.⁹ Indeed, technology and the services that flow from technology are almost always ahead of regulation and regulators. And, the current statutory framework of the 1996 Act, along with a patchwork of interpretative rulings from the Federal Communications Commission (“Commission”), and judicial holdings, are dependent on making technological distinctions.¹⁰ Too often though they are not in harmony. For that reason, the IAC advocates that the Commission adopt a broad, flexible and forward looking approach that is applicable across all present and future enabling technologies and services. Policy should not be driven by technology.

Therefore, in a reply to comments filed by various providers of IP-enabled, cable, satellite, communications and broadband services, by various state and local government entities, and by various non-profit and consumer organizations, and specifically to the Microsoft Corporation’s over-arching premise that, “the Commission should be guided by ... principles, which will protect and promote innovation”¹¹, the IAC offers the

⁷ In order to effectively address the impact of IP-enabled technologies and services, the Commission must look at the IP-enabled services rather than attempting to distinguish various IP-enabled technologies via definitional categories. Because IP-enabled services utilize cross-platform technologies, many of which have different regulatory implications, this Reply takes a broad policy approach to addressing the impact of IP-enabled services.

⁸ *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 at ¶ 1 (Adopted February 12, 2004, Released March 10, 2004) (the “*IP NPRM*” hereinafter)

⁹ Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, at 1, OPP Working Paper Series No. 30 (August 1998)(The Working Paper Series, generated by FCC Office of Plans and Policy, present staff analysis and research in various states, but not necessarily the view of other Commission members or Commission itself).

¹⁰ As the Commission acknowledged itself that: “all of the specific mandates of the 1996 Act depends on application of the statutory categories established in the definition sections.” *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 (released April 10, 1998) at ¶ 21 (the “Universal Service Report”).

¹¹ Comments of Microsoft Corporation, WC Docket No. 04-36 at i (2004)

following guiding principles, in an effort to protect and to promote tribal, state, and local government authorities and in an effort to protect consumers while still fostering growth and innovation in IP-enabled services.

While tribal, state, and local governments comprise a broad spectrum of different authorities, by offering guidance on specific areas such as *universal service and deployment, public safety and homeland security, disability access and consumer protection, public interest capacity set aside, rights of way management, fair and reasonable compensation, and alternative dispute resolution*, the IAC intends to highlight the significance of the preservation of tribal, state, and local authorities and the respective contribution the same will have to the seamless and successful deployment of IP-enabled services.

Commitment to Services of Social Responsibility

Many comments support the concept of guiding principles, including Microsoft Corporation's focus on guiding principles designed to protect and promote innovation. While IAC applauds the guiding principle concept, the principles guiding the Commission should address the concerns of all interested parties, and not merely the concerns of specific industry participants. The *IP NPRM* devoted a substantial amount of space to address services of social responsibility, i.e. universal service and deployment, public safety, homeland security, disability access, and consumer protection.¹² The IAC seeks to address these issues as well as the set aside of capacity set aside for the public benefit.

Universal Service

The Commission sought comments on "how regulatory classification of IP-enabled services, delivered over traditional network infrastructure would affect its ability to fund universal service", and its support mechanism.¹³ Mandated by the 1996 Act, and implemented by the FCC, universal service was designated to benefit all Americans, particularly in low income, high-cost areas, places with little return on capital investment. It was also meant to serve schools and libraries, and rural health care centers.¹⁴

With the coining of new definitions such as information service, Congress directed the FCC to study and explain the impact such services, mixed or hybrid, may have on universal service.¹⁵ In a 1998 Report to Congress, the FCC emphasized its approach of fostering competition among the IP-enabled service providers by exempting information services from universal service contribution requirements.¹⁶ Looking back, the Commission's approach may enjoy some merit, but IP-enabled services have already disrupted the benefits of universal service programs, including sources of funding and

¹² *IP NPRM*, at ¶¶ 63, 65-66.

¹³ *Id.* at ¶ 63.

¹⁴ Universal Service Report at ¶¶ 5-10.

¹⁵ Universal Service Report at ¶¶ 1-12

¹⁶ *Id.* at ¶¶ 34-50

support mechanisms. More desperately, the states have also seen aspects of their authority diminished by the definitional framework that the legislation created.¹⁷ As the Nebraska Public Service Commission cautioned, if the Commission exempts IP-enabled services from state universal service contribution requirements, it may “hinder the ability of the regulated telecommunications carriers to provide service at an affordable and reasonably comparable rate.”¹⁸

Therefore, the IAC urges the Commission to exercise restraint on taking any course of action that might jeopardize the viability of universal service. Having said that, the IAC recognizes that the current support mechanism for universal service, given the underlying regulatory framework, will likely need to be reformed to address the migration from existing to IP-enabled infrastructures.¹⁹ In support, the IAC recognizes the statement by the Commission’s Commissioner Michael J. Copps: “We’ve got to step up and do big picture” on issues including VOIP and, “the reform of universal service.”²⁰ Any reform, however, must not defeat the purpose of universal service.

As a corollary, the IAC would like to address universal deployment as it relates to IP-enabled services, specifically investment and re-investment in underserved markets, and access by underprivileged consumers.²¹ In that regard, it must be noted that without adequate and sustained build-out, universal service, and some Commission initiatives such as Lifeline and Linkup will likely fall short. The IAC agrees with the comments submitted by the National Consumers League cautioning that only those who can afford a broadband connection will be able to take advantage of IP-enabled services, leaving the costs of standard telecommunications services on those least able to afford them.²² For the private industry, investment and reinvestment in less profitable and underprivileged markets do not generate sufficient revenue to justify capital borrowed on the open market. Ironically, when local authorities have attempted to offer municipal telecom services in such markets, they are often met with legal and political challenges by industry.²³ In the end, even if industry prevails in such challenges, it is not the local

¹⁷ Besides blanketed preemptive prohibition in section 253(a), states’ jurisdiction on universal service, consumer protection, and public safety are subject to costly FCC preemption and industry litigation. “Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253 (b). The Act further states that: “if, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C. § 253 (d).

¹⁸ Comments of the Nebraska Public Service Commission, WC Docket No. 04-36 at 7-8 (2004)

¹⁹ Initial Comments of the Illinois Commerce Commission, WC Docket No. 04-36 at 14-16 (2004)

²⁰ TR Daily, May 3, 2004, “Wireless Industry Lobbyists Wary of States, Unlicensed Devices”

²¹ See generally, In the Matter of Lifeline and Link-Up, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 03-109, FCC 04-87 (Adopted April 2, 2004, Released April 29, 2004), the Commission had a significant discussion about underprivileged consumers and underserved markets.

²² See, e.g. Comments of National Consumer League, WC Docket No. 04-36 at 7 (2004)

²³ Nixon v. Missouri Municipal League, Slip Opinion, No. 02-1238, argued January 12, 2004, decided March 24, 2004.

authorities that suffer the defeat, it is the underserved and the Commission's own important policy agenda of ubiquitous broadband deployment.

Public Safety and Homeland Security

For public safety and Homeland Security issues particularly E911, the *IP NPRM* invited comments whether “voluntary consensus” instead of regulation may “spur deployment of IP-enabled E911 services”.²⁴ As an IAC member recently stated before a Senate hearing, “the ability to call for help in times of an emergency is not ‘voluntary’ – it’s mandatory.”²⁵ Microsoft’s Comments suggested that IP-enabled services should only be regulated where the same has substantially replaced traditionally regulated services and when, “innovators have failed to resolve important social or economic problems”.²⁶ In the IAC’s view, there are several aspects of 9-1-1 service that may require regulatory leadership: (1) funding (access points) integrity of the 9-1-1 system; (2) technology planning and deployment (not a patchwork, but a systemic plan); and (3) consumer expectations (public at-large, various communities, deaf, hard-of-hearing, elderly, etc). Comments filed by the King County E911 Program detailed an alarming account of that county’s E911 service. That county’s funding for E911 was jeopardized because states have been prohibited from “assessing 911 taxes”.²⁷ While voluntary consensus as an ideal may sound laudatory, but without clear direction or path, it likely will not work because many IP-enabled service providers may simply choose to ignore E911 programs.²⁸

Without any legislative or regulatory oversight, VoIP and other IP-enabled services will not have the incentive to develop functions and features that accommodate emergency services, such as call back or location information.²⁹ Contrast that lack of industry incentive to develop and implement E911 in IP-enabled services with an inherent consumer expectation, as vividly described by Commissioner of Georgia Public Service Commission, Stan Wise: “imagine a consumer in upstate New York who replaced his traditional phone line with this service had the rotten luck of experiencing a heart attack or stroke after ‘normal business hours’. He dials 911 and, because it only goes to the business line, no one picks it up. Brutal as it sounds, he is simply out of

²⁴ *IP NPRM*, ¶¶ 55-56

²⁵ Hearings on The VOIP Regulatory Freedom Act, S 2281 Before the full Committee on Commerce, Science and Transportation, 108th Cong., 2nd Sess. (2004) (testimony of Mr. David Jones, Director of Emergency Services, Spartanburg County Communications/9-1-1, the First Vice President of the National Emergency Number Association) Mr. Jones is also vice-chairman of the IAC.

²⁶ Comments of Microsoft Corporation at i.

²⁷ Comments of the King County E911 Program, WC Docket No. 04-36 at 3-5, 8-10.

²⁸ Indeed, some VoIP providers not only ignore E911, but actually require that their customers agree to hold the provider harmless if the customer is unable to obtain emergency service using their VoIP services. See Vonage Holdings Corporation’s Terms of Service on its website, www.vonage.com. This has led local governments to also issue warnings to potential VoIP consumers that the local government will similarly not be responsible if a resident is unable to obtain emergency service in a prompt fashion using VoIP. City of Weston, FL Letter to Vonage Holdings Corporation. dated February 24, 2004.

²⁹ Comments of the King County E911 Program, WC Docket No. 04-36 at 3-5, 8-10.

luck!!”³⁰ The result on a small scale is one family’s tragedy. Add in the real threat of terrorism and the result is a national catastrophe.

Many of the comments urge that it is “too early” to mandate 911 requirements on VoIP.³¹ At what point is it not too early? In 1910, all ocean liners were required to install wireless communication devices for the purpose of emergency and rescue. The result, it saved over seven hundred (700) lives during the 1912 Titanic tragedy.³² Undoubtedly, we don’t need an E911 Titanic as a wake-up call. It is of the utmost importance and should not be eroded by “voluntary consensus”, deregulation or market exploration. Ultimately, this public safety interest is broader than those interests of service providers.³³ Once again, the Commission should fully acknowledge the disruption the IP-enabled services have caused to the existing regulatory framework, recognizing that the same may not be flexible enough to handle such disruption. The IAC stresses that E911 service is a social service responsibility that is credited with saving countless lives, preserving homeland security, and aiding law enforcement.

With regard to Homeland Security, the IAC calls attention to the Department of Defense’s (“DoD”) Comments to the *IP NPRM* for a discussion of relevant Homeland Security issues. In particular, the IAC highlights the DoD’s recommendation that the FCC require foreign investors to give notice to the United States government prior to a foreign investment group effectuating a transaction that would give that group influence or control over an IP-enabled service.³⁴

Disability Access

The *IP NPRM* solicited comments on whether the Commission should subject IP-enabled services to the same disability access requirements as traditional telephone providers.³⁵ The Commission noted that several states already took action to implement disability access requirement with VoIP providers.³⁶ The IAC notes that comments already filed detail that the marketplace is insufficient to sustain adequate disability

³⁰ Hearings on The VOIP Regulatory Freedom Act, S 2281 Before the full Committee on Commerce, Science and Transportation, 108th Cong., 2nd Sess. (2004) (testimony of the Honorable Stan Wise, Commissioner of Georgia Public Service Commission, and President of the National Association of Regulatory Utility Commissioners) (the “Wise Testimony”) The testimony is also available at www.naruc.org.

³¹ Comments of AT&T Corporation, WC Docket No. 04-36 29 (2004)

³² Department of Commerce, Bureau of Navigation, Radio Service, *Important Events in Radiotelegraph* at 6, 9-14 (Government Printing Office, Washington, 1916) available through <http://earlyradiohistory.us/1916impt.htm>. It is noteworthy that federal government passed the Radio Act of 1912 to mandate a uniform rescue signal in part because had such a signaling system been installed in 1910, more lives could have been saved. *See Milestones in Telegraphic History based on a chronology developed by Robert Jones*, W5TU, Richardson, TX and published in DOTS and DASHES, Volume XV Nos. 1-4, 1987 at 7, available through http://members.tripod.com/morse_telegraph_club/images/newpage1.htm

³³ Comments of National Association of Telecommunications Officers and Advisors, et al., WC Docket No. 04-36 at 21 (the “Comments of Local Government Coalition”) (2004)

³⁴ Comments of the Department of Defense, WC Docket No. 04-36 at 13-15.

³⁵ *IP NPRM* at ¶¶ 31, 58-60.

³⁶ *Id.* at ¶ 34.

access requirements, and that the Commission must create a steady regulatory mechanism to remedy market failure in order to assure such access.³⁷ To exclusively rely upon the marketplace and industry consensus will ultimately pose a substantial risk of those most vulnerable such as people with disabilities.

The National Organization on Disability/ Harris Poll survey commissioned in November 2001 discovered that 58 percent of people with disabilities did not know whom to contact about emergency plans in their community. Some 61 percent had not made plans to quickly and safely evacuate their homes. And among those who were employed, 50 percent said that no plans had been made to safely evacuate their workplaces.³⁸

Regarding the ever-evolving technology necessary for emergency response, there are many types of emergency equipment for use by people with disabilities during a disaster. They include reverse 911 notification systems. Unfortunately though, there are no federal minimum safety or review standards for these systems, and therefore "buyer beware" remains a necessary caution.

The message from emergency professionals to the disability community is the same as to the population as a whole: be prepared. With adequate forethought, planning, and cooperation, all of a community's residents, with and without disabilities, will be given the maximum chance to prepare for and survive a disaster, and to return to normal life as quickly as possible.

Given these considerations, it is recommended that the Commission subject IP-enabled services to the same disability access requirements as traditional telephone providers.³⁹

Consumer Protection

Not long ago, California adopted a "telecommunications bill of rights" to safeguard a number of consumer rights in the "relatively unregulated world of wireless and other new telecommunications services."⁴⁰ Moreover, a recent customer survey, compiled by the University of Michigan and the American Customer Satisfaction Index, revealed that two industry groups, with most explosive growth outlook, cable broadband, and wireless service providers, scored the lowest.⁴¹ The new legislation and survey results signify a rapidly growing dilemma – whether the existing regulations, federal or

³⁷ Comment of Communication Service for the Deaf, Inc., WC Docket No. 04-36 at 11-13. *See also*, Comments of the American Foundation for the Blind, WC Docket No. 04-36.

³⁸ Relevant information available at <http://www.nod.org/emergency/index.cfm>

³⁹ See generally Comments from *The National Organization on Disability's Emergency Preparedness Initiative Guide on the Special Needs of People with Disabilities*, WC Docket No. 04-36.

⁴⁰ Jesse Drucker, *California Adopts Rules to Rein in the Wireless World*, Wall St. J., June 1, 2004, at D2. The "new telecommunications services" referenced are IP-enabled services, VoIP in particular. *Id.*

⁴¹ American Society for Quality, *American Customer Satisfaction Index Rises* available at www.axcessnews.com/business_060304b.shtml

state, still provide adequate protection for consumers in an unprotected world.⁴² Undoubtedly the current consumer protection has been disrupted by IP-enabled services. For example, Vonage Holdings defeated the state of Minnesota's efforts to use traditional telephone regulation to regulate VoIP⁴³, and the Commission exempted pulver.com's Free World Dialup service from common carrier's obligations.⁴⁴ The New York Public Services Commission took another approach, finding traditional economic regulation not applicable to IP-enabled services, but instead requiring that industry guarantee consumers certain basic protections, such as E911.⁴⁵

Though varying in degrees, all regulations share one common theme – reasonable consumer protection is essential for efficient operation;⁴⁶ whether deemed telecommunications, information services, or a hybrid technology, the service providers must be held to certain reasonable performance and customer service standards.

Public Interest Capacity Set Aside

For decades, through the Cable Act of 1984, the Cable Act of 1992, and a number of court decisions, the cable industry has been required to set aside channels for use by the public, educational institutions, and the government. A report by the House Energy and Commerce Committee, attached to the Bill that ultimately became the Cable Act of 1984, reasoned:

One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media other than the licensees or owners of those media ... A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public – the fundamental goal of the First Amendment ...⁴⁷

The actual origin and development of these public, educational, and governmental (“PEG”) access channels, however, can be traced to the 1960's when, in an effort to

⁴² *IP NPRM* at ¶¶ 71-74.

⁴³ *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F.Supp. 2d 993 (D. Minn. 2003)

⁴⁴ *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (Adopted February 12, 2004, Released: February 19, 2004). It should be noted that pulver's service is entirely within broadband network, unlike some other VoIPs, its calls never touch traditional phone network. *See also*, Mark Wigfield, *It Looks Like a Duck, Or Does it?* Wall St. J., May 24, 2004, at R 8.

⁴⁵ New York Public Service Commission, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, Case 03-C-1285 (Issued and Effective May 21, 2004). After the PSC ruling, Vonage sought judicial relief, and the federal district court sided with Vonage issuing a preliminary injunction against PSC pending FCC's decision of IP-enabled service through current IP NPRM. *See* Ben Charny, Vonage beats back New York ruling, CNET News.com.

⁴⁶ Comment of Utah Division of Public Utilities, W.C. Docket No. 04-36; FCC 04-28 at 6 (2004)

⁴⁷ James N. Horwood, *Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Freespeech*, 25 Seton Hall L. Rev. 1413, 1414 (1995), quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667

‘create a more direct right of access to the video media,’ local governments began requiring cable operators to provide channels for PEG access as a condition of franchise approval.”⁴⁸ Whatever its roots may be, it is clear that from their inception, PEG access channels have continued to evolve, providing communities with access to the dissemination of information and critical content, facilitating growth of local communications infrastructures.

The 1996 Act also contains a number of provisions to advance the public interest by requiring providers to set aside capacity for public purposes. For example, local governments can require cable and Open Video System operators to set aside capacity for public, educational, and government access. The Commission is considering requiring a similar set aside for DBS providers. In determining an appropriate regulatory framework for IP-enabled services, the Commission should treat functionally equivalent IP-enabled services the same as cable and other video services and establish a mechanism for similar reservation of capacity for the public interest.⁴⁹

Preservation Not Preemption

At the present, the inherently integrated IP-enabled network has already caused a disruption to the existing regulatory framework because it crosses over a variety of the definitional, technological parameters that emerged from the 1996 Act, but such an impact must not be used as a vehicle for whittling away at relevant tribal, state, and local authorities. In reality, it is those very authorities that have a vested interest in facilitating the rapid deployment of the new services. Tribal, state, and local authorities are major customers of emerging technologies and services.⁵⁰

While the *IP NPRM* does not directly address the issues of state, local and tribal authorities, it does invite comments on the broad issue of the “impact that IP-enabled services, many of which are accessed over the Internet” on the communications landscape.⁵¹ In response, the IAC incorporates by reference its Reply Comments to a recent *Notice of Inquiry* (“706 NOI”), wherein the Commission solicited comments of

⁴⁸ Id., quoting, Daniel L. Brenner & Monroe E. Price, *Cable Television and Other Nonbroadcast Video* 6.04[1], at 6-32 (1994)

⁴⁹ The IAC supports the interesting concept advocated by the Citizens Utility Board (Illinois) and would urge the further exploration of a functional equivalency test for appropriate regulation of IP-enabled services. See Comments of Illinois Citizens Utility Board, WC Docket No. 04-36 at 7-8 (2004)

⁵⁰ The City of Charlotte, North Carolina, population 614,300, devotes \$23.4 million a year to telecommunications and IT, and has a total budget of \$1.5 billion. Mecklenburg County, North Carolina, with a population of just over 700,000, spends \$18.2 million on telecommunications and related services; the County’s annual budget is \$1.1 billion. Collectively, the city and county employs IP services for a 311 Citizen Call-IN Line; they are in the first stage of employing IP technology across all city/county-wide services;

The City and County of San Francisco, population of 740, 000, devotes \$80 million a year to telecommunications and IT, and has a total budget of \$4.5 billion. The local authorities have deployed VOIP as a pilot project saving 100 desktop phones in the Parks and Recreation Department. The San Francisco Community College system has deployed about 1000 VOIP phones. See Comments of Local Government Coalition at 5-6

⁵¹ *IP NPRM* at ¶ 1

“reasonable expectations” regarding rights-of-way management that “may help remove barriers to investment” and that may help provide effective resolution of rights of way disputes.⁵² The IAC has also included the topics of fair and reasonable compensation and alternative dispute resolution to further address the *IP NPRM*’s invitation for comments regarding the impact of IP-enabled services.

Rights of Way Management

In its Reply Comments to the Commission’s *706 NOI*, the IAC set out its position on the importance of the preservation of state and local authority for rights of way management.⁵³ Where IP-enabled services are a cross-platform technology whose tentacles brush and sometimes entangle other technologies (even including that of “old” wire-line), the IAC again urges the Commission to affirmatively recognize and endorse rights of way management as a traditional police power afforded to state and local government, and outside the scope of the Commission’s own jurisdiction.

While state and local authority’s rights of way management has oft been cast as a barrier to entry and to capital investment, the IAC again implores the Commission to recognize that in fact tribal, state and local governments have actually been integral contributors to directing and channeling much of telecom build-out since the inception of telephone.⁵⁴ Tribal, state, and local governments have invested tremendous resources to ensure that their roads and streets are maintained in good condition and that there is adequate zoning and land use planning, both of which are instrumental to successful and robust broadband build-out. From an investment perspective, the tribal, state, and local authorities are also among the most enthusiastic and reliable users of the IP-enabled services.

Based on the foregoing examples together with the many that go unreported, the IAC underscores the mutual benefits that industry and governments derive from one another’s services and, in that regard, reiterates the need for emphasis to be placed on preservation and resolution not preemption and litigation.

Fair and Reasonable Compensation

The *IP NPRM* does not directly address the issue of compensation to state, local and tribal governments. However, not surprisingly, it was raised by a number of groups

⁵² *In the Matter of Inquiry concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, FCC 05-55 at ¶¶ 38, 39-40. (Adopted: March 11, 2004, Released: March 17, 2004) (the “*706 NOI*”)

⁵³ Reply Comments of the Federal Communications Commission Intergovernmental Advisory Committee, GN Docket 04-54 at 3-6 (2004)

⁵⁴ 47 U.S.C. § 253(a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Even though section 253(c) carved out a “safe heaven” for local government’s rights-of-way management, but it has been frequent target of litigation. See 47 U.S.C. § 253 (c)

most noticeably by the Comments of Local Government Coalition: “Commission action should not undermine local taxing authority, and should not exempt any person from paying fair prices for using public property.”⁵⁵

The tribal, state, and local compensatory authority includes, but is not limited to, rights of way management, licensing and/or permitting, franchise fees and taxing authorities. As previously indicated, the current compensatory authorities are built upon the 1996 Act’s separate and defined regulatory framework. By labeling IP-enabled service as an “information service”, the Commission has used the impact of IP-enabled services to effectively chip away the existing compensatory structure.

For instance, in the *Cable Modem Ruling*, the Commission stated that: “once a cable operator has obtained a franchise for such a system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide the cable modem service.”⁵⁶ Piggy-backing on the Commission’s position, the cable operators and the NCTA urged that the FCC should not allow local governments to require payment of additional franchise fees.⁵⁷ Such a policy has not only effectively prohibited the local authorities from participating in the deployment process, but it has also rendered the Commission’s flexible ancillary jurisdiction vulnerable. In that regard, if the Commission uses its ancillary jurisdiction for the purpose of classifying VoIP or IP-enabled services as an information service, the Commission will likely face judicial challenge and a “serious risk of reversal”.⁵⁸

The IAC would also point out that it is ironic that the only parties urging that the Commission determine that IP-enabled services should not be required to pay fair and reasonable compensation for use of the rights of way are the parties that do not actually pay such fees and taxes. All compensation for the use of the rights of way, whether in the form of franchise fees or local and state taxes, is ultimately paid by the consumers of the services. Cable operators and communications providers pass one hundred percent of such fees and taxes through to consumers. None of the organizations representing consumers urged the Commission to conclude that consumers of IP-enabled services should not pay fair and reasonable compensation for use of the rights of way. These organizations undoubtedly recognize that it is more appropriate for consumers of the services to pay such compensation than for taxpayers who are not using the services.

Furthermore, as illustrated throughout this Reply, tribal, state, and local governments always compensate industry, as paying customers, for the goods and

⁵⁵ Comments of the Local Government Coalition at iii, 25-26

⁵⁶ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, ¶ 102-103 (Adopted: March 14, 2002, Released: March 15, 2002) (the “*Cable Modem Ruling*”)

⁵⁷ See Comments of Time Warner, Inc. WC Docket No. 04-36 at 17-19 (2004); See, e.g. Comments of National Cable & Telecommunications Association, WC Docket No. 04-36 at 22-23, 38-39 (2004)

⁵⁸ Comment of the City and County of San Francisco, WC Docket No. 04-36 at 7-8 (2004)

services received from them. Conversely, industry, a significant customer of state, local and tribal governments, through their use of and access to public resources, consistently seeks to evade fairly compensating tribal, state, and local governments. To remedy this disparity industry should fulfill its compensatory obligations to tribal, state, and local governments.

Rather than legal posturing via jurisdictional threats and iterations, the IAC emphasizes and points to the examples discussed herein that highlight the shared values and common benefits between industry and state, local and tribal authorities. It is that very common ground that has already led to and that will continue to guide and shape the successful build-out and deployment of IP-enabled services.

Accordingly, the IAC urges the Commission to adopt as a fundamental guiding principle that state and local governments and tribal authorities are entitled to manage the use of the rights of way with respect to IP-enabled services. Further, the tribal, state, and local compensatory frameworks that include fair and reasonable compensation for the use of the rights of way, licensing and/or permitting fees, franchise fees and taxing authorities must be preserved.

Alternative Dispute Resolution

Rather than a framework of preemption and litigation, once again, the IAC encourages that a framework of creative solutions be established to deal with potential disputes and conflicts that may arise out of the widespread deployment of IP-enabled services. Specifically, the IAC notes that the 1996 Act did not expressly create a flexible mechanism for such dispute resolution. Realizing this shortcoming, the LSGAC, the predecessor of IAC, working with the Commission, and a variety of industry groups, composed a “Tower Siting Guidelines”(the “TSG”) that calls for the expeditious resolution of, “disputes in a manner consistent with the interest of all parties.”⁵⁹ For unknown reasons, the TSG have never been utilized. Nevertheless, it remains a good model to respond to a rapidly changing, disruptive technological environment.

By way of a real time, implemented example, the TSG model has proved successful in New Jersey. The New Jersey Department of Environmental Protection (NJDEP) invited all affected stakeholders in developing detailed rules for installation of submarine telecommunication cables. The most significant issue was the potential for conflicts between cable facilities and commercial fishing operations that use gear to scrape and dig into the seabed. After several ad hoc meetings, NJDEP decided to align competing interests by forming Submarine Cable Task Force with representatives from

⁵⁹ The Guidelines for facilities siting implementation and informal dispute resolution process are agreed to by LSGAC, the Cellular Telecommunications Industry Association (CTIA), the Personal communications Industry Association (PCIA) and the American Mobile Telecommunications Association (AMTA). Under the TSG, a volunteer panel of two will be formed, one from local government and the other representing the wireless industry. Both volunteers listen to the concerns from industry and local government, and make recommendations, which are not legally binding. The “process is intended as a mechanism to resolve issues short of court action if possible.” The TSG is available at www.fcc.gov.

all industries, achieving a balance between the concerns of the cable industry as well as the commercial fishing industry.⁶⁰

Instead of building new frameworks that will perpetuate time consuming and resources intensive litigation, to resolve disputes between government authorities and industry in deployment of facilities, the IAC urges the Commission to focus on creating more effective dispute resolution processes. Further, similar to the work of the LSGAC, the IAC would volunteer its efforts to spearhead such alternative dispute resolution processes.

Conclusion

On a muggy July morning 1919, a young army officer hastily packed his gear, kissed his wife and infant boy goodbye and jumped on a military vehicle for a coast-to-coast convoy. “Pain as you go”, he likely murmured, as he stood in the chilling rain after an exhausting 62-day journey from Washington D.C. to San Francisco, highlighted by delays and bad road conditions.⁶¹

On a muggy June morning 1956, the soldier-turned-President murmured the now famous words “pay as you go” as he signed the Federal Highway Act of 1956 without much fanfare or publicity. Even though the idea of interstate highway was not born with Dwight Eisenhower, it was he who transformed a young officer’s dream into a presidential vision, developing and improving the nation’s critical infrastructures. It was his vision that transcended years of confusion, endless egos, and merited but unnecessary disagreement, as he put in such simple terms - “I wanted the job done.”⁶²

On a muggy summer morning 2004, within a beige building off 12th Street, S.W., a team of Commission officials debate, deliberate and delineate balanced and effective regulations for IP-enabled services, an emerging critical infrastructure of this nation. It is a job that requires doing. With it there will surely be associated costs. This Reply has sought, however, to highlight that because a technology disrupts industry and government alike, the energy of that disruption can equally be used to implement positive change, incorporating and preserving the seemingly competing interests.

The time since the passage of the 1996 Act to this Commission’s *IP NPRM* should be viewed holistically as a preparation for ubiquitous broadband deployment, with miles of fiber infrastructures being built out, applications and services developed, operations launched, workers trained, governmental officials familiarized, and businesses and the public educated. Even with its inherent shortcomings, the 1996 Act and a series of Commission actions have guided us through this exciting growth and development. Now, at the gateway of emerging technological disruption, the IAC urges the

⁶⁰ State & Local Rights-of-Way Success Stories, available at <http://www.ntia.doc.gov/ntiahome/staterow/ROWstatestories.htm>.

⁶¹ Richard F. Weingroff, The Man Who Changed America, Part I, Public Roads at 4-8, March/April, 2003.

⁶² Richard F. Weingroff, The Man Who Changed America, Part II, Public Roads at 5, 8-16, May/June, 2003.

Commission to take an integrated stance on how to support the deployment of and migration to IP-enabled services, balancing the needs of tribal, state, and local governments with those of industry and consumers. The guiding principles discussed throughout this Reply should be applied universally across all current and future technologies and services. Those principles form the backbone of an important social contract and should, therefore, be the framework from which technology and innovation emerge.

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