

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
E-MAIL ADDRESS PORTABILITY) **RM-11391**

COMMENTS OF THE

INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE

To the Commission:

I. INTRODUCTION

The Independent Telephone and Telecommunications Alliance (ITTA) hereby submits comments in the above-captioned proceeding. ITTA represents mid-size local exchange companies that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 13 million customers in 43 states. The Commission seeks comment on a Petition that requests the Commission to impose “e-mail address portability.” For the reasons set forth below, ITTA urges the Commission to refrain from imposing such regulations that are inconsistent with policy and precedent.

ITTA supports generally a minimalist approach to the regulation of Internet protocol (IP) enabled services. ITTA supports regulatory intervention only where necessary to ensure the public health, safety, and welfare, or where intervention is necessary to ensure that providers of the underlying networks upon which IP-enabled services rely are assured the opportunity to obtain adequate compensatory resources necessary to deploy and maintain those networks. The instant Petition may raise

questions with regard to a particular Internet service provider (ISP), but it does not demonstrate adequately that the Commission should disregard Congressional preference for a “hands-off” approach to regulation of IP-enabled services. The circumstances described in the Petition do not implicate the type of important public interest concerns that could tend to justify Commission intervention.

II. DISCUSSION

A. **REGULATION OF E-MAIL IS NOT NECESSARY TO FULFILL AN EXPRESS STATUTORY OBLIGATION**

The Communications Act of 1934 confers upon the Commission jurisdiction to regulate common carriers (Title II) and broadcasting (Title III). In addition to these matters, the Commission has general jurisdiction over “all interstate and foreign communications by wire or radio . . . and all persons engaged within the United States in such communication . . . ;”¹ this category is known as “Title I,” or ancillary, jurisdiction. Notably, Title I jurisdiction is “restricted to that reasonable ancillary to the effective performance of [the Commission’s] various responsibilities” under Titles II and III.² The Commission has recognized that it may exercise ancillary jurisdiction where, “in the Commission’s discretion . . . [it] has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.”³ The express statutory statements of Congress, however, would tend to argue *against* Commission intervention in e-mail service.

¹ 47 U.S.C. § 152(a).

² See *United States v. Southwestern Cable Co.*, 392 US 157, 178 (1968) (*Southwestern Cable*).

³ *IP-Enabled Services: Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28, at para. 46 (2004) (*IP-Enabled NPRM*), citing *Southwestern Cable*, *supra*, n.2. In *Southwestern Cable*, the Supreme Court upheld the Commission’s decision to prohibit the importation by community antennae television (CATV) of distant signals into the 100 largest television markets. The Commission utilized its Title I authority to regulate CATV in order to ensure that benefits arising out of a system of local broadcast

Section 230 of the Communications Act states that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation . . .*”⁴ (emphasis added). Section 230 is consistent with the Commission’s historic *Computer II* decision, in which the Commission recognized that enhanced services would develop best if left unregulated;⁵ Section 230 of the Act codified these principles. The Commission has interpreted Section 230 to mean that “Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II.”⁶ Although the Commission noted its Congressionally-reserved right to “impose such regulations as may be necessary to carry out its other mandates under the Act,”⁷ the Commission was clear in the *IP-Enabled NPRM* that wholesale regulation of IP-enabled

stations (governed by Title II) would not be jeopardized by CATV. In *United States v. Midwest Video Corp.*, the Commission exercised Title I jurisdiction to bar CATV systems with more than 3,500 subscribers from carrying the signal of local broadcast stations unless the CATV also provided capabilities for local production and presentation of services. The Supreme Court upheld this decision, finding that it would further the “regulatory goals . . . of television broadcasting by increasing the number of outlets for community self-expression” See *United States v. Midwest Video Corp.*, 406 US 649, 668 (1972) (internal citations omitted). And, yet, in *FCC v. Midwest Video Corp.*, the Supreme Court limited the expression of ancillary jurisdiction when the Commission reached too far, finding that rules requiring cable television systems to develop minimum channel capacity and to make available channel space, equipment, and facilities for access essentially imposed common carrier obligations on cable systems, in conflict with statutory statements that broadcasters are not common carriers. See, generally, *FCC v. Midwest Video Corp.*, 440 US 689, 696-709 (1979). The Court distinguished *United States v. Midwest Video Corp.*, stating that the requirement to originate local programming did not “abrogate the cable operators’ control over the composition of their programming, as do the access rules.” *FCC v. Midwest Cable Corp.*, 440 US at 700.

⁴ 47 U.S.C. § 230(b)(2).

⁵ *Amendment of Section 64.702 of the Commission’s Rules and Regulations: Tentative Decision and Further Notice of Inquiry and Rulemaking*, 77 FCC 2d 384 at paras. 127, 128 (*Computer II*) (“[W]e believe the market for these [enhanced] services will continue to burgeon and flourish best in the existing competitive environment.”), *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *affirmed sub nom.*, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (DC Cir. 1982), *cert. denied* 461 US 938 (1983).

⁶ *Petition for Declaratory Ruling that pulver.com’s Free World Dial-Up is Neither Telecommunications nor a Telecommunications Service: Memorandum Opinion and Order*, WC Docket No. 03-45, FCC 04-27, at n.69 (2004) (*Pulver*).

⁷ *Pulver* at n.69.

services would “not only run counter to our decades old goals and objectives to enable information services to function in a freely competitive, unregulated environment, but would directly contravene Congress’s express directives in Sections 706 and 230 of the Act . . .”⁸ The Commission noted the risks entailed by “apply[ing] a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network.”⁹ ITTA urges the Commission to maintain these distinctions and not impose unnecessary regulations.

B. COMMISSION POLICY DOES NOT SUPPORT REGULATION OF E-MAIL

1. E-MAIL IS NOT SUFFICIENTLY ANALOGOUS TO TITLE II OR TITLE III SERVICES TO WARRANT TITLE I REGULATION

The Petition would have the Commission swim upstream against the current of non-regulatory policy. The Commission has noted correctly that IP-enabled services are an “increasingly available, sophisticated, and attractive alternative to consumers” and emerged “in an environment largely free of government regulation, and the great majority, we expect, should remain unregulated.”¹⁰ When outlining potential regulation of IP-enabled services, the Commission described “analogous services provided over the public switched telephone network (PSTN).”¹¹ The first paragraph of the IP-Enabled NPRM explains, “Increasingly . . . customers will *speak* with each other using VoIP-based services instead of circuit-switched telephony and *view* content over streaming

⁸ *Pulver* at n.69. Notably, in this instance, the Commission was discussing the application of regulation to Pulver Free World Dial-Up, which the Commission determined was a “computer-to-computer” communication. An *a priori* argument may be advanced in that FWD, which carries a voice element and therefore may have been viewed as a substitute for voice service was *not* subject to regulation. Therefore, a non-voice computer-to-computer *text* communication should not be subject to regulations applicable generally to voice carriers.

⁹ *Pulver* para. 19.

¹⁰ *IP-Enabled NPRM* at para. 35.

¹¹ *IP-Enabled NPRM* at para. 3.

Internet media instead of broadcast or cable platforms.”¹² In that description, the Commission highlighted the services comprised by Titles II and III, to which Title I ancillary jurisdiction might be reasonably tied.¹³ Notably and logically absent is reference to applications that are not reasonable replacements for regulated services, *i.e.*, e-mail. In fact, the Commission stated:

We believe . . . that traditional economic regulation designed for the legacy network should not apply outside the context of the PSTN, and therefore will be inapplicable in the case of most IP-enabled services.¹⁴

The Commission carried this philosophy forward when it developed the definition of “interconnected VoIP” that it has employed when extending Title I authority to IP-enabled services: the service (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires IP-compatible CPE; and, (4) permits users to receive calls from and terminate calls to the PSTN.¹⁵ That focus on comparability to regulated services should not be diffused to now encompass services outside the rubric of those that may apparently substitute for Title II or Title III offerings.

¹² *IP-Enabled NPRM* at para. 1 (emphasis added).

¹³ This approach is consistent with distinctions articulated earlier by the Commission, which suggested that distinctions should be based on whether service (1) holds itself as providing voice or facsimile service; (2) requires CPE different than that usually employed for a standard touch-tone call or facsimile transmission; (3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan; and (4) transmits customer information without net change in form or content. *See Federal-State Joint Board on Universal Service: Report to Congress*, CC Docket No. 96-45, FCC 98-67, at para. 88 (1998) (*Stevens Report*).

¹⁴ *IP-Enabled NPRM* at n.116. The Commission broadly defined IP-enabled services as “services and applications relying on the Internet Protocol family.” *IP-Enabled NPRM* at para. 1. Although the Commission acknowledged that its definition of “IP-Enabled services” could lead parties to “question what it would mean to apply E911 obligations on an Internet retailer, or to tariff an on-line newspaper offering,” it recognized properly that “some obligations may only be sensible in the context of VoIP services.” *See IP-Enabled NPRM* at n.155. The Commission explained that it had articulated a broad definition in order to ensure the ability to capture all pertinent situations.

¹⁵ *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers: First Report and Order and Notice of Proposed Rulemaking*, WC Docket Nos. 04-36 and 05-196, FCC 05-116, at para. 24 (2005) (*VoIP 911 Order*).

2. E-MAIL DOES NOT IMPLICATE SUFFICIENT NON-ECONOMIC CONCERNS THAT WOULD TEND TO JUSTIFY IMPOSITION OF TITLE I REGULATION

The Commission has described a difference between “regulations designed to respond to the dominance of centralized, monopoly-owned networks [and] . . . those designed to protect the public safety and other consumer interests.”¹⁶ The Commission described the latter as involving “emergency services, law enforcement, access by individuals with disabilities, consumer protection, [and] universal service.”¹⁷

The Commission has stepped in to address non-economic regulation in several instances, and relied upon its ancillary jurisdiction to do so in each case. The Commission imposed E911 requirements on VoIP providers;¹⁸ required VoIP providers to contribute to the Universal Service Fund;¹⁹ extended customer proprietary network information (CPNI) requirements to VoIP providers;²⁰ and, ordered VoIP providers to

¹⁶ *IP-Enabled NPRM* at para. 36.

¹⁷ *IP-Enabled NPRM* at para. 36.

¹⁸ *VoIP 911 Order*, at para. 22. (“Because we have not decided whether interconnected VoIP services are telecommunications services or information services, we analyze the issues addressed in this Order primarily under our Title I ancillary jurisdiction to encompass both types of service”).

¹⁹ *Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resources Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services: Report and Order and Notice of Proposed Rulemaking*, WC Docket No. 06-122, CC Docket No. 96-45, CC Docket No. 98-171, CC Docket No. 90-571, CC Docket No. 92-237, NSD File No. L-00-72. CC Docket No. 99-200. CC Docket No. 95-116, CC Docket No. 98-170, WC Docket No. 04-36, FCC 06-94 (2006) (“Absent our final decision classifying interconnected VoIP services, we analyze the issues addressed in this Order under our permissive authority pursuant to Section 254(d) and our Title I ancillary jurisdiction.”) *Id.* at para. 35.

²⁰ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services: Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115, WC Docket No. 04-36, FCC 07-22 (2007) (“We conclude that we have authority under Title I of the Act to impose CPNI requirements on providers of interconnected VoIP service.”) *Id.* at para. 55.

provide access to individuals with disabilities.²¹ (The Commission’s determination that interconnected VoIP providers are subject to the Communications Assistance for Law Enforcement Act (CALEA) was based upon a finding that broadband internet access service providers are “telecommunications carriers” under CALEA.)²²

Notably, and in the first instance, these assertions of Title I jurisdiction have been to *voice* services that are interconnected with the PSTN. Notwithstanding open questions regarding the provision of video via IP-enabled services, it is evident from these decisions that the Commission’s interest in extending Title I jurisdiction springs from analyses similar to those articulated in the *Stevens Report*, *i.e.*, what “substitutes” for the voice service?

Second, *arguendo* the Commission would assert jurisdiction over e-mail, the regulation requested by the Petition does not fall reasonably within the gamut of non-economic matters that are worthy of regulation. The Petitioner states, “[t]he loss of an e-mail address is a [] crushing blow to any business since not only does all the collateral material have to be discarded, but all the good will that has been generated over the years with that address can be lost in a second if the address is terminated,” and concludes incorrectly that, “[a]s in the pre-LNP days, consumers and businesses are effectively held

²¹ *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements: Report and Order*, WC Docket No. 04-36, WT Docket No.96-168, CG Docket No. 03-123, CC Docket No. 95-105, FCC 07-110 (2007) (“We exercise our Title I ancillary jurisdiction to establish a regulatory framework applying disability access requirements to all interconnected VoIP providers and related equipment manufacturers.”) *Id.* at para. 21.

²² *See, Communications Assistance for Law Enforcement Act and Broadband Access and Services: First Report and Order and Further Notice of Proposed Rulemaking*, ET Docket No. 04-295, RM-10865, FCC 05-153, at para. 26, *et seq.* (2005).

hostage by their ISPs.” The ISP, e-mail, and domain registration markets reflect healthful and robust competition; persons interested in perpetual Internet identities can obtain domain name registration from any number of providers and transfer web-hosting and associated e-mail and other functions between other providers. Remedies less intrusive and more favorable to the furtherance of a truly competitive market than those requested by the Petitioner are readily available. The Commission should not adopt interventionist policies as requested by the Petition.

C. NUMBER PORTABILITY IS NOT ANALOGOUS TO E-MAIL

The Petitioner argues that e-mail address porting requirements would be consistent with the Commission’s consumer protection ideals as set forth in *Consumer Protection in a Broadband Era: Report and Order and Notice of Proposed Rulemaking*.²³ In that *Notice*, the Commission describes a “duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services.”²⁴ That rationale, however, indicates that corollaries between narrowband and broadband services will be drawn to the extent that *consumer protection* initiatives present in the narrowband market are exported to similar services in broadband. The Commission, in fact, has demonstrated this approach in its *Consumer Protection NPRM*: consumer protection issues that were noticed included customer proprietary network

²³ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era: Report and Order and Notice of Proposed Rulemaking*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, FCC 05-150 (2005) (*Consumer Protection NPRM*).

²⁴ *Consumer Protection NPRM* at para. 146.

information (CPNI); “slamming;” truth-in-billing; network outage reporting; Section 214 discontinuance; and Section 254(g) rate averaging. Number portability was not noticed, and with reasonable basis.

Number portability is not an outgrowth of consumer protection. Rather, the intent of number portability in the statute, and as articulated by the Commission, is the furtherance of competition among telephone providers.²⁵ No similar rationale can be discerned in the market for e-mail or ISPs, and the Petitioner’s attempt to import regulation of a similar flavor should be rejected.

Number portability is statutorily ordered and arises out of the same sections of the Act that mandate interconnection and other actions intended to promote competition in the local exchange market. The Commission found that “number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers,” since the ability of end users to retain their telephone numbers when changing service providers “gives consumers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase.”²⁶ A similar rationale cannot be applied to ISPs and e-mail service. Competition in the ISP market is robust. Unlike the telephone market, it never bore the imprint of a regulated monopoly in any of its forms or markets, and therefore should not be subject to interventionist policies to impose corrective measures. If anything, the availability of *free* email services from numerous providers underscores the competitive nature of the service that has emerged

²⁵ 47 U.S.C. § 251(b)(2).

²⁶ *Telephone Number Portability: First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 95-116, RM 8535, FCC 96-286, at para. 30 (1996).

free of unnecessary regulatory bindings. The Commission should maintain this structure that has facilitated a healthy and robust market.

III. **CONCLUSION**

There is no rational basis for the Commission to assert Title I jurisdiction over e-mail services. The Petitioner has not demonstrated sufficient justification to impose non-economic regulations pursuant to the Commission's Title I authority. The e-mail market is robustly competitive, and regulations should not be imposed where Congress has stated a clear preference to "preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."²⁷ For these reasons and as discussed above, the Petition should be denied.

Respectfully submitted,

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²⁷ 47 U.S.C. § 230(b)(2).