

TESTIMONY OF THE VOICE ON THE NET COALITION
BEFORE THE WYOMING JOINT CORPORATIONS, ELECTIONS AND
POLITICAL SUBDIVISIONS INTERIM COMMITTEE
REGULATORY TREATMENT OF VOICE OVER INTERNET PROTOCOL

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Good morning committee members. My name is Glenn Richards and I am partner in the Washington, DC office of Pillsbury Winthrop Shaw Pittman and also the Executive Director of the Voice on the Net Coalition. First I would like to thank you for the opportunity to spend time with you today to provide a general overview of Federal Communications Commission and state actions related to Voice over Internet Protocol and other IP-enabled services.

By way of background, I have been practicing telecommunications law for almost 27 years, and for the past 16 of those years a major focus has been Internet communications. For those of you not familiar with VON, its members include many of the leading Internet communications companies, including Google, Microsoft, Skype, Vonage and Yahoo. For more than 15 years, VON has been working with federal and state policymakers to advance regulatory policies that enable consumers, businesses and government to enjoy the full promise and potential of Internet Protocol or IP communications. The companies in VON are developing and delivering the next generation of voice, video and data communications services that can be used anywhere and everywhere that broadband is available -- no telephone required.

Once limited to hobbyists, IP communications today is an emerging technology that is providing new choices and options for consumers and businesses. According to a report released last year by the FCC, at the end of 2010, there were more than 50,000 interconnected VoIP subscriber lines in Wyoming, receiving service from 40 VoIP providers. Nationally, there were

more than 32 million VoIP subscriber lines in services, an increase of more than 22 percent from the prior year.

The dramatic growth of IP communications has created choices in the marketplace to the benefit of consumers that are saving hundreds of millions each year on these new technologies. VoIP also provides consumers flexibility and features not possible in yesterday's telephone network. These include the ability to use an IP-enabled phone through any broadband connection anywhere in the world; allowing voice mail to be sent to email or converted to text; allowing multiple devices to ring at the same time, and bringing video conference calling to the masses. At the same time, quality and reliability equal if not surpass that of the legacy phone network.

For businesses, particularly small and medium sized businesses, IP communications is lowering costs, allowing increased control over communications, increasing productivity, increasing mobility, enabling collaboration, and giving companies a competitive advantage. IP communications promotes telework; allowing people to work seamlessly from home as if they were in the office; creating more time with family and greater employment opportunities for parents of small children, adult caregivers and the disabled.

IP communications is also bridging the gap between rural and urban Americans. VoIP can bring good information age jobs to rural communities, and encourages the rapid deployment of broadband to rural areas.

The history of Internet communications regulation arguably begins in March 1996 when a small trade association of long distance resellers, called America's Carriers Telecommunication Association or ACTA, filed a petition asking the FCC to stop the sale of software that was used to enable voice communications between computers over the public Internet, or in some cases

from computers to telephones. ACTA also asked the FCC to begin a rulemaking to define permissible communications over the Internet. ACTA noted that it was not in the public interest to permit long distance service to be given away and suggested that the software providers should be subject to the same regulations as telecommunications providers.

Comments were filed in response to the ACTA petition but the FCC never issued an order in that proceeding. Basically, not much else happened from a regulatory perspective for the next seven 7 years. Regulators asked questions, but Internet telephony – as it was called then -- was still a curiosity; used mostly by hobbyists. However, during that time the decreasing cost of personal computers and the increasing availability of broadband technologies, naturally led to the growing use of Internet communications. Companies such as Free World Dial-up (an early version of Skype) and ITXC were challenging traditional telecom business models by using the Internet to provide free or low cost international communications services. A company called Vonage began offering a home telephone service using existing customer premises equipment, along with a simple adapter, over the customer's high speed Internet connection. The Vonage service for the first time allowed residential customers to manage their communications services – providing features and capabilities previously only available to business users; and at much lower prices than were available from traditional telephone companies.

The relative quiet ended in July 2003, when the Minnesota Department of Commerce filed a complaint with the state Public Utilities Commission asserting that Vonage was providing a telephone exchange service and subject to state law and regulations as a telephone company, including the requirements to get a certificate of operating authority, file tariffs and provide 911. In September 2003, the Minnesota commission issued an order asserting jurisdiction over Vonage, and telling it to comply with state regulations. That order was subsequently reversed by

a federal court and that reversal upheld on appeal. But more importantly for our discussion today, Vonage, while the matter was under appeal, also filed a petition for declaratory ruling with the FCC asking it to preempt the Minnesota order, arguing that its service should be classified as an information service and thus not subject to state regulation; or, in the alternative that regardless of the regulatory classification that its service could not be separated into distinct interstate and intrastate communications. The FCC agreed with Vonage that it was impractical to separate the service into interstate and intrastate communication, relying in part on the fact that the service was nomadic – that is the service could be accessed from a broadband connection anywhere in the world, and that permitting Minnesota to regulate the service would thwart a federal policy of promoting advanced communications services and noting that multiple state regulatory regimes would likely violate the Commerce Clause. The Commission did not address whether the service should be classified as an information or telecommunications service; and that issue remains unresolved today. While the issue was not specifically before the FCC, it did note that it would likely also preempt state regulation of other entities, such as cable companies, that provided integrated communications capabilities over the Internet.

Also in 2004, the Commission issued what is now referred to as the Pulver Order, In that decision, the FCC specifically declared that Pulver’s Free World Dialup – which was a directory service that facilitated free, computer-to-computer Internet voice communications between FWD subscribers, using unique numerical identifiers (and not telephone numbers), was an information service and not a telecommunications service. Information services are generally not subject to state regulation and limited, if any, FCC regulation. This decision is important today because it’s the basis for the regulatory scheme for companies like Skype, or others that offer Internet-based

PC-to-PC voice services that do not interconnect with the public telephone network, and thus are not treated like providers of interconnected VoIP.

Finally, in 2004, the FCC released a Notice Proposed Rulemaking asking hundreds of questions about the proper scope of federal regulation of IP-enabled services. In summary, the NPRM broached the question of whether Voice over IP or other IP-based services should be classified as information or telecommunications services, or otherwise subject to some or all of the regulations that applied to telecommunications carriers.

In 2005, the FCC issued the first decision that imposed a regulatory requirement on Voice over IP. Specifically, the FCC required VoIP providers to provide E-911 service to their customers. This decision was largely based on the finding that VoIP was fast becoming, and marketed as, a replacement for basic telephone services and that there was a consumer expectation that such services could reach 911. To distinguish between the various kinds of IP communications services, the FCC limited the requirement to interconnected VoIP, a definition now codified in the FCC's rules, that means a service that that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet-protocol compatible equipment and (4) permits users generally to receive calls that can originate on and can terminate to the public switched telephone network.

Interestingly, the Commission imposed the 911 requirement and asserted its authority over interconnected VoIP using its Title I or ancillary authority to broadly promote public safety, rather than declaring interconnected VoIP a telecommunications service which would have achieved the same result but would have subject the service to the full spectrum of telecom regulations. That same rationale was applied in a decision issued later in 2005 that applied

CALEA obligations to providers of interconnected VoIP. For those of you unfamiliar with CALEA, its purpose is to enhance the ability of law enforcement and intelligence agencies to conduct electronic surveillance by requiring that telecommunications carriers, VoIP providers and manufacturers of telecommunications equipment modify and design their equipment, facilities, and services to ensure that they have built-in surveillance capabilities, allowing federal agencies to monitor all telephone, broadband internet, and VoIP traffic in real-time. Both the 911 and CALEA decisions were upheld on appeal; including the Commission's line of reasoning and its use of Title I authority to impose these new requirements on interconnected VoIP.

With this new regulatory framework in place, the FCC during the past six years has continued to impose what I would consider consumer protection and public safety obligations on providers of interconnected VoIP. These obligations include contributing to the Federal Universal Service Fund, making the service accessible to person with disabilities, paying FCC regulatory fees, requiring VoIP providers to port telephone numbers to other communications providers, requiring FCC approval before discontinuing VoIP service, allowing states to assess universal service obligations on VoIP revenues, and, most recently, requiring VoIP providers to file reports of network outages with the FCC. Consumers can also file complaints online with the FCC specifying VoIP service provider issues. There are also a number of pending FCC proceedings that could impose additional obligations on interconnected VoIP, including application of the truth in billing and cramming rules and considering whether VoIP providers should be permitted direct access to telephone numbers (which today are available only to telecommunications carriers).

The FCC, through authority provided by Congress in 2010, has imposed certain disabilities access obligations on non-interconnected and one-way VoIP services. Examples of

non-interconnected VoIP would be services such as Facetime – which allows iPhone users to speak and see other over a Wi-Fi connection. One-way VoIP services would include Skype Out, which allows customers to pay for calls that terminate on the PSTN. The FCC is also considering whether one-way services that can call to the PSTN should be required to provide 911 services to their customers.

As of today, no state public utility commission regulates interconnected VoIP or any other IP-enabled service. In fact, more than 22 states have legislation in place recognizing there is no reason to burden IP enabled services with legacy telecommunications regulations, most recently joined by Mississippi and Utah. Similar legislation has also been introduced and is under consideration in California, Colorado, Connecticut, New Hampshire and New York. In a competitive market with low barriers to entry and low switching costs that directly benefits consumers, entry and rate regulation has the potential to materially and adversely impact technological innovation, hinder the growth of new and innovative services and place roadblocks in the way of companies eager to invest in and deliver innovative products and features.

A few state commissions, including Maine, New Hampshire, Vermont and Wisconsin, have issued orders finding that they can assert jurisdiction over fixed, or non-nomadic, VoIP services, such as those provided by cable companies. The Vermont order has been appealed to the state supreme court, where briefs will be filed today. In Maine and Wisconsin, however, subsequent legislation removed such jurisdiction and rendered those decisions moot.

In closing, I would suggest that it is applications like VoIP that are driving broadband deployment and adoption. The FCC's regulatory approach for IP services supports the broader

policy of not regulating the Internet or Internet applications. This broader policy is consistent with goal of the National Broadband Plan of ubiquitous broadband for all Americans.

I would recommend that Wyoming follow this path, by providing certainty in the marketplace and passing legislation prohibiting state regulation of VoIP or other IP-enabled services, which would include Internet delivered applications and services used by consumers, businesses, and government every day, such as instant messaging, e-mail, web surfing, search, streaming video, click to chat, mobile VoIP and voice communications applications such as Skype video calling.

This forward looking policy will facilitate transformative improvements in the way people in Wyoming communicate that harnesses the power of the Internet and provide three critical benefits to the state of Wyoming during these challenging economic times:

- (1) a platform for innovation delivering advanced broadband communications features;
- (2) increased competition among network and service providers leading to cost savings for consumers and businesses across the state; and
- (3) increased infrastructure investment and accelerated broadband deployment – critical elements of job creation and economic growth in the state.

Everyone in Wyoming has much to gain from a predictable regulatory environment that allows innovative IP enabled applications and services to remain free from regulations originally intended for plain old telephone services. We look forward to working with you and other policy makers in Wyoming to forge pragmatic solutions that enable consumers, businesses, and the economy to achieve the full promise and potential that VoIP and IP-enabled services can deliver.

Thank you for your time and I look forward to your questions.