

**Before the  
STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

Proceeding on Motion	)	
of the Commission to Examine	)	
Issues Related to the Transition	)	Case No. 05-C-0616
to Intermodal Competition	)	
in the Provision of	)	
Telecommunications Services	)	

**COMMENTS OF UNITED ONLINE, INC.**

Russell M. Blau  
Ronald W. Del Sesto  
Edward W. Kirsch  
SWIDLER BERLIN LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
Telephone: (202) 424-7500  
Facsimile: (202) 424-7643

Counsel for United Online, Inc.

Dated: August 15, 2005

**Before the  
STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

Proceeding on Motion	)	
of the Commission to Examine	)	
Issues Related to the Transition	)	Case No. 05-C-0616
to Intermodal Competition	)	
in the Provision of	)	
Telecommunications Services	)	

**COMMENTS OF UNITED ONLINE, INC.**

**I. INTRODUCTION**

United Online, Inc. (“United Online”) submits these comments in the above-referenced case in support of the Commission’s broad review of its telecommunications policies, practices and rules in order to determine to what extent, if any, changes in the telecommunications environment, including, but not limited to, the emergence of intermodal forms of competition such as cable services and nascent Voice over Internet Protocol (“VoIP”) services, dramatic industry-structure changes such as the propose mergers of AT&T with SBC and MCI with Verizon, rapid technological change, and other market place developments support changes in the Commission’s existing regulatory regime and the adoption of rules governing VoIP services.<sup>1</sup>

**A. United Online’s Existing Services**

United Online is headquartered in Woodland Hills, California and has offices in New York City; Renton, Washington; San Francisco, California; Orem, Utah; Munich, Germany; Jarfalla, Sweden; and Hyderabad, India. United Online is a leading provider of consumer Internet

---

<sup>1</sup> *Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Case No. 05-C-0616, Order Initiating Proceeding and Inviting Comments, at 4 (June 29, 2005) (“Order Initiating Proceeding”) (“The goal of this proceeding is to conduct a broad review of our telecommunications policies, practices and rules in light of the fast changing telecommunications environment ... any changes we consider should allow for the possibility of further technological or industry-structure changes (e.g., mergers) in the future.”).

subscription services, including dial-up Internet access, premium email, personal web hosting and domain services, and community-based networking, through well established brands such as NetZero, Juno and Classmates.<sup>2</sup> The Company also offers free Internet access, email and web hosting, and intends to introduce VoIP services in the near future.

**B. United Online's Planned VoIP Service Offerings**

In the near term, United Online intends to begin offering three VoIP service products under its NetZero brand, including: (1) a peer-to-peer VoIP service; (2) an outbound-only service that only provides the ability to terminate traffic on the public switched telephone network ("PSTN"); and (3) a VoIP product that will allow for both in inbound and outbound calling. United Online's three VoIP services differ significantly from each other and from the broadband-only services offered by many of the leading VoIP providers. Most importantly, United Online's planned peer-to-peer and outbound-only VoIP services are not practical substitutes for traditional wireline voice services; instead, they supplement rather than replace such services and should be subject to no regulation beyond the consumer protection laws and regulations applicable to all businesses. United Online's planned two-way VoIP service will also not be a practical replacement for traditional telephony services because it will often be provided over a dial-up Internet connection. Each use of the service will require logging onto a general purpose computer and a VoIP application, which is relatively time consuming and cumbersome compared to the use of a traditional phone with a terminal adaptor and other broadband VoIP technologies.

All three of these planned products require the end user to turn on a general purpose computer, wait for the computer to start up, log onto the computer, log onto the Internet, log onto a VoIP application, strap-on a headset, position a microphone and dial a number through the

---

<sup>2</sup> More information on United Online and its current service offerings can be found at <http://www.unttd.com>.

VoIP software application. None of these three services, as planned, will use a terminal adaptor. Further, dial-up Internet access users will invariably retain their traditional wireline telephony line in the absence of an “always-on” broadband connection. Thus, United Online’s planned VoIP services are not practical replacements for traditional telephony and should not be burdened by the Commission with legacy or new regulations.

**C. Any Regulation of VoIP Services Should Be Minimal and Tailored Rather Than “One Size Fits All” At This Early Stage of Deployment of VoIP Services**

As part of this generic proceeding, the Commission is investigating whether to subject VoIP services to regulation in the form of consumer protection, service quality obligations and other requirements. United Online believes that VoIP services should remain unregulated at this early stage in the product life cycle where VoIP services have minimal market share as compared to traditional telephony and there is vibrant competition among VoIP providers. Competition in the nascent VoIP services market is fierce, especially compared to the Internet access market, with a plethora of VoIP providers offering a wide variety of VoIP services with a wide range of features. In this environment, the most effective method to discipline the behavior of providers of VoIP services is to let consumers choose the best value among VoIP service offerings in light of the amount they prefer to spend and the functions they seek. In the absence of burdensome regulations, VoIP providers will be able to introduce services with the set of features that they believe has the most appeal to consumers at a given price point.

If the Commission imposes any of its legacy service quality, consumer protection and other regulations or new regulations on VoIP services, it should take a nuanced approach that regulates only those services that are likely to constitute a replacement for a traditional telephony service rather than taking a “one-size fits all approach.” In any event, such regulation should be minimal for all three of United Online’s planned services. Otherwise, as demonstrated below, the

Commission risks stifling innovation, reducing consumer choice and impeding competition in the nascent market for VoIP services.

Moreover, United Online observes that while it supports the efforts of the Commission to examine its regulations in light of developments in the communications marketplace, the VoIP services that it intends to offer are inherently interstate in nature. The Federal Communications Commission (“FCC”) in its *Vonage Declaratory Ruling* preempted much individual state regulation of inherently interstate services, because such state regulation would inevitably conflict with the development of a unified national approach for facilitating deployment of VoIP services.<sup>3</sup> The *Vonage Declaratory Ruling* establishes that such inherently interstate services are generally subject to exclusive FCC jurisdiction, which “preclude[s] state regulation” in most instances.<sup>4</sup>

**D. Cable Providers and ILECs Possess Extensive Market Power Over Essential Facilities So That Protection From Port Blocking and Other Abuses Is Necessary To Facilitate Innovation and Growth in the VoIP Services Market**

United Online does not agree with the Commission’s underlying assumptions that intermodal competition is flourishing and “traditional competitors are losing ground” due to intermodal competition from wireless providers, VoIP service providers that are not affiliated with ILECs and other service providers.<sup>5</sup> While unaffiliated broadband VoIP service providers have made progress, they have a long way to go before they can compete effectively against traditional wireline providers of telephony services like Verizon which has about *9 million lines in*

---

<sup>3</sup> See generally *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (FCC Nov. 12, 2004) (“*Vonage Declaratory Ruling*”).

<sup>4</sup> *Id.* at ¶¶ 1, 32, 46.

<sup>5</sup> Order Initiating Proceeding, at 1, 21.

*New York State alone.*<sup>6</sup> Further, the growth in access lines provided by unaffiliated VoIP service providers does not in many instances result in a loss of a customer for the ILEC because the ILEC often provides the underlying DSL broadband connection and the customer often retains its traditional telephony line and uses VoIP as a supplemental service for its mobility capability and cost savings on certain calls. When United Online starts offering VoIP to dial-up Internet access users, it obviously will not replace an existing telephone line.

The Commission makes much of its observation that Verizon lost “nearly 4 million retail lines” between 1999 and 2004, and acknowledges that only 1.2 million of these lines were lost to facilities based competitive carriers while 2.8 million were lost to resale or UNE-P providers.<sup>7</sup> United Online underscores, however, that Verizon will soon recoup most of these lines as a result of its acquisition of one of its largest competitors (*i.e.*, MCI)<sup>8</sup> and the collapse of UNE-P competition due to the FCC’s recent orders that eliminate CLEC access to UNE-P and curtail access to other facilities including loops.<sup>9</sup> Further, wireless broadband and Broadband over

---

<sup>6</sup> At the time of the Commission’s Competitive Analysis Report, Verizon had 9,247,518 retail local exchange lines. *Analysis of the Local Exchange Service Competition in New York State*, Case No. 03-C-1220, at 7 (NY PSC, 2003); *Order Initiating Proceeding*, at 1. Vonage Crosses 400,000 Line Mark, Press Release, at 1 (Jan. 5, 2005). The press release is available at 21, n.25. [www.vonage.com](http://www.vonage.com).

<sup>7</sup> Order Initiating Proceeding, at 21, n.25.

<sup>8</sup> At the time of the Commission’s Competitive Analysis Report, Verizon was the largest local exchange company with 9,247,518 retail local exchange lines; AT&T ranked second with 1,105,237 lines; Frontier ranked third with 853,757 lines; and MCI ranked fourth with 562,943 lines. Based on this data, the proposed merger of Verizon and MCI may combine the first and fourth largest local exchange companies in New York and significantly increase Verizon’s total line count. Further, at the time, MCI was the second largest CLEC in New York state with retail revenues of \$208,965,285. Verizon was the largest carrier in the state by local service revenues with \$4,505,292,000 in revenue. *Analysis of the Local Exchange Service Competition in New York State*, Case No. 03-C-1220, at 7 (NY PSC, 2003).

<sup>9</sup> *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC

Power Line (“BPL”) do not provide meaningful widespread competition to traditional telephony. In fact, the two largest wireless providers are owned by RBOCs (*i.e.*, Cingular (owned by BellSouth and SBC) and Verizon Wireless). As a result, the Internet access market is dominated by a duopoly consisting of ILECs providing DSL service and cable providers using cable modem technology.

This duopoly possesses substantial market power over critical bottleneck facilities for Internet access and has every incentive to discriminate in favor of their traditional wireline operations or even their own affiliated VoIP service providers at the expense of unaffiliated providers as the nascent market for VoIP services grows more competitive with traditional services. For example, Madison River Communications, LLC recently engaged in such abuse by using port blocking to undermine unaffiliated VoIP providers until the FCC forced the company to enter into a consent decree and agree not to block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.<sup>10</sup> Accordingly, the Commission must proactively preclude such market power abuses and ensure that consumers have the ability to choose unaffiliated VoIP service based on the relative merits of the competing VoIP service offerings. Specifically, ILECs and cable companies must be precluded from blocking ports used for competing VoIP applications, access to lawful content, and other services or otherwise preventing customers from using VoIP applications from competing providers.

In addition to precluding port blocking, the Commission should be guided by the following four principles, recently adopted by the FCC to promote open and competitive VoIP services,

---

Docket No. 01-338, Order on Remand, FCC 04-290, at ¶¶ 5, 199 (Feb. 4, 2005) (“TRRO”) (“we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.”).

<sup>10</sup> *In the Matter of Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, Consent Decree, at ¶¶ 3, 5 (March 3, 2005).

in crafting its own rules: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, including the VoIP applications of unaffiliated providers; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers over their chosen Internet access services.<sup>11</sup>

Consistent with these principles, the Commission should adopt rules to ensure that wireline porting of telephone numbers is completed expeditiously and strictly within the nominal five day interval and on an automated basis in order to prevent ILECs from undermining unaffiliated VoIP competition. Finally, in light of the fact that the Internet access market is dominated by a duopoly, the Commission should refrain from deregulating wireline services to ensure that VoIP competition flourishes during this transitional period of growing but nascent competition from intermodal providers including VoIP.

## II. RESPONSES TO THE COMMISSION'S SPECIFIC QUESTIONS

### A. Consumer Protections

1. *In view of the proliferation of competitive alternatives, is it appropriate for the Commission to relax some of its traditional consumer protections applicable to wireline companies?*

United Online has no comment on this issue at this time.

2. *Are there core consumer protections (e.g., slamming, cramming, termination notices, contract disclosures) that should be enforced by the Commission, notwithstanding the existence of competitive choices? Should a set of core consumer protections apply to wireless and VOIP/cable telephony, as well as traditional wireline?*

---

<sup>11</sup> *New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet*, FCC Policy Statement, at 1 (August 5, 2005).

United Online limits its response to this inquiry to the three specific VoIP services that it presently plans to introduce as described above. United Online maintains that many of the Commission's consumer regulations are designed for traditional wireline services and are wholly inappropriate for United Online's VoIP services because, as shown above in Section I, they are not a true replacement for traditional wireline services and often the underlying problem that the Commission's regulations seek to resolve is unlikely to arise in the context of United Online's VoIP services.

For example, the practice of switching a customer's service without obtaining permission from the customer or "slamming," is not an issue with United Online's VoIP services. To use these services, Customers will have to affirmatively log onto the Company's website and enter their name, billing address, credit card information and other information, or provide this information to the Company by telephone, to establish an account. Then, the customers must install United Online's VoIP software application, and log in to that application before placing calls by dialing users through the client software. In contrast to traditional wireline telephony, United Online VoIP customers obtain dial-up or broadband Internet access and must actively register for the service over a website, and install and configure specialized software to utilize United Online's VoIP services. Thus, customers cannot be switched to United Online's services without their active participation as well as consent. In sum, the Commission's regulations regarding slamming are not relevant to United Online's VoIP services and would needlessly add expense to the deployment of such services, thereby stifling innovation in this emerging and technically dynamic diverse market.

Likewise, the practice of "cramming" or inserting unauthorized charges on a customer's telephone bill, which they did not use or order, often in an inconspicuous manner, is not likely to occur with United Online's VoIP services. "Cramming," is not an issue because United Online does not issue bills to customers, rather a customer's credit card is billed only the relevant charges for the service plan they select each month, including applicable charges for international calls, calls in excess of monthly calling allowances, and other applicable charges made by the customer. Accordingly, unauthorized charges from third parties cannot find their way on to a United Online customer's VoIP bill. To the extent that some VoIP provider attempted to bill a customer's credit card for unauthorized charges, this would be a violation of existing laws governing credit transactions and does not require additional action by this Commission.

United Online agrees in this context with the Commission's assessment that "[w]here feasible, competition is the most efficient way by which the [Commission's] goal[s] may be achieved."<sup>12</sup> Although the VoIP market is extremely small in comparison to the traditional telecommunications market, the competition in the nascent VoIP services market is fierce with a plethora of VoIP providers offering a wide variety of VoIP services with a wide range of features. In this environment, the most effective method to discipline the behavior of providers of VoIP services is to let consumers choose the best value among VoIP service offerings in light of the amount they prefer to spend and the functions they seek. In the absence of burdensome regulations, VoIP providers will be able to introduce services with the set of features that they believe has the most appeal to consumers at a given price point.

---

<sup>12</sup> Order Initiating Proceeding, at 2.

Moreover, in the past, the Commission has regulated traditional telecommunications services “to protect consumers from abuses by dominant suppliers of essential services” with large market share and market power.<sup>13</sup> There is currently no dominant participant in the VoIP marketplace in a position to exert control over the market for such services. United Online operates in a highly competitive market. If consumers are dissatisfied with United Online’s VoIP services they can vote with their feet because there is a large array of diverse VoIP service offerings available. Further, United Online and most other VoIP providers that are not affiliated with ILECs do not have control over their customer’s access to the PSTN or Internet as they rely on other providers for such access. Thus, the vibrant competition in the VoIP market over price and features, combined with the VoIP provider’s lack of control over key inputs such as last mile facilities, ensures that consumers will be protected from abuse and poor service by their freedom to readily change VoIP service providers.

Although, regulation of VoIP services similar to those of United Online should be minimal, it may be appropriate to require VoIP providers adhere to a few requirements that are consistent with their business practices. For example, it would not be onerous for VoIP providers serving residential customers to make contract disclosures over their Internet websites and protect a customer’s personal information from disclosure to third parties. Most providers of VoIP services already provide such protections to consumers because they are widely demanded in the market place and are needed to effectively compete.

3. *Does the Commission have a unique role to play in addressing consumer complaints? Should a common forum for the timely handling of consumer complaints be available under the auspices of the Commission? In other words, should the Commission’s complaint handling function and the authority to enforce core consumer protections be extended to wireless and VOIP/cable telephony? If so, what should the nature and scope of that function be?*

As set forth in its response to question II.A.2, except for requirements regarding disclosure of contract terms and privacy, United Online believes that the highly competitive nature of the VoIP market place and the VoIP’s providers lack of control over any essential facilities obviate the need to impose any of the Commission’s consumer protection regulations and other regulations. In this competitive market, VoIP service providers are under intense pressure to ensure that their customers are fully satisfied with their service. Otherwise, they will rapidly lose customers to the multitude of available VoIP providers or their customers will choose traditional wireline telephony. Since unaffiliated VoIP service providers at present do not possess market power nor do they control any access facilities, there is no need for a specialized agency to handle consumer complaints.

4. *What impact might municipally owned wire/wireless networks have?*

Municipally owned wireline and wireless networks foster additional much needed competition in the broadband Internet access marketplace. Many consumers have only one choice for broadband Internet access, while others have the choice of two providers: ILEC provided DSL

---

<sup>13</sup> Order Initiating Proceeding, at 2.

service or cable modem service. This duopoly is not sufficient to create robust price competition and preclude these providers from engaging in abusive practices such as port blocking in order to ensure the dominance of their own affiliated VoIP service providers and their other applications. High-speed Internet access services owned by municipalities, will provide consumers with increased choice in the Internet access market and somewhat constrain the ability of the dominant DSL and cable providers to abuse their power by port blocking and other techniques that will limit a consumer's ability to use the applications and select the content of their choice.

## **B. Universal Service**

### *1. Do the universal service goals articulated in 1996 remain valid in 2005?*

United Online has no comment on this issue at this time.

### *2. Our view that "basic service" should be periodically re-evaluated appears appropriate in view of the expanding use of and reliance on high speed and wireless telecommunications capabilities. Does the existing definition of "basic service" remain appropriate in today's environment?*

United Online has no comment on this issue at this time.

### *3. Although, to date, we have not found a need to establish a universal service funding mechanism to ensure generally affordable rates in "high cost" areas of the state, does that conclusion remain valid as traditional revenue streams are challenged by growing competition, technological advancement, and evolving inter-carrier compensation arrangements?*

United Online has no comment on this issue at this time.

### *4. What approaches should we pursue to ensure the continued availability of affordable basic telecommunications service to all consumers in New York?*

United Online has no comment on this issue at this time.

## **C. Market Power and Regulatory Flexibility**

### *1. The basic issue confronting us today is, given the proliferation of intermodal competition and choices for consumers, what is the appropriate role of the regulator in preventing market power abuses? More particularly, is there sufficient actual and potential competition for retail telecommunications service, including residential basic local telephone service, to prevent a firm from raising its price or providing poor quality service without suffering commensurate competitive losses?*

While intermodal competition has made some progress, the Commission must continue to intervene to preclude market power abuses by ILECs and ensure that consumers have the ability to choose unaffiliated VoIP service offerings based solely on the relative merits of affiliated and

unaffiliated VoIP services. As the Commission acknowledges in “particular, oversight should be exercised where there are significant entry barriers, bottleneck facilities, or inadequate levels of intermodal competition.”<sup>14</sup> As discussed in Section I above, the overwhelming marketplace reality today is that competition in the market for Internet access is limited to a duopoly of ILEC wireline DSL providers and cable modem service providers. These providers have substantial control over bottleneck facilities and every incentive to discriminate in favor of their affiliated VoIP service providers at the expense of unaffiliated providers by engaging in port blocking and other practices as the nascent market for VoIP services steadily grows and eventually challenges traditional telephony.

As suggested in Section I, the Commission should be guided by the four principles recently adopted by the FCC to promote an open and competitive market for VoIP and other information services: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, including the VoIP applications of unaffiliated providers; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers over their chosen Internet access services.<sup>15</sup>

2. *What measure of competition should we consider when determining whether retail pricing flexibility is appropriate? Can the Department's competitive index be used for this purpose?*

United Online has no comment on this issue at this time.

3. *Are the criteria and assigned weights in the Department's competitive index reasonable? In particular, is the VoIP telephone weight reasonable in light of current carrier policies concerning the availability of stand-alone broadband?*

United Online has no comment on this issue at this time.

4. *Can price levels from competitive areas serve as a first level gauge of reasonableness for prices in non-competitive areas?*

United Online has no comment on this issue at this time.

5. *How do we define competitive versus non-competitive areas/markets?*

United Online has no comment on this issue at this time.

---

<sup>14</sup> Order Initiating Proceeding, at 13.

<sup>15</sup> *New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet*, FCC Policy Statement, at 1 (August 5, 2005).

6. Should we allow rates in less densely populated areas to increase to their underlying cost levels?

United Online has no comment on this issue at this time.

**D. Service Quality**

1. How should we adapt our service quality regulation to the marketplace realities?

Subjecting the VoIP services that United Online plans to provide and similar services to service quality regulations would be impracticable, and would frustrate innovation and competition. As discussed in Section I and in the response to question II.A.2. above, the marketplace for VoIP services is characterized by robust competition and the steady introduction of a wide variety of services providing a plethora of features and functions at various pricing points. This stream of innovation is driven by customer preferences and would be impeded by service quality requirements. Competitive demands require that VoIP service providers deliver a product that meets the customer's quality expectations for the particular flavor of VoIP such as peer-to-peer, or computer-driven VoIP, because dissatisfied consumers can readily migrate either to another VoIP provider or direct their business to traditional telephony service providers. Further, in the case of United Online, none of the Company's planned VoIP service offerings are intended to replace traditional wireline telephony services so any service quality obligations developed in that context are wholly inappropriate for United Online's services.

The imposition of service quality standards is impractical because some VoIP services utilize the public Internet while others use a privately managed network and others use a combination of the two approaches. VoIP providers use a wide variety of standards and technologies as compared to providers of traditional telephony. Thus, parameters such as packet loss and latency can be variable between services but still meet customer expectations for the flavor of VoIP service selected by that customer.

Moreover, the VoIP service providers that are not affiliated with ILECs do not control their customer's broadband or dial-up Internet connection and cannot exert end-to-end control over their VoIP service. In the vast majority of cases, service quality issues arise from issues with a customer's underlying Internet connection and not with the VoIP software applications. Accordingly, imposing service quality requirements on VoIP service providers is impractical because United Online and other providers do not control their customers underlying physical Internet connection and have no leverage to negotiate service level agreements with ILECs and cable companies that seek to advance their competing affiliated VoIP service providers.

2. Are output-oriented performance measures still valid as a means of informing consumer choices, and, if so, should they be expanded to include all modes (wired and wireless, VoIP and cable telephony)?

Please see United Online's response to question II.D.1 above.

3. Should proactive service quality performance oversight and enforcement of whatever breadth be limited to less competitive markets or geographic areas? More

importantly, indeed critically, how can this be done in a manner that ensures the overall reliability of the underlying inputs, the interconnected networks themselves?

Please see United Online's response to question II.D.1.

4. Regulatory reform in the area of telecommunications service quality must not compromise the state's economic well-being, security, or safety. How is this done in other critical infrastructure areas (e.g., transportation), and how do those experiences inform us?

United Online has no comment on this issue at this time.

5. Is our performance-centric approach appropriate in an era of intermodal competition, where other service providers (e.g., wireless, VoIP) are not subjected to our regulation?

United Online disagrees with the Commission's underlying assumption that VoIP services are a source of significant intermodal competition. First, if you take the leading unaffiliated VoIP providers in the United States and add all of their customers together, you would have, at most, 2 million customers throughout the entire country compared to *about nine million lines for Verizon in New York alone*.<sup>16</sup> Moreover, a customer seeking to utilize United Online's services must possess either a telephone line (for dial-up access) or a broadband Internet connection. Because United Online and all other unaffiliated VoIP providers do not provide the last-mile facility or broadband Internet access services, they do not constitute an intermodal competitor. The market for Internet access services is largely controlled by a duopoly of wireline dialup or DSL providers and cable companies. This duopoly level of competition is not sufficient to ensure that competition will discipline the behavior of the duopolist, especially with respect to consumer pricing and measures to limit the access of other application service and content providers to their networks.

In addition, the Commission characterizes wireless services, including wireless broadband, as a "widely available" source of intermodal facilities based competition.<sup>17</sup> United Online believes this source of competition should largely be dismissed at present. The two largest wireless carriers in the nation Cingular (*i.e.*, SBC and BellSouth) and Verizon Wireless are controlled by the same RBOCs that dominate the wireline DSL market. Accordingly, the emergence of wireless broadband services will not constitute a meaningful third source of intermodal competition in addition to the duopoly of ILEC provided DSL and cable modem service. Thus, the wholesale market for broadband Internet access services will continue to be dominated by only two modes: telephone companies providing dialup and DSL and as well as cable providers using cable modems for the foreseeable future.

---

<sup>16</sup> *Analysis of the Local Exchange Service Competition in New York State*, Case No. 03-C-1220, at 7 (NY PSC, 2003).

<sup>17</sup> *See, e.g.*, Order Initiating Proceeding, at 17.

6. *If our service quality regulation and reporting were extended to all modalities (wireline and wireless) and all providers (e.g., VoIP and cellular), what, if any, legal constraints apply to extending basic service quality regulation to all modalities?*

As discussed in the Introduction, the FCC's *Vonage Declaratory Order* indicates that state regulation of United Online's planned VoIP service offerings is preempted because these services constitute interstate services. Accordingly, the Commission is precluded from extending its service quality regulations to such services or imposing reporting requirements on such services.<sup>18</sup>

7. *Should we modify, relax, or eliminate performance-based standards in competitive markets?*

As discussed in the Introduction and in response to question II.D.5 above, United Online does not believe that the marketplace for broadband Internet access services is sufficiently competitive to allow for the elimination of the performance-based standards that are currently imposed on providers of traditional telephony. Also, please see United Online's response to question II.D.5 above.

8. *Are performance standards essential to ensure that consumers have access to a reliable, seamless network of networks and, if so, should they be changed?*

As set forth in response to questions II.D.5 and II.D.7, United Online maintains that the Commission's existing performance standards for traditional telephony providers are necessary until a much more competitive market develops. The existing duopoly in residential broadband Internet access services is not sufficiently competitive.

9. *Is reporting based on size still relevant? Should we focus our reporting requirements on less competitive markets or geographic areas?*

United Online has no comment on this question at this time.

10. *Should we continue to allow an exception for carriers that provide service solely by repackaging or reselling another carriers' service?*

United Online has no comment on this question at this time.

11. *Should all carriers be held to a threshold standard for service?*

United Online is an information service provider and is not a carrier. It is unclear whether the Commission's question contemplates the imposition of threshold service standards on VoIP service providers such as United Online. United Online opposes the imposition of threshold standards for service on VoIP service providers because such requirements would be impractical.

---

<sup>18</sup> See *Vonage Declaratory Ruling*, at ¶¶ 1, 32, 46.

ble given the differing implementations of VoIP services, and would stifle innovation, reduce consumer choice, and impede competition in the VoIP services market place as discussed more fully in United Online's response to question II.D.1 above.

12. Are the customer trouble report rate (CTRR) measures still reflective of the quality of service provided to consumers?

United Online has no comment on this question at this time.

13. Are there other more relevant measures than the CTRR?

United Online has no comment on this question at this time.

14. Should a periodic survey of customer satisfaction be used?

United Online has no comment on this question at this time.

15. Is our Public Service Commission (PSC) Complaint Rate Level still relevant?

United Online has no comment on this question at this time.

16. Should we maintain and expand our Commendation Program for excellent service?

United Online has no comment on this question at this time.

17. Parts 602 (Consumer Relations and Operations Management) and 603 (Service Standards) were streamlined in 2000 to better reflect the competitive environment; should these regulations be re-examined in light of the changing market? Is additional streamlining needed?

United Online has no comment on this question at this time.

18. In 1996, we emphasized our duty to know how the state's telecommunication infrastructure varies by region, how that infrastructure compares with the rest of the world's, and how effective competition is in providing services demanded by consumers. The primary vehicle for gathering this information is our requirement for local exchange carriers (LECs) to submit annual construction budgets. Is this information still needed? If so, should it be modified in some fashion? Are there more relevant indicators that we should monitor? Are capital dollars still relevant or should we only consider benchmarks and outputs? Should intermodal competitors contribute data in order for us to gauge the robustness of telecommunication infrastructure in the state?

United Online has no comment on this question at this time.

**E. Level Playing Field**

1. *Recognizing that federal law plays a significant role in numbering administration, should the numbering principles referred to above be equally applicable to new, IP-based numbering solutions?*

United Online embraces many of the numbering principles identified by the Commission and maintains that many of them should be equally applicable to new, IP-based numbering solutions. For example, United Online agrees with the application of the following principles to IP-based numbering solutions: (1) customers should be able to call all valid telephone numbers; (2) telephone numbers are a common resource to be shared among all service providers; (3) control of telephone numbers must shift from the incumbent carriers; and (4) customers and competitors must have access to the telephone numbers and directory listings of all other service providers.<sup>19</sup>

However, at least three of the principles identified by the Commission have little to do with numbering and instead implicate intercarrier compensation policies which are now under review and consideration by the FCC.<sup>20</sup> Specifically, the following Commission principles referenced in the *Order Initiating Proceeding* concern intercarrier compensation: (8) traffic and related data (*e.g.*, billing and routing information) must be exchanged between local exchange carriers; (9) local exchange carriers are entitled to compensation for the cost of the services provided to each other; and (10) compensation charges and rates should be cost-based, uniform, and encourage long-term efficiency.<sup>21</sup>

United Online agrees that rates for intercarrier compensation should be based on incremental costs in order to promote long term efficiency and should be uniform regardless as to whether a service provider has its own facilities. However, these intercarrier compensation policies should be considered independently of numbering policy for IP enabled services. Moreover, to the extent the Commission intends to revisit intercarrier compensation for traffic delivered to ISPs, especially dial-up traffic, such traffic is governed by the FCC's ISP Remand Order.<sup>22</sup> Further, the FCC has characterized the types of VoIP services that United Online intends to introduce as interstate services that are subject to its exclusive jurisdiction, so United Online questions whether the Commission has jurisdiction to adopt intercarrier compensation rules applicable to these services.<sup>23</sup>

---

<sup>19</sup> Order Initiating Proceeding, at 18.

<sup>20</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33 (March 3, 2005).

<sup>21</sup> Order Initiating Proceeding, at 18.

<sup>22</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131, at ¶¶ 77-82 (April 27, 2001) (“ISP Remand Order”).

<sup>23</sup> See *Vonage Declaratory Ruling*, at ¶¶ 1, 32, 46.

2. *Do we need to implement additional number optimization measures in light of the potential demand for numbers by new competitors?*

At present, United Online does not believe that it is necessary for the Commission to adopt additional number optimization measures due to increased demand from VoIP services or other new technologies. While steadily growing, the number of lines or connections provided by VoIP services is relatively small. Further, United Online's planned peer-to-peer service offering does not utilize numbering resources at all, nor does the Company's one-way service. Those customers that take advantage of United Online's two-way service would likely need a second line and thus make use of numbering resources whether it be from United Online, another VoIP provider, or a provider of traditional wireline telephony. In short, the impact on numbering resources should be neutral.

3. *Are the numbers and listing information of IP-based subscribers available generally at reasonable terms, or is this a new bottleneck?*

United Online has no comment on this question at this time.

4. *Are IP-enabled providers able to access the information they require from telephone, cable, and wireless sources to support efficient management of their operations?*

United Online has no comment on this question at this time.

5. *Do gaps in the availability of number portability represent an impediment to choice?*

As discussed in the Introduction above, United Online's three planned VoIP services (peer-to-peer, outbound-only, and two-way VoIP service) are not intended to be replacements for a customer's primary wireline service and are marketed as a second line service, not as a primary service. Accordingly, United Online will not utilize number portability in provisioning the initial implementation of its three VoIP services. However, United Online is interested in ensuring that the processes for porting numbers is efficient so that VoIP services in general are able to attract more users and gain wide consumer acceptance.

To ensure that VoIP service providers are able to compete with providers of traditional telephony on a level playing field, the Commission must adopt rules to establish a more efficient and streamlined number porting process. The existing processes for porting numbers are inefficient and permit ILECs to create impediments and delays. At present each ILEC utilizes its own forms for porting, and most of the processes are manual and highly subject to order entry errors and other mistakes. Further, even though there is a nominal interval of five business days for the porting of a number between wireline carriers in the case of "simple ports," it is not uncommon for a port to take upwards of thirty days. Delays arise, among other reasons, because the processes are needlessly complex and ILECs can define what constitutes a "simple" port to which the five day interval applies, versus a "complex" and "error free" port. Regardless of whether the error is due to the ILEC or the requesting provider, the five day deadline will not apply to a port if an error is found in the request. Thus, the Commission should simplify and streamline the

porting processes and ensure that they are immune from ILEC manipulation in order to establish a level playing field for VoIP and other service providers.

6. Are routing and rating information routinely exchanged, or are carriers exerting dominance to obscure the information necessary to ensure appropriate compensation and efficient network management?

United Online has no comment on this question at this time.

7. Have the FCC's recent rule changes restored an appropriate balance for facilities-based provision or is there more we should and could do?

United Online has no comment on this question at this time.

8. How has the playing field leveled for the state's smaller incumbent carriers? In our original order, we implemented a modified version of the "joint proposal" originally offered by the New York State Telephone Association. That proposal envisioned a gradual change in the relationship among local carriers, under which the incumbents would all gradually transition to a common basis for exchange of traffic and intercarrier compensation that would be symmetrical with the state's competitive local exchange carriers. How is the transition proceeding?

United Online has no comment on this question at this time.

9. Where market dominance persists or emerges for bottleneck facilities or functions that are critical for fair competition, active government oversight must exist. Are the Commission's processes adequate to remedy potential bottleneck issues?

The Commission should adopt regulations that preclude port blocking and other abusive conduct as discussed in the Introduction and Sections II.C.1, II.E.3 and II.E.5 above. Further, the Commission should develop rules to enforce the FCC's four principles for an open Internet to ensure that ILECs and cable companies are unable to use their market power to stifle innovation, reduced consumer choice and impede competition from unaffiliated VoIP service providers. Otherwise, the Commission should avoid imposing unnecessary and potentially burdensome regulations on VoIP providers.

Respectfully submitted,

---

Russell M. Blau  
Ronald W. Del Sesto  
Edward W. Kirsch  
SWIDLER BERLIN LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
Telephone: (202) 424-7500  
Facsimile: (202) 424-7643

Counsel for United Online, Inc.

Dated: August 15, 2005