

The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

Testimony of

Randolph J. May
President
The Free State Foundation

before the
Senate Finance Committee
and the
House Economic Matters Committee
of the
Maryland General Assembly

On
SB 864 and HB 1379

**Voice Over Internet Protocol Service and Internet Protocol-Enabled
Service**

March 20, 2007

The Free State Foundation
10701 Stapleford Hall Dr., Potomac, MD 20854
Tel. 301-299-3182 Fax: 301-299-5007
E-Mail: info@freestatefoundation.org
www.freestatefoundation.org

Mr. Chairman and distinguished Members of the Committee:

Good afternoon. My name is Randolph May, and I am President of The Free State Foundation, an independent, non-profit research and educational institution located in Potomac, Maryland. The Free State Foundation is a think tank that promotes free market, limited government, and rule of law principles in Maryland and throughout the United States. I appreciate the opportunity to present this testimony on cross-filed bills SB 864 and HB 1379.

I have over thirty years of experience working in communications law and policy. I am the co-editor of two academic books on communications policy and the author of over a hundred scholarly law review articles, essays, and commentaries on communications law and policy topics, including dozens on the specific subject of net neutrality. A brief biographical sketch may be found at:

http://www.freestatefoundation.org/images/Randolph_May.Web_Version.doc

And a partial list of my publications may be found at:

<http://www.freestatefoundation.org/images/PublishedWorksofRandyMay.doc>

I am the co-editor of a book published in 2006 by Springer entitled, *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated*, which addresses issues relating to the costs and benefits of regulating broadband Internet services.

SB 864 and HB 1379 are simple but nevertheless very important bills. In essence, they make clear that the Maryland Public Service Commission has no jurisdiction to regulate Voice over Internet Protocol (“VoIP”) and other Internet Protocol-enabled (“IP-enabled”) services. This is a forward-looking, deregulatory approach which constitutes sound policy as well as sound law. Passage of these bills will help establish Maryland as a state with a regulatory climate that is conducive to the development, promotion, and growth of new broadband and Internet-related technologies and businesses.

I. PSC Regulation of VoIP and Other Internet Services Would Be Counterproductive and Harm Consumer Welfare

As a matter of public policy, SB 864 and HB 1379 make sense because VoIP and other IP services are digital broadband applications that are offered in the marketplace on a competitive basis. In this competitive environment, regulation of these services by the Public Service Commission (“PSC”) is unnecessary. Indeed, it would be counterproductive and harm consumer welfare because the costs to consumers imposed by regulation would outweigh any benefits.

VoIP is simply a digital application in voice format, and other Internet Protocol digital applications may be offered in data or video formats. In any event, all of these broadband IP-enabled services are subject to competition among the various broadband

providers, as well as from providers of comparable services still being offered over traditional analog facilities, such as the copper wire which still serves many of Verizon's customers.

Right now the two largest broadband service providers in Maryland, as in most of the nation, are the telephone companies and cable operators. Wireless companies are fast gaining a larger share of the broadband marketplace, offering voice applications, but video and data as well. Satellite operators presently provide some broadband Internet services, with promises of more bandwidth on the way. And the power companies loom on the sidelines as major potential broadband competitors, already offering service on a test basis in several markets. In addition to the facilities-based providers, there are other significant providers of VoIP services, such as Vonage, which rely in whole or in part on the facilities of others to offer their services.

As discussed below, it has been well-established federal policy at least since 2002 for broadband services to exist in a minimally regulated environment, and this remains federal policy today.¹ Maryland's citizens have benefited from this deregulatory environment. The Federal Communications Commission's ("FCC's") most recently released data show that for the year ending June 2006, the number of high-speed broadband lines in Maryland increased 66%, an even more robust figure than the healthy nationwide 52% increase.² The same report showed that 92% of Maryland's zip codes have at least three or more providers of broadband service.³

So, there is no sound policy reason for the PSC to exercise jurisdiction for the purpose of imposing economic regulation over VoIP or any other IP-enabled services that employ broadband connections. To do so almost certainly would inhibit investment and stifle the innovation necessary for the continued robust development of these new broadband services. Conversely, the denial of PSC regulatory jurisdiction will promote the continued investment and innovation that contributes to the further development of an even more robust competitive communications marketplace.

II. In Any Event, PSC Regulation of VoIP and IP-Enabled Services Almost Certainly Would Be Preempted

As stated above, for many years it has been federal policy that broadband Internet services, including VoIP services, should not be subject to public utility-type regulation. In the Telecommunications Act of 1996, Congress declared that it is U.S. policy "to preserve the vibrant and competitive market that presently exists for the Internet and other interactive computer services, *unfettered by federal or state regulation.*"⁴ Under its

¹ See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (2002); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 F.C.C.R. 3019 (2002); Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, 70 Fed. Reg. 60,222 (2005).

² See High-Speed Services for Internet Access: Status as of June 30, 2006, FCC, January 2007, at Table 10, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf

³ *Id.*, at Table 17.

⁴ Communications Act, 47 U.S.C. § 230(b).

authority to implement the federal Communications Act, the FCC already has declared that broadband Internet services are not “telecommunications services” subject to traditional common carrier regulation. Instead they are “information services” which should exist “in a minimal regulatory environment that promotes investment and innovation in a competitive marketplace.”⁵ This determination was affirmed by the Supreme Court in 2005 in the landmark *Brand X* decision.⁶

More particularly, in February 2004 the FCC also declared that computer-to-computer broadband VoIP applications are unregulated information services “subject to federal jurisdiction.”⁷ Especially relevant here, the FCC determined that “consistent with our precedent concerning information services...any state regulations that seek to treat FWD [the computer-to-computer VoIP application] as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of non-regulation.”⁸ With respect to the VoIP service at issue in the *Pulver Declaratory Ruling*, the FCC stated that if it did not preempt state regulation, “we would risk eliminating an innovative service offering that...promotes consumer choice, technological development and growth of the Internet, and universal service objectives.”⁹

Later in 2004, the FCC employed the same reasoning in extending preemption of state regulation to VoIP services that interconnect with the public switched telephone network. When the Minnesota Public Utilities Commission asserted regulatory jurisdiction over Vonage’s DigitalVoice VoIP service, which allows Vonage’s subscribers to originate or terminate calls on the public switched network, the FCC stated: “We find that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota’s regulations would thwart federal law and policy.”¹⁰ The FCC concluded that “preempting the *Minnesota Vonage Order* is compelled to avoid thwarting valid federal objectives for innovative new competitive services like DigitalVoice.”¹¹

Thus, it is almost certain that if the Maryland PSC ever attempted to assert jurisdiction over VoIP or other IP-enabled services, the FCC would promptly preempt such action. Indeed, the Maryland Attorney General’s Office, in the context of examining so-called “net neutrality” regulation, has concluded that state regulation of broadband Internet services almost certainly would be preempted.¹² The instant bills, by stating

⁵ See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (2002).

⁶ National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005).

⁷ Petition for Declaratory Ruling that pulver.com’s Free World Dial-Up Is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, FCC 04-27, February 19, 2004, at para. 8.

⁸ Id., at para. 15.

⁹ Id., at para. 19.

¹⁰ Vonage Holding Corp. Petition for Declaratory Ruling Concerning the Order of the Minnesota Public Utilities Commission, 19 F. C.C.C.R. 22204, 22411 (2004), aff’d, Vonage Holdings Corp. v. Minnesota Public Utilities Com’n, 290 F.Supp. 2d 993 (D. Minn. 2003).

¹¹ 19 F.C.C.R. at 22412.

¹² See Letter to Delegate Mary Ann Love from Assistant Attorney General Kathryn M. Rowe, dated February 27, 2007.

clearly that the PSC “does not have jurisdiction over the regulation of VoIP service or IP-enabled service,” ensure that a completely unnecessary and wasteful expenditure of state resources is avoided by ruling out a federal-state conflict over preemption that the state almost certainly would lose.

III. Conclusion

SB 864 and HB 1379 constitute sound public policy and should be enacted. In light of the technologically dynamic and competitive environment that already exists for broadband services, including the VoIP and other IP-enabled services that are the subject of these bills, assertion of PSC jurisdiction over these broadband services would be unnecessary and counterproductive. Marketplace competition, rather than traditional public utility regulation, will ensure that Maryland’s consumers are protected and receive the highest quality services at the lowest prices. PSC regulation would stifle the investment and innovation which leads to even more vigorous competition.

Moreover, enactment of these bills will ensure there is no conflict with the well-established federal policy favoring a minimally regulated environment for broadband Internet services. By removing uncertainty by stating clearly now that the PSC lacks jurisdiction over such services, the bills avoid time-consuming, costly federal-state conflicts in which resources would be simply wasted in fruitless litigation the state almost certainly would lose. These resources can be put to use much more productive use by the state, broadband providers, and consumers.

The Free State Foundation
10701 Stapleford Hall Dr., Potomac, MD 20854
Tel. 301-299-3182 Fax: 301-299-5007
E-Mail: info@freestatefoundation.org
www.freestatefoundation.org