

Regulatory Considerations for Cable-Provided Voice over Internet Protocol Services

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This paper examines the views of the Federal Communications Commission (“FCC”), state agencies, Congress, and the courts with regard to Voice over Internet Protocol (“VoIP”) services otherwise known as “Internet Telephony,” “IP telephony,” or “IP-Enabled Services.”

I. OVERVIEW OF HISTORICAL AND CURRENT FEDERAL AND STATE REGULATORY TREATMENT OF VOIP SERVICES

Providers of VoIP services historically have not been burdened with the same regulatory obligations imposed upon traditional providers of circuit-switched telecommunications services. VoIP service providers’ avoidance of these burdens rests upon regulatory distinctions established between “telecommunications services” and “information services.”^{1/} Based on these classifications, “telecommunications services,”^{2/} such as basic local telephone service and long distance service, have been subject to all of the trappings of telecommunications regulation. Meanwhile, information services, such as e-mail and Internet access, have flourished free from regulation. IP-Enabled Services -- most of which have been limited to interstate or international services -- avoided regulation through providers’ claims that VoIP service falls into the category of information services.

Over the past year, service providers and equipment vendors have focused their attention on developing VoIP services and products that can provide consumers innovative voice offerings that include local, long distance, and international calling, as well as many enhanced applications that are integrated with the voice application.^{3/} The expansion of VoIP service to incorporate applications that extend to the local market, in particular, has drawn significant attention from regulators and providers of traditional plain old telephone services (“POTS”). This section

^{1/} 47 U.S.C. § 153(20) (defining “information service”). The definition of information services encompasses enhanced services and value added services.

^{2/} 47 U.S.C. §§ 153(43) (defining “telecommunications”); 153(46) (defining “telecommunications service”).

^{3/} VoIP services available today include: multimedia conferencing, which allows multiple users to communicate with one another via voice and video while accessing data sources; high-power call centers, which allow customer service representatives to share data, instant message, and communicate in voice simultaneously in real time; unified messaging, which routes e-mails, faxes, and voicemails to a single unified mailbox; expanded call management and screening, which handles and distributes incoming voice messages and has the potential to convert them to text messages and to page the recipient; availability awareness, which allows end users to specify whether they are free for a voice conversation, for video-conferencing, for e-mail or for gaming; location scheduling, which indicates where communications should be forwarded; and simplified relocation, which permits the user to relocate to another office or city anywhere in the world without significant network reprogramming because the voice-embedded IP configuration data is tied to the end user and not the physical extension. *See, e.g., Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701 (b)(1), and Rule 69.5(b)*, Petition for Forbearance, WC Docket No. 03-266, at 11-14 (filed Dec. 23, 2003) (“Level 3 Forbearance Petition”); Peter Grant, *Ready for Prime Time*, THE WALL STREET JOURNAL, Jan. 12, 2004, at R7 (noting that businesses use VoIP to set up conference calls, to allow employees to route calls to other locations including their homes or their cell phones, and to establish a single directory for voicemail and emails); *see also Verizon Kicks off Massive Overhaul Changes Commit Firm to a New Generation of Net*, THE BOSTON GLOBE, Jan. 8, 2004, at E1 (reporting that Verizon is launching a multibillion-dollar overhaul of its network to provide local VoIP services); *Mid-Day Business Report: Star Business Round Up, Web Phone Rush*, THE KANSAS CITY STAR, Dec. 11, 2003 (reporting that Qwest and SBC are now offering local VoIP services); *Qwest Launches into Internet-based Calls*, USA TODAY, Nov. 5, 2003, at 3B.

provides an overview of the federal and state past and present regulatory policies shaping the future regulatory treatment of VoIP service providers.

A. FCC Actions Relevant to Assessing the Future Regulation of IP-Enabled Services

1. 1998 Report to Congress

In its 1998 *Report to Congress*,^{4/} the FCC analyzed VoIP services. It did so from the perspective of the two distinct classifications set forth in the Communications Act of 1934, as amended,^{5/} for “telecommunications service” and “information service.” The FCC found that IP telephony blurred the line between telecommunications services and information services. Indeed, the FCC found that phone-to-phone VoIP had begun to “resemble traditional basic transmission offerings,” which would require the service to be regulated as a telecommunications service, and noted that “to the extent we conclude that certain forms of ‘phone-to-phone’ IP telephony services should be characterized as ‘telecommunications services,’ the providers of those services would fall within the 1996 Act’s mandatory requirement to contribute to universal service mechanisms.”^{6/} The FCC also stated “certain ‘phone-to-phone IP telephony’ services lack the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services.’”^{7/}

Based on those findings, the FCC tentatively defined the term “phone-to-phone IP telephony” to mean instances in which the provider: (1) held itself out as providing voice telephony or facsimile transmission service; (2) allowed customers to use the same customer premises equipment (“CPE”) (*i.e.*, telephone handsets) used to make voice calls over the public switched telephone network (“PSTN”); (3) permitted calls to ordinary telephone numbers; and (4) transmitted calls without making any net change in form or content.^{8/} These “phone-to-phone” services, the FCC suggested, were the types of IP services that bore the closest resemblance to traditionally regulated telecommunications services. The 1998 *Report to Congress* was the first time the FCC had taken steps to distinguish between the various types of VoIP services (phone-to-phone, computer-to-computer, computer-to-phone, and vice versa) and to discuss how those services compare to traditional telecommunications services.^{9/}

^{4/} *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (“*Report to Congress*”).

^{5/} Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq.* (1996)) (the “Act”).

^{6/} *Report to Congress* ¶ 15.

^{7/} *Report to Congress* ¶¶ 83, 89.

^{8/} *Report to Congress* ¶ 88.

^{9/} The FCC noted that computer-to-computer IP telephony was not a telecommunications service, primarily because vendors who sell the software and hardware needed to make IP voice calls with a computer were merely selling customer premises equipment, not transmission capacity. *See Report to Congress* ¶ 77. Likewise, the FCC determined that Internet service providers (“ISPs”) were not “providing” or “offering” telecommunications services because ISPs were providing a service that typically included storage, retrieval, and manipulation of data, and generally had no way of knowing whether their customers were using Internet access services for transmission capacity to make computer-to-computer voice calls. *See id.* ¶ 87.

Despite the FCC's findings that phone-to-phone VoIP service resembled a telecommunications service, the FCC stopped short of concluding that it *is* a telecommunications service. The FCC concluded that it would be inappropriate "to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings."^{10/} This permitted VoIP services to continue to be free from access charges and other regulatory burdens.

The FCC also said in the *Report to Congress* that it would address the regulatory status of VoIP in upcoming proceedings with more focused records. In February 2004, the FCC adopted a notice of proposed rulemaking ("NPRM") regarding the legal and regulatory framework for IP-Enabled Services, including VoIP, which is discussed below.^{11/}

2. Cable Modem Classification Proceedings

The FCC's 2002 *Cable Modem Ruling*^{12/} is important to the classification of VoIP services provided via a cable modem. The FCC there determined that cable modem service was properly classified as an interstate information service subject to Title I of the Act, not a cable service subject to Title VI of the Act, and that there is no separate offering of telecommunications service by cable modem providers.^{13/} The FCC defined cable modem service, for the purpose of this proceeding, as "a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access."^{14/}

The FCC found that cable modem service as then offered by cable operators was an integrated offering -- the telecommunications component was not separable from the data processing or information service capabilities of the service.^{15/} Cable operators providing cable modem service over their own facilities were not offering telecommunications service to end users; rather they were using telecommunications to provide end users with cable modem service.^{16/}

In the NPRM portion of the *Cable Modem Ruling*, however, the FCC asked for comment on what factors would indicate that a cable operator is offering a stand-alone telecommunications service, what regulations should apply to that service, and whether it would be appropriate to

^{10/} *Report to Congress* ¶ 90.

^{11/} *IP-Enabled Services*, 19 FCC Rcd 4863 (2003) ("*IP-Enabled Services NPRM*").

^{12/} *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Ruling*").

^{13/} *Id.* ¶ 7.

^{14/} *Id.* ¶ 31.

^{15/} *Id.* ¶ 39.

^{16/} *Id.* ¶ 41.

forbear from common carrier regulation where a cable operator was offering a stand-alone telecommunications service to ISPs or subscribers.^{17/} The FCC tentatively concluded that forbearance would be justified because common carrier regulation was not necessary for the protection of consumers or to ensure that rates were just and reasonable and not unjustly or unreasonably discriminatory.^{18/}

Having determined that cable modem service is an interstate information service, the FCC also sought comment on the regulatory implications of that determination. For example, the FCC, recognizing that cable modem service is provided over the facilities of cable systems that occupy public rights-of-way in local communities (and therefore, may be subject to oversight by local franchising authorities), sought comment on how to deal with such local regulations under its information service regime.^{19/} However, it also invited “comment on any other forms of State and local regulation that would discourage investment in advanced communications facilities, or create an unpredictable regulatory environment.”^{20/} The cable industry took the position that the FCC should preempt state and local regulations that attempt to regulate cable modem service or public rights-of-way.^{21/} In contrast, the state and local governments argued that the FCC should not preempt state and local laws, including laws regulating cable modem service, the public rights-of-way, customer proprietary network information, and truth-in-billing.^{22/}

Several groups appealed the FCC’s finding that cable modem service was an interstate information service.^{23/} The case was heard by the Court of Appeals for the Ninth Circuit, which had previously found that cable modem service was both an information service and a telecommunications service (contrary to the FCC’s statements in the *Cable Modem Ruling* that the definitions were mutually exclusive). As a result, the court determined that it was bound by its prior decision and was required to find that cable modem service was both an information service and a telecommunications service.^{24/} The court did not address the substantive aspects of the classification issue, but ruled based on a legal requirement that it could not make a finding that was inconsistent with its prior ruling. The FCC and several cable operators asked the full panel of the Ninth Circuit to rehear the case,^{25/} which was denied by the court.^{26/} The court did,

^{17/} *Id.* ¶ 93.

^{18/} *Id.* ¶ 95.

^{19/} *Id.* ¶¶ 96-108.

^{20/} *Id.* ¶ 99.

^{21/} *See, e.g.*, Comments of AOL Time Warner, Inc. at 8, 12; Comments of Arizona Cable Telecommunications Association at 12, 14-15, 18; Comments of Charter Communications at 18-20.

^{22/} *See, e.g.*, Comments of the Attorney General of Texas at 5-6; Comments of the People of California and the California Public Utilities Commission at 6; City of New York at 6, 17; Comments of the City Council of New Orleans at 4.

^{23/} *Brand X Internet Servs. v. FCC*, Nos. 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, Petition for Review (9th Cir. filed Mar. 22, 2002).

^{24/} *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

^{25/} *Brand X Internet Servs. v. FCC*, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, Petition for Rehearing En Banc of the Federal Communications Commission (9th

however, grant the FCC's request to stay the issuance of mandate in the case pending the FCC's decision to seek Supreme Court review.^{27/} The Solicitor General (on behalf of the FCC) and the cable industry asked the United States Supreme Court to hear the case and overturn the ruling that cable modem service is both a telecommunications and information service. In addition, the state and local governments asked the Supreme Court to hear the case and overturn the ruling that cable modem service is not a cable service. On December 3, 2004, the Supreme Court granted the petitions for certiorari filed by the Solicitor General and the cable industry.^{28/} The Supreme Court, however, did not grant the petition filed by the state and local governments dealing with the classification of cable modem service as a cable service. In response to the Supreme Court's decision, Chairman Powell stated that: "High-speed Internet connections are not telephones, and I'm glad the Supreme Court has agreed to review the Ninth Circuit's ruling that they are."^{29/}

At this time, the Ninth Circuit's decision has little effect on cable-provided VoIP services. Although the classification of cable modem service as an information service may provide an additional layer of regulatory protection to cable-provided VoIP services, VoIP service providers' classification of their VoIP services as information services is not changed by the court's decision.

3. pulver.com Free World Dialup Order

On February 12, 2004, the FCC adopted an order declaring pulver.com's Free World Dialup service to be an interstate information service.^{30/} In 2003, pulver.com filed a petition for declaratory ruling requesting the FCC to rule that its Free World Dialup service is neither telecommunications nor a telecommunications service within the Act's definitions.^{31/} Free World Dialup facilitates point-to-point broadband Internet protocol voice communications and is only provided within pulver.com's network to those customers that subscribe to the service. pulver.com argued that its service does not fit within the statutory definitions of "telecommunications," "telecommunications service," or "information service" because Free World Dialup does not offer subscribers transmission services or telecommunications for a fee. The *pulver.com Order* emphasizes the FCC's long-standing policy of keeping consumer Internet

Cir. filed Dec. 4, 2003); Petition for Rehearing En Banc of the National Cable & Telecommunications Association, Time Warner, Inc., Time Warner Cable, Charter Communications, Inc., and Cox Communications, Inc. (9th Cir. filed Dec. 4, 2003).

^{26/} *Brand X Internet Servs. v. FCC*, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, Order (9th Cir. Mar. 31, 2004).

^{27/} *Brand X Internet Servs. v. FCC*, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, Order (9th Cir. Apr. 9, 2004).

^{28/} *FCC v. Brand X Internet Services; NCTA v. Brand X Internet Services*, Nos. 04-281, 04-277, Certiorari Granted (Dec. 3, 2004).

^{29/} *Chairman Powell Reacts to Supreme Court Cable Modem Decision*, News Release (Dec. 3, 2004).

^{30/} *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004) ("*pulver.com Order*").

^{31/} *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003).

services free from burdensome economic regulation at both the federal and state levels,^{32/} which will be discussed further below.^{33/}

4. AT&T Phone-to-Phone Order

On April 21, 2004, the FCC released an order finding that the phone-to-phone IP telephony service offered by AT&T was a telecommunications service upon which interstate access charges may be assessed.^{34/} In 2002, AT&T filed a petition for declaratory ruling asking the FCC to find that its phone-to-phone IP services were exempt from access charges.^{35/} AT&T argued that incumbent LECs' efforts to impose access charges on this type of traffic violates Congress's goal to preserve the vibrant and competitive free market that exists for the Internet and the FCC's policy established in the *Report to Congress* of exempting all VoIP services from access charges pending the future adoption of nondiscriminatory regulations.

The FCC found that AT&T's service is properly classified as a telecommunications service, and thus, is subject to access charges under the FCC's current rules. The FCC emphasized that its decision was limited to the type of service described by AT&T in its petition. Specifically, the decision is limited to an interexchange service that: 1) uses ordinary customer premises equipment with no enhanced functionality; 2) originates and terminates on the PSTN; and 3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.^{36/} Throughout the decision, the FCC stressed that end users did not receive additional benefits or services from AT&T's IP service because "[e]nd users place and receive calls from their regular touch-tone telephones, use 1+ dialing, and do not subscribe to a service separate from, or pay rates that differ from, those paid for AT&T's traditional circuit-switched long distance service."^{37/} The FCC also noted that the purpose of its decision was to provide clarity to the industry pending the outcome of the FCC's comprehensive *IP-Enabled Services NPRM* and the *Intercarrier Compensation* proceeding, both of which are discussed below.

5. Vonage Order

On November 12, 2004, the FCC issued an order in response to a request by Vonage to preempt an earlier decision of the Minnesota Public Utilities Commission ("PUC"), which is discussed in more detail below. The Minnesota PUC's decision attempted to classify Vonage as

^{32/} *pulver.com Order* ¶ 21.

^{33/} See *infra* Section II.A.

^{34/} *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("AT&T Phone-to-Phone Order").

^{35/} *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, AT&T Petition for Declaratory Ruling, WC Docket No. 02-361 (filed Oct. 18, 2002).

^{36/} *AT&T Phone-to-Phone Order* ¶ 1.

^{37/} *AT&T Phone-to-Phone Order* ¶¶ 18, 17; see also Statement of Chairman Michael K. Powell, FCC 04-97 ("it is important to be guided by the perspective of the consumers that are purchasing service, in determining how a service should be understood").

a provider of “telephone service” and to impose entry, rate, and 911 requirements on Vonage as a condition of offering service in the state.^{38/}

The FCC determined that the Minnesota PUC’s decision should be preempted. The FCC found Vonage’s service could not be separated into interstate and intrastate communications for compliance with Minnesota’s requirements without negating valid federal policies and rules. The FCC reiterated its findings in the *pulver.com Order* that applying the end-to-end analysis to Internet-based services is difficult, if not impossible. While there may be some indirect proxies available to determine jurisdiction (such as NPA-NXX or billing address), the FCC found that these proxies do not fit in the Internet world and would impose substantial costs on Vonage to retrofit its network into the traditional voice service model.

The FCC also found that preemption of the Minnesota PUC’s requirements was consistent with the policies and goals of the Act as set forth in Sections 230 and 706 of the Telecommunications Act of 1996. As discussed below, these provisions dictate that there should be a single national policy for information and Internet-based services.

The *Vonage Order* also extends to IP-enabled services that have the same basic characteristics as Vonage’s service, including: (1) a requirement for a broadband connection from the user’s location; (2) a need for IP-compatible CPE; and (3) a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video. Thus, the FCC concluded that to the extent other entities, such as cable companies, provide services with these characteristics, the FCC would preempt state regulation to an extent comparable to what it did in the *Vonage Order*.

The FCC found that there are fundamental differences between Vonage’s service and the telephone services provided by circuit-switched providers: (1) Vonage customers must have access to a broadband connection to the Internet to use the service; (2) Vonage customers must have specialized CPE; (3) Vonage customers receive a suite of integrated capabilities and features; and (4) the NANP numbers used with Vonage’s service are not tied to the user’s physical location for either assignment or use. The FCC rejected the use of the “functional equivalence” test that the Minnesota PUC appeared to use. If the FCC were to use the test, it would find Vonage’s service to be far more similar to CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment.

The *Vonage Order* did not address whether Vonage's service is a telecommunications service or an information service - those matters are left to the generic IP-Enabled Services proceeding, which is discussed below. In addition, the *Vonage Order* did not express an opinion on the applicability of Minnesota’s general laws governing entities conducting business in the state (such as taxation, fraud, general commercial dealings, marketing, advertising, and other

^{38/} *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*Vonage Order*”).

business practices). With regard to 911 services, the FCC stated that it preempted the Minnesota decision with regard to 911 only to the extent that those requirements were a condition of entry. Similarly, to the extent the Minnesota PUC demands payment of 911 fees as a condition of entry, that requirement is preempted. The FCC, however, stressed that Vonage should not cease its efforts to develop a workable public safety solution and to offer its customers access to emergency services. The FCC stated that these issues would be addressed “as soon as possible, perhaps even separately” in the generic IP-Enabled Services proceeding.

B. Pending FCC Proceedings that May Result in Regulation of IP-Enabled Service Providers

1. IP-Enabled Services NPRM

The FCC held a VoIP Forum in December 2003 to gather information concerning advancements, innovations, and regulatory issues related to VoIP services.^{39/} During the Forum, several commissioners intimated that the FCC will likely continue its “hands-off” approach to regulating VoIP services.^{40/} These comments, coupled with others by the commissioners,^{41/} suggest a recognition of the rapidly changing nature of VoIP services. The FCC also has been conducting “Solutions Summits” on targeted issues such as emergency services, disability access, and compliance with the Communications Assistance for Law Enforcement Act (“CALEA”).^{42/}

In February 2004, the FCC adopted a generic NPRM governing the legal and regulatory framework for IP-Enabled Services, including VoIP services.^{43/} While the NPRM asked many

^{39/} *FCC Announces Agenda for the Voice over IP Forum to be Held on December 1, 2003*, Public Notice, DA 03-3777 (rel. Nov. 24, 2003); *Powell: FCC To Tackle VoIP in NPRM Rather than NOI*, TR DAILY, Oct. 30, 2003; *Powell Tells CES FCC Must Understand and Protect VoIP This Year*, COMMUNICATIONS DAILY, Jan. 12, 2003, at 1-2.

^{40/} Opening Remarks of FCC Chairman Michael K. Powell at the FCC Forum on Voice over Internet Protocol (VoIP) (Dec. 1, 2003) (stating that VoIP should remain as free from economic regulation as possible and that the burden should be on those wanting to apply regulation to the service); Opening Remarks of Commissioner Jonathan S. Adelstein at the Voice over Internet Protocol Forum (Dec. 1, 2003) (remarking that the FCC’s VoIP policy should encourage efficient technologies while protecting the FCC’s other critical initiatives, such as universal service).

^{41/} See Kudlow & Kramer: Interview with Chairman Michael K. Powell, CNBC Television (Nov. 19, 2003) (VoIP communication is “a life-style changing new fantastic technology” and “the most vibrant innovation to come into the American economy, the global economy, in decades, centuries even”); Letter from Chairman Michael K. Powell to Senator Ron Wyden (Nov. 5, 2003) (“VoIP providers are introducing innovations previously unheard of in voice communications, such as the ability to choose from over 100 area codes and to take your number with you anywhere in the world as long as you can access the Internet”); “Accessing the Public Interest: Keeping America Well-Connected,” Remarks of Jonathan S. Adelstein Commissioner, Federal Communications Commission, 21st Annual Institute on Telecommunications Policy & Regulation (Dec. 4, 2003) (“VoIP is one of the most exciting developments in telephony in decades, and promises a new era of competition, new efficiencies, lower prices, and innovative services.”).

^{42/} *FCC Internet Policy Working Group To Hold First “Solutions Summit” on Thursday, March 18, 2004*, News Release (rel. Feb. 12, 2004) (discussing 911 issues); *FCC Internet Policy Working Group To Hold Second “Solutions Summit” on Friday, May 7*, News Release (rel. Mar. 11, 2004) (discussing disability access issues).

^{43/} *IP-Enabled Services*, 19 FCC Rcd 4863 (2003) (“*IP-Enabled Services NPRM*”).

questions regarding the appropriate framework for IP-Enabled Services, the FCC did not offer any tentative conclusions. The FCC recognized that rapid changes in technology will lead to a class of VoIP services that are significantly different from the traditional POTS services to which they were compared in the 1998 *Report to Congress*.^{44/} Accordingly, the FCC asks commenters to categorize and classify different types of IP-Enabled Services based on whether the service is: 1) functionally equivalent to traditional telephony; 2) substitutable for traditional telephony; 3) interconnected with the PSTN and uses North American Numbering Plan numbers; 4) a peer-to-peer service; and 5) a private carriage or common carriage service.^{45/} The FCC also asks commenters to address the proper legal classification and regulatory framework to be applied to each category of IP-Enabled Service and the jurisdictional nature of each type of service. In addition, the FCC specifically asks whether 911/E911, disability access, intercarrier compensation, and universal service obligations should apply to IP-Enabled Services,^{46/} or whether forbearance may be appropriate for some types of services.^{47/}

Comments on the *IP-Enabled Services NPRM* were filed in May and July of 2004. With the exception of the states, some consumer groups, and one competitive LEC, nearly every commenter argued that IP-Enabled Services are interstate services based on either the principles set forth in the FCC's *pulver.com Order*, the mixed-use theory, or the inseparability doctrine. The parties asserted that state authority over IP-Enabled Services must be expressly preempted in order to preserve a national policy for the deregulation of the Internet and Internet-based services. The commenters also argued that allowing states to individually regulate VoIP services would create an unmanageable, unworkable regulatory regime that will thwart continued deployment of IP-Enabled Services. In addition, there was widespread agreement that the FCC should not impose regulations that have the potential to curtail the deployment and investment in new and innovative IP-Enabled Services.

In contrast, there were substantial differences between the parties on the appropriate regulatory framework for IP-Enabled Services with some parties supporting a "layers" model and others supporting a functional equivalence approach. Others used the proceeding to emphasize the need for access to the incumbent LECs' network and proposed that the FCC impose requirements on incumbent LECs with market power, including the duty to provide nondiscriminatory access to loops or other bottleneck facilities. Given the disagreement between the parties and the substantial number of issues raised in the *IP-Enabled Services NPRM*, there has been some speculation that the FCC may rule on individual pieces of the regulatory

^{44/} See, e.g., Separate Statement of Commissioner Kathleen Q. Abernathy (Feb. 12, 2004) ("In the IP world, voice communications, once restricted to a dedicated, specialized network, represent but one application - one species of bits - provided alongside many others."); Separate Statement of Commissioner Jonathan S. Adelstein (Feb. 12, 2004) ("IP. . . is integral to an explosion of choices for consumers, such as phones in PDAs, voice through Instant Messaging-like services, not to mention lower prices on the services we are accustomed to."); see also *Report to Congress* ¶¶ 83-91.

^{45/} *IP-Enabled Services NPRM* ¶¶ 35-37.

^{46/} For IP-Enabled Services provided over wireless or cable, the FCC asks whether Title III or Title VI regulation should apply. See *IP-Enabled Services NPRM* ¶¶ 67-70.

^{47/} *IP-Enabled Services NPRM* ¶¶ 46-48.

framework for IP services rather than release one order addressing all of the issues raised by the NPRM.^{48/}

2. CALEA Petition for Rulemaking and NPRM

In the *IP-Enabled Services NPRM*, the FCC stated that it would consider the application of CALEA to IP-Enabled Services as part of a larger rulemaking request on CALEA to be filed by the Department of Justice (“DOJ”) and Federal Bureau of Investigation (“FBI”) (collectively “Law Enforcement”).^{49/} On March 10, 2004, the DOJ and FBI filed a Petition for Expedited Rulemaking requesting the FCC to initiate a comprehensive rulemaking to resolve various outstanding issues associated with the implementation of CALEA.^{50/} The DOJ and FBI asked the FCC to immediately issue a declaratory ruling finding that CALEA’s definition of “telecommunications carrier” is different than, and broader than, the Act’s definition, and thus, encompasses additional entities, such as broadband access and broadband telephony providers. In the rulemaking request, the DOJ and FBI asked the FCC to adopt rules to ensure that future services also are subject to CALEA and to enforce CALEA packet-mode compliance deadlines and benchmarks. The FBI and the DOJ also urged the FCC to refrain from relying on an industry proposed voluntary compliance regime because under such a regime, Law Enforcement would have no enforcement mechanism against VoIP service providers who do not participate.^{51/}

Numerous parties filed comments in response to the DOJ/FBI CALEA Petition. The vast majority of commenters either opposed the Petition generally or the application of CALEA to the specific type of services they offer. ISPs and VoIP service providers oppose Law Enforcement’s attempts to expand the reach of CALEA to Internet access services, broadband telephony, and broadband access. Most of the commenters focused their arguments on the fact that these services are information services and Congress specifically excluded those services from CALEA’s requirements. In fact, several parties noted that only Congress could expand CALEA as requested by Law Enforcement. Several commenters also supported industry-created standards for VoIP services and other IP-based services rather than mandated standards.

Despite the substantial opposition to Law Enforcement’s request, the FCC issued a NPRM on August 9, 2004 seeking comment on many of Law Enforcement’s proposals.^{52/} In the *CALEA NPRM*, the FCC seeks comment on the definition of “telecommunications carrier” under CALEA, and tentatively concludes that facilities-based providers of any type of broadband Internet access service, including, but not limited to, cable modem, wireline, satellite, wireless, and broadband access via powerline, whether provided on a wholesale or retail basis, are subject

^{48/} Howard Buskirk, *FCC May Break Final VoIP Rulemaking into Easy-to-Digest Pieces*, *Official Says*, TR DAILY, Apr. 14, 2004; *Wireline*, TR Daily, Aug. 10, 2004.

^{49/} *IP-Enabled Services NPRM* at n.158.

^{50/} *Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act*, Joint Petition, RM-10865 (filed Mar. 10, 2004) (“CALEA Petition”).

^{51/} *Ex Parte* Presentation of Federal Bureau of Investigation and Department of Justice, CC Docket Nos. 02-33, 95-20, 98-10, CS Docket No. 02-52 (filed July 11, 2003).

^{52/} *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676 (2004) (“CALEA NPRM”).

to CALEA.^{53/} The FCC also tentatively concludes that providers of VoIP services that are characterized by Law Enforcement as “managed” or “mediated” are subject to CALEA as telecommunications carriers.^{54/} A managed or mediated service includes VoIP services that offer voice communications calling capabilities whereby the VoIP provider acts as a mediator to manage the communications between its end points and to provide call set up, connection, termination, and party identification features, often generating or modifying dialing, signaling, switching, addressing, or routing functions for the user.^{55/} The FCC’s tentative conclusions are based on the FCC’s proposal that these services fall under CALEA as replacements “for a substantial portion of the local telephone exchange service.”^{56/}

The FCC tentatively concludes that broadband Internet access service is a replacement for dial-up Internet access service and that Congress intended such services to be covered under CALEA. The FCC reasoned that, at the time CALEA was enacted, Internet services generally were provided on a dial-up basis, and the local exchange carrier providing that transmission service was subject to the requirements of CALEA.

With regard to VoIP services, the FCC tentatively concludes that VoIP services provide an electronic communication switching or transmission service that replaces a substantial portion of local exchange service for VoIP service customers in a manner functionally the same as POTS service. The FCC also tentatively determines that the public interest - the effect on competition, the development and provision of new technologies and services, and public safety and national security - supports subjecting managed VoIP service providers to CALEA. The FCC did note, however, that its classification of VoIP services for CALEA purposes did not prejudice its classification of VoIP services for regulatory purposes.

Comments on the *CALEA NPRM* were filed in November and December of 2004. The application of CALEA to IP services under current law is discussed below.

3. Wireline Broadband Classification Proceeding

In the 1998 *Report to Congress*, the FCC generally concluded that Internet access services are information services, not telecommunications services.^{57/} The FCC’s 2002 *Wireline Broadband NPRM*^{58/} addressed that issue further, with the FCC tentatively concluding that wireline broadband Internet access services are interstate information services, whether provided over a third-party’s facilities or self-provisioned facilities.^{59/} Significantly, the FCC

^{53/} *CALEA NPRM* ¶ 47.

^{54/} *CALEA NPRM* ¶ 37.

^{55/} *CALEA NPRM* ¶ 37.

^{56/} *CALEA NPRM* ¶ 37.

^{57/} *Report to Congress* ¶¶ 56-82.

^{58/} *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (“*Wireline Broadband NPRM*”).

^{59/} *Wireline Broadband NPRM* ¶ 17.

acknowledged that classifying wireline broadband Internet access service as an information service might affect the obligations traditionally imposed on telecommunications service providers, and sought comment on how its classification would affect those requirements.^{60/}

The only reference in this proceeding to VoIP services occurred in the FCC's discussion on the possibility of imposing universal service obligations on all broadband Internet access providers.^{61/} However, the FCC's discussion was limited to its concern with the universal service implications of traditional services, such as voice traffic, migrating to broadband platforms.^{62/} Specifically, the FCC questioned whether that migration would affect the FCC's ability to support universal service in an equitable and nondiscriminatory manner or whether such migration will lower or raise the cost of providing service to consumers.

4. Universal Service Proceedings

In another 2002 proceeding addressing the methodology for assessing and recovering universal service contributions, the FCC noted that the "accelerating development of new technologies like 'voice over Internet' increases the strain on regulatory distinctions such as interstate/intrastate and telecommunications/non-telecommunications, and may reduce the overall amount of assessable revenues reported under the current system."^{63/} Given the FCC's commitment in the *Report to Congress* "to ensure that financial support for federal universal service support mechanisms [are] maintained,"^{64/} the FCC might subject broadband Internet access services to universal service obligations despite its tentative classification of the service as an information service. A similar result could be expected for VoIP services, even if those services were classified as information services, or classified as telecommunications services for which the FCC chooses to apply a policy of forbearance of most regulations applicable to telecommunications services.

^{60/} *Id.* ¶ 16. Specifically, the FCC asked about the obligations imposed on telecommunications carriers by the Communications Assistance for Law Enforcement Act ("CALEA"), possible obligations imposed by the USA PATRIOT Act of 2001, network reliability requirements, consumer protection requirements (including the process for discontinuing service), privacy restrictions, slamming prohibitions, obligations for serving persons with disabilities, and telecommunications carriers' general unbundling and access requirements. *Id.* ¶¶ 54-59, 61. Thus, despite its tentative conclusion to classify wireline broadband Internet access services as information services, the FCC recognized that some national security, network reliability, and consumer protection obligations might be required to protect the interests of consumers. However, the FCC asked commenters to discuss "whether there are adequate incentives" for providers to protect consumers' interests without the imposition of additional regulation. *Id.* ¶ 60.

^{61/} The FCC sought comment on the application of universal service requirements to *all* facilities-based providers of broadband Internet access services, including wireline, wireless, cable, and satellite. *See Wireline Broadband NPRM* ¶ 79.

^{62/} *Wireline Broadband NPRM* ¶ 82.

^{63/} *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*, 17 FCC Rcd 3752 ¶ 13 (2002) ("*Universal Service NPRM*").

^{64/} *Report to Congress* ¶ 4.

5. Petitions for Declaratory Ruling and Forbearance

Several carriers have filed petitions for declaratory ruling asking the FCC to make a definitive statement regarding the classification of VoIP services. To date, the FCC has taken action on some of those petitions, and has sought comment on several others.

In 1995, a coalition of small interexchange carriers calling themselves America's Carriers Telecommunications Association ("ACTA"), petitioned the FCC to issue a declaratory ruling confirming its authority over interstate and international telecommunications services using the Internet and regulating entities providing VoIP services as common carriers, subject to tariff filing and facilities authorization requirements.^{65/} While ACTA was particularly concerned with long distance services, its petition took a much broader position by asking the FCC to institute a rulemaking "to govern the use of the Internet for providing telecommunications services" because of the "impact on the traditional means, methods, systems, providers, and users of telecommunications services."^{66/} The ACTA petition also proposed potential bases for the FCC's authority to regulate the Internet.^{67/} Predicting the worst, the petition asserted that the "new technology" would be used to circumvent the FCC's rules and regulations to allow "gambling, obscenity, prostitution, drug traffic, and other illegal acts."^{68/} The FCC never acted upon the petition, although in late 1997, then Commissioner Powell told ACTA members that "I believe strongly that I must understand clearly your perspective and have some faith that you are not acting like Chicken Little, crying unnecessarily that the sky is falling."^{69/}

In 1999, US WEST filed a petition asking the FCC to declare that phone-to-phone IP telephony services were telecommunications services and therefore should be subject to the FCC's access charge requirements when they originate or terminate calls using local exchange carrier ("LEC") facilities.^{70/} US WEST argued that long distance carriers providing phone-to-phone VoIP services used precisely the same access service that US WEST provided to long distance carriers circuit-switched facilities. US WEST also claimed that those services transported traffic in the same way as traditional voice services, except for the internal use of a

^{65/} *In the Matter of the Provision of Interstate and International Interexchange Telecommunications Service via the "Internet" by Non-tariffed, Uncertified Entities*, RM 8775, Petition for Declaratory Ruling and Institution of Rulemaking, (filed March 4, 1995) ("ACTA Petition").

^{66/} ACTA Petition at i, 4.

^{67/} ACTA Petition at 10; *see also* 47 U.S.C. § 151.

^{68/} ACTA Petition at 10.

^{69/} *Speech of Commissioner Michael K. Powell* before the America's Carriers Telecommunications Association, McLean, VA (Dec. 15, 1997).

^{70/} *Petition of US WEST, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony*, Petition for Expedited Declaratory Ruling (filed April 5, 1999) ("US WEST Petition"). In late 1998, both BellSouth and US WEST reportedly asked the FCC to consider using its accelerated complaint procedures to determine whether Qwest's long distance phone-to-phone voice services using IP technology should be subject to the payment of access charges. Neither carrier filed such a complaint. Qwest's quarterly financial statements, in which it publicly stated that it was not paying access charges for phone-to-phone VoIP services, may have prompted the April 1999 US WEST Petition. *See* Qwest Communications International, Inc., Form SEC 10-Q, at 18-19 (May 13, 1999). After the announcement of its acquisition of US WEST, however, Qwest's quarterly financial statement no longer contained a reference to phone-to-phone VoIP service.

packet-switched protocol that does not involve a net change in the form or content of the traffic. The FCC never issued a public notice requesting comment on US WEST's Petition.

In December 2003, Level 3 asked the FCC to forbear from applying access charges to VoIP traffic to the extent the FCC's rules could be interpreted to impose access charges on such traffic.^{71/} Level 3 argued that forbearance is in the public interest because it will bring an end to the current legal uncertainty as to whether access charges apply to VoIP services originating and/or terminating on the PSTN while the FCC completes its review of a uniform intercarrier compensation regime. The FCC sought comments on Level 3's petition,^{72/} and is required to issue a decision by March 2005.^{73/}

Also in December 2003, BellSouth filed a petition for declaratory ruling asking the FCC to find that state commissions may not regulate broadband Internet access services by requiring BellSouth to provide wholesale or retail broadband services to voice service customers of competitive LECs using unbundled network elements ("UNEs").^{74/} BellSouth argued that state commission decisions requiring the provision of broadband Internet access to competitive LEC UNE voice service customers impose state regulation on interstate information services in contravention of the FCC's *Computer Inquiry* decisions and that state commission decisions specifying the terms and conditions under which incumbent LECs provide federally tariffed broadband transmission either on its own or as part of a broadband information service intrude on the FCC's exclusive authority over interstate telecommunications. The FCC sought comments on Level 3's petition, but has not issued a decision. While this proceeding does not directly address the treatment of VoIP, it does require a review of the classification, jurisdictional, and regulatory treatment of certain broadband services. The findings in connection with this proceeding could prove pertinent to the classification and jurisdictional issues confronting VoIP services.

In February 2004, SBC filed a petition for declaratory ruling asking the FCC to declare that its IP platform service is an interstate information service.^{75/} SBC argued that the FCC should use its ancillary authority to tailor specific regulatory requirements for the IP platform service, but should not impose the full panoply of common carrier regulation on the service. In

^{71/} *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701 (b)(1), and Rule 69.5(b)*, Petition for Forbearance, WC Docket No. 03-266 (filed Dec. 23, 2003) ("Level 3 Forbearance Petition").

^{72/} *Pleading Cycle Established for Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications*, Public Notice, DA 04-1 (rel. Jan. 2, 2004).

^{73/} *Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. Section 160(c) from Application of Section 251(g) of the Communications Act of 1934, as Amended, the Exception Clause of Section 51.701(b)(1) of the Commission's Rules, and Section 69.5(b) of the Commission's Rules*, Order, DA 04-3323 (rel. Oct. 21, 2004).

^{74/} *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket No. 03-251, Emergency Request for Declaratory Ruling (filed Dec. 9, 2003).

^{75/} *Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services*, Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-29 (filed Feb. 5, 2004).

addition, SBC filed a petition for forbearance from the application of traditional common carrier regulation to its IP platform service.^{76/} The FCC sought comments on SBC's petition for declaratory ruling, but has not issued a decision.^{77/} The FCC also sought comment on SBC's petition for forbearance, and is required to issue a decision by May 2005.^{78/}

C. State Regulation of IP-Enabled Services

Several states have begun to consider the question of how -- or whether -- they should regulate VoIP services. Some states have found few differences between IP-based voice services and traditional circuit-switched voice services.^{79/} Pending a definitive ruling from the FCC on the classification of VoIP services, states believe they remain free to make their own determinations regarding the level of regulation applicable to IP-Enabled Services.

1. Minnesota

In August 2003, the Minnesota Public Utilities Commission ("PUC") ruled that the VoIP service provided by Vonage constituted a "telephone service" under Minnesota law and ordered Vonage to comply with state law by seeking a Certificate of Public Convenience and Necessity ("CPCN"), filing a 911 plan, and submitting tariffs.^{80/} The PUC closely examined the service provided by Vonage and concluded that "Vonage is offering two-way communication that is functionally no different than any other telephone service."^{81/} In addition, the PUC found that it could exercise jurisdiction over Vonage as a company providing telephone service within Minnesota because there is no "federal law that preempts state law with respect to telephone services provided using VoIP technology."^{82/}

^{76/} *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, SBC Communications Inc. Petition for Forbearance, WC Docket No. 04-29 (filed Feb. 5, 2004).

^{77/} *Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to "IP Platform Services,"* Public Notice, DA 04-360 (rel. Feb. 12, 2004).

^{78/} *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Order, DA 04-3844 (rel. Dec. 7 2004).

^{79/} *See, e.g.,* Docket No. 00-00309, *Petition of MCI Metro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with Bellsouth Telecommunications, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Interim Order of Arbitration Award, at 23 (Tenn. R.U.C. Apr. 3, 2002) (finding that calls using IP technologies should be treated the same as circuit-switched traffic and be subject to the FCC's rules for intercarrier compensation, regardless of whether the call is data or voice), *upheld by* Final Order of Arbitration Award (Tenn. R.U.C. Apr. 24, 2002).

^{80/} Docket No. P-6214/C-03-108, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance (Minn. P.U.C. Sept. 11, 2003).

^{81/} *Id.* at 8.

^{82/} *Id.*

Vonage appealed the decision to a Minnesota federal district court and sought a preliminary injunction to stop implementation of the Minnesota PUC's order pending review by the court. On October 16, 2003, the Minnesota court granted Vonage a permanent injunction.^{83/} The court concluded that Vonage is an information service provider and that information services such as those provided by Vonage must not be regulated by state law. The court found that state regulation would effectively decimate Congress's mandate that the Internet remain unfettered by regulation. The Minnesota PUC asked the court to reconsider its decision.^{84/} The court denied this request in January 2004, finding that the PUC did not provide an adequate basis for reconsidering the decision.^{85/}

The Minnesota PUC has appealed the federal court's decision to the United States Court of Appeals for the Eighth Circuit stating that it "respectfully disagrees" with the district court's finding that because Vonage uses the Internet, it provides an information service.^{86/} In April 2004, the FCC filed an amicus brief urging the court to refrain from ruling until the FCC completes its pending proceedings in which the FCC plans to address "Vonage's regulatory status in particular and the regulatory status of Internet telephony services more generally."^{87/} The FCC noted that there is a public interest in ensuring that courts have the benefit of the FCC's considered views regarding federal and state authority over IP services.^{88/} In addition, as discussed above, Vonage filed a Petition for Declaratory Ruling with the FCC seeking to have the Minnesota PUC's decision preempted,^{89/} which was granted by the FCC. Although the FCC granted Vonage's preemption petition prior to oral argument, the Eighth Circuit refused to delay oral arguments. Thus, the appeal remains pending.

2. California

In February 2004, the California PUC instituted a proceeding to investigate the status of VoIP.^{90/} The PUC's preliminary analysis suggests that the functional nature of the service, rather

^{83/} *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F. Supp. 2d 993, 994 (D. Minn. 2003).

^{84/} *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, Civil No. 03-5287, Motion for Amended Findings of Fact, Conclusions of Law, and Judgment, or in the Alternative, a New Trial including the Taking of Additional Testimony (MJD/JGL) (Minn. D. Ct. filed Oct. 30, 2003).

^{85/} *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, Civil No. 03-5287 (MJD/JGL), Memorandum and Order (Minn. D. Ct. Jan. 14, 2004).

^{86/} *Minnesota Public Utilities Commission v. Vonage Holdings Corp.*, No. 04-1434, Notice of Appeal (8th Cir. filed Feb. 13, 2004); see also *Minnesota PUC Appeals VoIP Ruling*, TR DAILY, Feb. 15, 2004.

^{87/} *Minnesota Public Utilities Commission v. Vonage Holdings Corp.*, No. 04-1434, Brief of the United States and the Federal Communications Commission as *Amicus Curiae* (8th Cir. filed Apr. 21, 2004).

^{88/} Margaret Boles, *FCC Urges Court to Hold Off on Ruling in Minnesota VoIP Case*, TR DAILY, Apr. 21, 2004.

^{89/} *In the Matter of Vonage Holding Corporation's Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Petition for Declaratory Ruling (filed Sept. 22, 2003).

^{90/} Investigation No. 04-02-007, *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Order Instituting Investigation (adopted Feb. 11, 2004).

than the technology used to deploy the service, will determine whether the service qualifies as a public utility service under California law. As a result, the PUC tentatively concludes that VoIP services interconnected with the PSTN qualify as public utility telecommunications services. The PUC is seeking comment on that conclusion and is looking at the impact of VoIP on universal service programs, access charges, public safety, consumer protection (customer privacy, notice for discontinuance of service, cramming and slamming), and numbering resources.

In 2003, the California PUC sent letters to several VoIP service providers in the state, which directed the VoIP service providers to register with the PUC as competitive LECs by a certain date.^{91/} All six providers that received letters declined to register and maintained that the services they provide are information services, not telecommunications services, and therefore are not under the California PUC's jurisdiction.^{92/} One commissioner, Susan Kennedy, publicly has disagreed with the PUC's position on this issue and has argued that VoIP should be permitted to evolve without rules.^{93/}

In addition, the California PUC initiated a rulemaking proceeding in December 2002 to amend its service quality standards.^{94/} The California PUC sought comment on applying its service quality rules "to any intrastate telecommunications service, including any services using Internet Protocol (IP) telephony." The PUC stated, "Anticipating this emerging technology, we intend for the rules we adopt in this proceeding to apply to similar services regardless of the technology used to provide the service. We seek comment on whether the measures and standards proposed for telecommunications services using traditional technologies are adequate and appropriate for application to services that use IP telephony. We seek comment on whether additional measures are needed for telecommunications services offered over an IP platform."^{95/}

The California PUC also found in 2002 that, despite the FCC's determination that Digital Subscriber Line service ("DSL") is interstate in nature, the California PUC has concurrent jurisdiction with the FCC over DSL transport service and thus can exercise jurisdiction over certain aspects of the service.^{96/} The California PUC reasoned that DSL transport involved both interstate and intrastate applications, and that there was no "clear and manifest" congressional intent to preempt all state authority over those services.

^{91/} Ben Charny, *California To License VoIP Providers*, CNET News.com, Sept. 30, 2003.

^{92/} Gayle Kansagor, *VoIP Service Providers Decline to Seek California Certification*, TR DAILY, Oct. 23, 2003.

^{93/} Susan Kennedy, *Let Internet Phone Service Evolve Without Rules*, MERCURY NEWS, Nov. 3, 2003.

^{94/} Rulemaking No. 02-12-004, *Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B.R.*, Order Instituting Rulemaking into the Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B (Cal. P.U.C. Dec. 5, 2002).

^{95/} *Id.*

^{96/} Case No. 01-07-207, *California ISP Association, Inc., Complainant v. Pacific Bell Telephone Company; SBC Advanced Solutions, Inc., Defendants*, Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion to Dismiss (Cal. P.U.C. Mar. 28, 2002) ("*California DSL Decision*").

Specifically, the California PUC relied on Section 414 of the Act,^{97/} which, in its view, permits states to exercise “their traditional police powers to safeguard consumer health, safety and welfare and to enforce their own laws with regard to interstate services provided to California customers, particularly where the state laws address misrepresentations to consumer and other marketing practices.”^{98/} Moreover, because the California PUC found that the FCC’s end-to-end analysis had “been questioned” by the courts, it chose not to rely on such an analysis, which would have supported the complete preemption of the California PUC’s jurisdiction over DSL transport.^{99/} While the California PUC’s decision did not address VoIP service, it does illustrate how a state might seek to invoke concurrent jurisdiction even where the FCC determines a service to be interstate in nature.

3. New York

In late 2003, the New York Public Service Commission (“PSC”) asked for comment on a complaint filed by Frontier against Vonage.^{100/} Frontier claimed that Vonage was in violation of the New York Public Service Law by offering telephone service in the state of New York without authorization from the PSC. Frontier also argued that Vonage’s service threatens public safety and consumer welfare because Vonage does not offer reliable access to 911 emergency services.

In May 2004, the New York PSC determined that Vonage is a telephone corporation as defined by the New York Public Service Law and, therefore, must obtain a CPCN.^{101/} The PSC emphasized that it intended only to apply minimal regulations to Vonage to ensure that it did not interfere with the rapid, widespread deployment of new technologies. At the same time, however, the PSC stated that it must ensure that its core public interest concerns, including public safety and network reliability, are met. Thus, the PSC determined that Vonage should be subject to, at most, the same limited regulatory regime that is applied to comparable competitive carriers in New York.

As it did in response to a similar decision from the Minnesota PUC, Vonage appealed the New York PSC’s decision to a federal district court in New York. In July 2004, the federal district court issued a preliminary injunction of the PSC’s decision.^{102/} The court’s order states

^{97/} 47 U.S.C. § 414 (“Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this Act are in addition to such remedies.”).

^{98/} *California DSL Decision* at 8-9.

^{99/} *Id.* at 9-10.

^{100/} Case 03-C-1285, *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provisions of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Notice Requesting Comments (N.Y.P.S.C. Oct. 9, 2003).

^{101/} Case 03-C-1285, *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provisions of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation (N.Y.P.S.C. May 21, 2004).

^{102/} *Vonage Holdings Corporation v. New York State Public Service Commission, et al.*, 04-CV-4306, Preliminary Injunction Order (S.D.N.Y. July 16, 2004).

that during the pendency of the injunction, Vonage will make “reasonable good faith efforts” to participate in PSC industry-wide workshops pertaining to service reliability of VoIP providers and shall provide the PSC with a contact person in the event of network outages. The order also states that Vonage will make “reasonable good faith efforts” to participate in PSC industry-wide workshops pertaining to 911. The injunction does not preclude the PSC from receiving complaints from Vonage customers, referring those complaints to Vonage, and offering to provide non-binding mediation. The order also states that Vonage’s voluntary cooperation does not subject Vonage to any New York laws, regulations, or rules applicable to telephone corporations.

In 2002, the New York PSC also issued a decision in a complaint proceeding between two carriers, finding that a provider of services using VoIP technology was subject to access charges because it was providing a telecommunications service, not an information service.^{103/} Although the New York PSC relied heavily on the FCC’s analysis of VoIP services in the FCC’s *Report to Congress*, the New York PSC chose to subject US DataNet to intrastate access charges, despite the FCC’s decision to refrain from subjecting VoIP service providers to access charges or any other regulatory requirements.

The *US DataNet Decision* has limited precedential value. The New York PSC expressly noted that this issue was part of a specific complaint proceeding involving US DataNet’s service and did not constitute a general policy ruling.^{104/} Nonetheless, the *US DataNet Decision* and other similar state decisions raise two issues for the FCC to consider: whether state regulation of *intrastate* long distance VoIP services interferes with the promotion of its national broadband policies, and whether VoIP service should ever be considered intrastate. Relevant to the FCC’s consideration of these issues was the FCC’s inquiry in its 2001 *Intercarrier Compensation NPRM* of whether all intercarrier compensation arrangements are within its jurisdiction, including intrastate access charges.^{105/} In the 2002 AT&T Petition for Declaratory Ruling proceeding before the FCC, the New York PSC argued that the findings of its *US DataNet Decision* should be followed.^{106/} In addition, many commenters in the Vonage/Frontier proceeding attempted to distinguish the *US DataNet Decision* and argued that the four-part test set forth in the FCC’s *Report to Congress* made clear that Vonage’s service is an information service.

^{103/} Case 01-C-1119, *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Order Requiring Payment of Intrastate Carrier Access Charges (N.Y.P.S.C. May 31, 2002) (“*US DataNet Decision*”).

^{104/} *US DataNet Decision* at 9.

^{105/} *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶¶ 121-22 (2001) (“*Intercarrier Compensation NPRM*”) (seeking comment on the FCC’s legal authority and responsibility to ensure that all access charges, including intrastate access charges, are subject to the same compensation regime).

^{106/} Comments of New York Public Service Commission on AT&T Petition for Declaratory Ruling, at 4 (filed Dec. 18, 2002).

4. Florida

The Florida Public Service Commission has made conflicting statements on the regulation of VoIP services. In one instance, in the context of an interconnection arbitration, the Florida PSC determined that the definition of switched access traffic should include IP-based services, and included VoIP services within the definition of services subject to access charges.^{107/} On the other hand, in a generic proceeding to review its compensation rules for all services, the PSC deferred a definitive ruling on VoIP services stating that “a broad sweeping decision on this particular issue would be premature at this time.”^{108/}

Similarly, the PSC refused to review a petition for declaratory ruling by CNM Networks, Inc. that phone-to-phone VoIP was not telecommunications under Florida law.^{109/} The Florida PSC found that the issue was pending review before the FCC and it would defer to the outcome of that proceeding. The PSC did, however, direct the staff to “conduct a[n] undocketed workshop to explore the issue of phone-to-phone IP telephony,” which was held in January 2003.^{110/}

5. Colorado

In 1999, US WEST (now Qwest) filed a petition with the Colorado Public Utilities Commission regarding the application of access charges to VoIP services.^{111/} The PUC never reached the merits of US WEST’s arguments.^{112/} Qwest then took the issue to the Colorado state courts. In response, the Colorado District Court for the City and County of Denver concluded in 2001 that VoIP service providers should be subject to switched access charges.^{113/} Despite the court’s decision, in a series of interconnection arbitration decisions, the PUC repeatedly found

^{107/} Docket No. 991854-TP, *Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Final Order on Arbitration, Order No. PSC-00-1519-FOF-TP (Fla. P.S.C. Aug. 22, 2000) (including phone-to-phone IP telephony in the definition of switched access traffic).

^{108/} Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Amendatory Order, Order No. PSC-02-1248A-FOF-TP, at 34 (Fl. P.S.C. Sept. 12, 2002).

^{109/} Docket 021061-TP, *Petition of CNM Networks, Inc. for Declaratory Statement that CNM's Phone-to-Phone Internet Protocol (IP) Telephony Is Not "Telecommunications" and that CNM Is Not A "Telecommunications Company" Subject to Florida Public Service Commission Jurisdiction*, Order Denying Petition for Declaratory Statement, at 3 (Fl. P.S.C. Dec. 31, 2002).

^{110/} *Staff Workshop: Voice over Internet Protocol* (Fla. P.S.C. Jan. 27, 2003).

^{111/} Docket No. 99F-141T, *US WEST Communications, Inc. v. Qwest Communications Corporation*, US WEST Communications, Inc. Complaint for Declaratory Judgment (Colo. P.U.C. filed April 2, 1999).

^{112/} Docket No. 99F-141T, *US WEST Communications, Inc. v. Qwest Communications Corporation*, Order Dismissing Case and Closing Docket, Decision No. C99-1051 (Colo. P.U.C. Sept. 15, 1999).

^{113/} *Qwest Corp., Inc. v. IP Telephony, Inc. d/b/a Mountain Solutions Telecom Group, Inc.*, Case No. 99-CV-8252, Order (Dist. Ct. Denver Jan. 12, 2001).

that VoIP services should not be included in the definition of switched access service and should not be subject to access charges.^{114/}

More recently, the Colorado PUC officially closed its generic investigation on VoIP services.^{115/} The PUC concluded that “[b]ecause of the legal uncertainty of whether a state may regulate VoIP services, as well as the host of policy issues involved with VoIP, we believe the most prudent course is to take no action with respect to VoIP pending FCC action.”^{116/} The Chairman of the Colorado PUC also called on VoIP service providers to seek free market solutions to intercarrier compensation and 911 service issues and urged them to negotiate service agreements “to show they are good corporate citizens and to show that traditional regulation is not necessary.”^{117/} The PUC also directed the staff to continue to monitor the FCC proceedings and comments made by parties related to VoIP.

6. Other States

Several other states have examined the issue of regulating VoIP services. For example, in 1999, the South Carolina Public Service Commission established a generic docket to examine the issue of VoIP services, but because it was concerned about the far-reaching implications of such a proceeding it voted to hold the matter in abeyance.^{118/} The Nebraska Public Service Commission, on its own motion, also opened a docket in 1999 to determine what types of services would be included in the definition of VoIP, as well as the responsibilities VoIP service providers have to consumers, and concluded that, “because IP telephony does not place the same burdens upon the network as does traditional switched telecommunications, the obligations of its providers should not be the same.”^{119/}

^{114/} See, e.g., Docket No. 00B-601T, *Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(B) of The Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Initial Commission Decision, Decision No. C01-312, at 30-31 (Colo. P.U.C. Mar. 16, 2001) (finding that the functionality and network use of VoIP service is different than circuit-switched technology, and therefore, should not be subject to access charges), upheld by Decision on Applications for Rehearing, Reargument, or Reconsideration, Decision No. C01-477 (Colo. P.U.C. May. 1, 2001).

^{115/} Docket No. 03M-220T, *Investigation into Voice Over Internet Protocol (VoIP) Services*, Order Closing Docket (Colo. P.U.C. Dec. 17, 2003).

^{116/} *Id.* at 1-2.

^{117/} *Id.* at 8. Chairman Sopkin also stressed that the policy implications of VoIP are “dramatic” and said the “nascent VoIP industry should not be subject to death-by-regulation, which could well occur by having 51 state commissions imposing idiosyncratic, inconsistent, and costly obligations.” See *id.* at 3.

^{118/} Docket No. 98-651-C, *Generic Proceeding to Review Voice Over the Internet (IP Telephony)*, Order Holding Matter in Abeyance, Order No. 1999-183 (S.C.P.S.C. Mar. 10, 1999).

^{119/} Application C-1825/PI-21, *Application of the Nebraska Public Service Commission on its Own Motion, Seeking to Conduct an Investigation Into the Effects of Internet Telephony on the Telecommunications Industry in Nebraska*, Order (Neb. P.S.C. Sept. 28, 1999); see also Docket 27385, *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc.*, Pursuant to Section 252(b) of the Telecommunications Act of 1996, Order, at 33-34 (Ala. P.S.C. May 21, 2001) (concluding that VoIP should not be included in the definition of switched access traffic because the FCC had not addressed the classification of VoIP).

More recently, the Public Utilities Commission of Ohio, the Washington Utilities and Transportation Commission, the Pennsylvania Public Utilities Commission, the Alabama Public Service Commission, the Utah Public Service Commission, Missouri Public Service Commission, the North Dakota Public Service Commission, and the Michigan Public Service Commission have initiated generic proceedings to consider the regulation of VoIP service providers operating within their states and the jurisdictional issues raised by VoIP services.^{120/} In addition, Florida, Illinois, and Tennessee have held workshops to investigate the status of VoIP.^{121/}

Several state commissions have been forced to look at the VoIP issue as a result of filings made by Time Warner Cable Information Services, LLC (“Time Warner Cable”) seeking to become certified as a VoIP service provider in the state. The Kansas Corporation Commission permitted SBC to intervene in Time Warner Cable’s Kansas application proceeding because SBC was concerned the proceeding might become a vehicle for setting policy on VoIP regulation.^{122/} The Kansas commission later granted Time Warner Cable’s application and explicitly stated that the grant of authority was made without determining whether the services provided by Time Warner Cable are subject to Kansas’ jurisdiction. The Kansas commission found that the question of whether it has jurisdiction over Time Warner Cable’s services should be reserved until the FCC addresses the issue.^{123/} The Missouri PSC likewise determined that Time Warner Cable’s application did not “necessitate a general discussion of VoIP,” and thus, withdrew “concerns regarding VoIP” from the proceeding.^{124/} Similarly, the Texas PUC denied motions to intervene in Time Warner Cable’s Texas certification proceeding because the PUC was “merely considering the application of Time Warner Cable for an SPCOA [certificate of authority], not

^{120/} Case No. 03-950-TP-COI, *In the Matter of the Commission’s Investigation into Voice Services Using Internet Protocol*, Entry (Pub. Utils. Comm’n Ohio. Apr. 17, 2003); Docket No. UT-030694, *Staff Investigation re: Voice over Internet Protocol (VOIP)* (Wash. Utils. Trans. Comm’n May 13, 2003); Docket No. M-00031707, *Investigation into Voice over Internet Protocol as a Jurisdictional Service*, Order (Pa. P.U.C. May 1, 2003); Docket No. 29016, *In re: Petition for Declaratory Order Regarding Classification of IP Telephony Service*, Order Establishing Declaratory Proceeding (Ala. P.S.C. Aug. 2003); Docket No. 04-999-02, *Regulation of Voice over the Internet Telephone Service (VoIP)*, Order Opening Docket (Utah P.S.C. Jan. 22, 2004); Case No. TW-2004-0324, *In the Matter of a Study of Voice over Internet Protocol*, Order Establishing Case (Mo. P.S.C. Feb. 3, 2004); Case No. PU-2967-03-666, *BEK Communications Cooperative, et al. v. Smartnet, Inc. d/b/a CallSmart*, Complaint (N.D.P.S.C. filed Nov. 25, 2003); Case No. U-14073, *Commission’s Own Motion to Commence an Investigation into Voice over Internet Protocol Issues in Michigan*, Order Commencing Investigation (Mi. P.S.C. Mar. 16, 2004).

^{121/} *Staff Workshop: Voice over Internet Protocol* (Fla. P.S.C. Jan. 27, 2003); *Workshop: Regulatory Issues – Local Voice Services Delivered over Packet Switched Networks* (I.C.C. May 8, 2003); *VoIP – A New Day in Telecommunications* (Tenn. R.U.A. Apr. 30, 2004).

^{122/} Docket No. 04-TWRT -244-COC, *In the Matter of Application of Time Warner Cable Information Services (Kansas) LLC for a Certificate of Convenience and Authority to Provide Local Voice Service within the State of Kansas*, Order Granting Southwestern Bell Telephone, L.P.’s Petition to Intervene (K.C.C. Jan. 2, 2004).

^{123/} Docket No. 04-TWRT -244-COC, *In the Matter of Application of Time Warner Cable Information Services (Kansas) LLC for a Certificate of Convenience and Authority to Provide Local Voice Service within the State of Kansas*, Order and Certificate (K.C.C. Feb. 3, 2004).

^{124/} Case No. LA -2004-0133, *In the Matter of the Application of Time Warner Cable Information Services (Missouri), LLC for a Certificate of Service Authority to Provide Local and Interexchange Voice Service in Portions of the State of Missouri and to Classify Said Services and the Company as Competitive*, Order Setting Prehearing Conference (Mo. P.S.C. Dec. 30, 2003).

an in-depth examination of VoIP regulation.”^{125/} The Texas PUC later approved Time Warner Cable’s application to provide VoIP services in the state.^{126/} The Ohio Public Utilities Commission considered similar requests to intervene in Time Warner Cable’s application proceeding there.^{127/} The Ohio commission ultimately found that Time Warner Cable could offer its services pending the outcome of Ohio’s generic VoIP proceeding.^{128/} Time Warner Cable also was granted authority in California and South Carolina.^{129/}

When presented with the classification of VoIP in the context of interconnection agreement arbitrations, the North Carolina Utilities Commission, the Alabama Public Service Commission, and the Kentucky Public Service Commission declined to determine whether VoIP service should be included in the definition of switched access traffic until the service was defined with some certainty or some definitive statement was made by the FCC.^{130/}

^{125/} Docket No. 28303, *Application of Time Warner Cable Information Services (Texas), L.P., d/b/a Time Warner Cable for a Service Provider Certificate of Operating Authority*, Order No. 4 Denying Motions to Intervene, and Directing Staff to File Recommendation (Tex. P.U.C. Nov. 25, 2003).

^{126/} Docket No. 28303, *Application of Time Warner Cable Information Services (Texas), L.P., d/b/a Time Warner Cable for a Service Provider Certificate of Operating Authority*, Notice of Approval (Tex. P.U.C. Dec. 17, 2003).

^{127/} Case 03-2229-TP-ACE, *In the Matter of the Application of Time Warner Cable Information Services (Ohio), LLC to Offer Local and Interexchange Voice Services*, Application for Certificate (Pub. Utils. Comm’n Ohio filed Nov. 5, 2003). Time Warner asked for numerous waivers of the Ohio rules governing telephone providers, including the discontinuance and presubscription rules. See Case 03-2229-TP-ACE, *In the Matter of the Application of Time Warner Cable Information Services (Ohio), LLC to Offer Local and Interexchange Voice Services*, Request for Waivers (Pub. Utils. Comm’n Ohio. filed Nov. 5, 2003).

^{128/} Case 03-2229-TP-ACE, *In the Matter of the Application of Time Warner Cable Information Services (Ohio), LLC to Offer Local and Interexchange Voice Services*, Entry (Pub. Utils. Comm’n Ohio Dec. 17, 2003); Entry on Rehearing (Pub. Utils. Comm’n Ohio Feb. 11, 2004); see also Case No. 03-950-TP-COI, *In the Matter of the Commission’s Investigation into Voice Services Using Internet Protocol*, Entry (Pub. Utils. Comm’n Ohio. Apr. 17, 2003).

^{129/} Docket No. 2003-363-C, *Application of Time Warner Cable Information Services (South Carolina), LLC for a Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services throughout the State of South Carolina and for Alternative Regulation*, Order Granting Certificate of Public Convenience and Necessity To Provide Interexchange and Local Voice Services and for Alternative Regulation and Modified Flexible Regulation (S.C.P.S.C. May 24, 2004); Application No. 03-12-031, *Time Warner Cable Information Services (California), LLC, for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resale Competitive Local, IntraLATA and InterLATA Voice Service*, Opinion (Cal. P.U.C. Mar. 16, 2004).

^{130/} Docket No. P-55, Sub 1178, *Petition of BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Recommended Arbitration Order (N.C.U.C. June 13, 2000); Docket 27385, *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc.*, Pursuant to Section 252(b) of the Telecommunications Act of 1996, Order, at 33-34 (Ala. P.S.C. May 21, 2001) (concluding that VoIP should not be included in the definition of switched access traffic because the FCC has not addressed the classification of VoIP); Case No. 2000-465, *Petition by AT&T Communications of the South Central States, Inc. and TCG Ohio for Arbitration of Certain Terms and Conditions of a Proposed Agreement with Bellsouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Order, at 5 (Ky. P.S.C. May 16, 2001) (declining to address the issue of VoIP service because it seems “more hypothetical than actual”).

7. NARUC and NASUCA

The National Association of Regulatory Utility Commissioners (“NARUC”) and the National Association of State Utility Consumer Advocates (“NASUCA”) adopted resolutions pertaining to VoIP services in late 2003. Specifically, NARUC adopted a resolution regarding “Information Services” stating that: (1) whenever possible and in accordance with the principle of technological neutrality, regulatory jurisdiction should be based on the characteristics of a service, not on the technology used to provide that service, whether the service is commingled with any other service or the speed or capacity of that service; (2) state and federal regulators should work together to adapt their regulatory oversight to the technological changes in communications markets so that all consumers receive the benefits of these new technologies; and (3) the FCC should carefully consider certain factors when determining the regulatory classification of VoIP services.^{131/} NARUC suggested that the FCC consider the following factors:

- Uncertainty and reduced capital investment while the scope of the FCC’s authority under Title I is tested in the courts;
- Loss of consumer protections applicable to telecommunications services under Title I;
- Disruption of traditional balance between federal and state jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty;
- Increased risk to public safety;
- Customer loss of control over content;
- Loss of state and local authority over emergency dialing service; and
- Reduced support base for federal and state universal service as well as state and local fees and taxes.^{132/}

More recently, NARUC adopted a resolution stating that Congress should not limit state public utility commissions from exercising their state authority and resources to regulate core telecommunications facilities used to provide both voice and data services and to promote deployment of advanced telecommunications capabilities. The resolution also noted that, before preempting state jurisdiction, Congress and the FCC should consult with the states and should ensure that states retain sufficient authority to protect the interests of their citizens, by ensuring that basic and advanced services are available in all areas at affordable and reasonably comparable rates.^{133/} In addition, NARUC adopted a resolution recognizing that state commissions and the FCC possess complementary strengths and should work together in the spirit of cooperative federalism. In NARUC’s view, regulation of telecommunications should be designed to use the strengths of state commissions and of the FCC.^{134/}

^{131/} National Association of Regulatory Utility Commissioners, *Resolution on Information Services* (Nov. 2003).

^{132/} *Id.*

^{133/} National Association of Regulatory Utility Commissioners, *NARUC Telecommunication Policy Resolution (National Consistency)* (Nov. 17, 2004).

^{134/} National Association of Regulatory Utility Commissioners, *NARUC Telecommunication Policy Resolution* (Nov. 17, 2004).

Likewise, NASUCA has adopted a resolution on VoIP service that calls on the FCC not to classify VoIP in a way that exempts it from consumer protection regulation, universal service support obligations, or E911 participation.^{135/} The resolution also urged the FCC not to preempt states from regulating VoIP services to ensure companies are providing reliable, affordable, high-quality telecom services, including access to E911.^{136/}

D. Congressional Efforts to Dictate the Regulatory Regime for IP Services

On April 2, 2004, Senator John Sununu (R-NH) and Representative Charles “Chip” Pickering (R-MS) introduced the “VoIP Regulatory Freedom Act of 2004” through separate bills in the Senate (S. 2281) and House (H.R. 4129), both of which provide a jurisdictional and regulatory structure for treatment of VoIP applications.^{137/} In many respects, the two bills are similar. Both prohibit the FCC from regulating VoIP applications except as specifically authorized. While the Pickering bill preempts all State and local regulation of VoIP, the Sununu bill specifically preserves state authority for consumer protection and unfair or deceptive trade practices, 911 emergency services, and state universal service and intercarrier compensation regimes.

Notably, the bills are limited to the regulation of VoIP *applications*; they expressly disclaim any effect on the authority of the FCC and the states to regulate the transmission facilities used to transmit VoIP applications. Neither bill classifies VoIP as a telecommunications service or information service, but both carve out a subset of VoIP (called “connected VoIP”), defined as a VoIP application capable of sending or receiving voice communications from the public switched network.

In the Pickering bill, connected VoIP is subject to requirements governing interprovider compensation, universal service, and access to law enforcement. The bill directs the FCC to establish “appropriate arrangements” to compensate providers of facilities and equipment used for connected VoIP. The Pickering bill also imposes CALEA-like obligations on providers of such VoIP applications. Rather than impose requirements for E911, disability access, security, and reliability of connected VoIP, the Pickering bill leaves those matters to industry to address through the establishment of consensus guidelines, protocols, or performance requirements. Any such requirements would apparently be voluntary.

In contrast, the Sununu bill requires the FCC to establish a transition period for connected VoIP applications to provide 911 services comparable to those provided by other telecommunications services. Similarly, the Sununu bill states that nothing in the bill modifies CALEA, the FCC’s authority under CALEA, or “the obligation of a provider of a VoIP application to furnish to an authorized law enforcement agency” all information requested pursuant to court orders.

^{135/} Herb Kirschhoff, *NASUCA Okays 4 Telecom Resolutions as NARUC Kills One*, COMMUNICATIONS DAILY, Nov. 19, 2003, at 5.

^{136/} *Id.*

^{137/} S. 2281, 108th Cong. (2004) (“Sununu Bill”); H.R. 4129, 108th Cong. (2004) (“Pickering Bill”).

A VoIP bill also was introduced by Representative Cliff Stearns (R-FL) and Representative Rick Boucher (D-VA) in July 2004.^{138/} The “Advanced Internet Communications Services Act of 2004” defines “advanced Internet communications service” as “an IP network and the associated capabilities and functionalities, services, and applications provided over an Internet protocol platform or for which an Internet protocol capability is an integral component, and services and applications that enable an end user to send or receive a communication in Internet protocol format, regardless of whether the communications is voice, data, video, or any other form.”^{139/} The bill deems those services to be interstate services. The bill also states that the FCC has exclusive authority to impose requirements on advanced Internet communications *voice* services for 911, disability access, USF, and intercarrier compensation if the FCC determines such regulations are technically feasible and economically reasonable. The FCC also is required to ensure parity among providers.

These recent bills are not Congress’s first attempt to craft legislation for IP services. H.R. 1291, the “Internet Access Charge Prohibition Act of 2000,”^{140/} was introduced by Fred Upton (R-MI) to codify the FCC’s long-standing exemption from access charges for ISPs. An amendment added by the House Commerce Committee at the instigation of the United States Telecom Association (“USTA”), however, appeared to invite the FCC to impose access charges on providers of IP telephony. As amended, the bill stated that “[n]othing . . . shall preclude the Commission from imposing access charges on the providers of Internet telephone services, irrespective of the type of customer premises equipment used in connection with such services.”^{141/} H.R. 1291 passed the House by a voice vote, but was never considered by the Senate. In response to the bill, Representative Ed Markey (D-MA) introduced a bill that would have specifically prohibited the FCC from imposing access charges on providers of IP telephony.^{142/}

II. POTENTIAL REGULATION OF IP-ENABLED SERVICES

As explained above, VoIP service currently is considered an unregulated information service. The distinctions between telecommunications services and information services have significant regulatory consequences. If VoIP service were determined to be a telecommunications service, it could be subject to a host of regulations at both the state and federal level. If determined to be interstate, state regulation would not be permitted except in rare circumstances, and if it remained an information service, VoIP would likely avoid most regulation. Certain fees and consumer protection measures, however, could still be applied even if IP-Enabled Services were not classified as telecommunications services.^{143/}

^{138/} H.R. 4757, 108th Cong. (2004) (“Stearns-Boucher Bill”).

^{139/} Stearns-Boucher Bill § 4(1).

^{140/} H.R. 1291, 106th Cong. (2000).

^{141/} H.R. 1291, 106th Cong. § 2(1)(2) (2000).

^{142/} H.R. 4769, 106th Cong. (2000).

^{143/} *Wireline Broadband NPRM* ¶¶ 54–61.

A. Tension between Federal and State Jurisdiction

Historically, information services have been free from state regulation. Generally, once the FCC exercises its Title I authority over an “information service,” any state regulations interfering with the FCC’s exercise of its authority could be preempted.^{144/} In its *Computer Inquiry* proceedings, the FCC found that information services must remain free of state and federal regulations to promote the competitive growth of such services.^{145/} The FCC has reaffirmed this finding in its decision ruling that pulver.com’s Free World Dialup service is an interstate information service that must remain free from unnecessary regulation,^{146/} and its recent decision finding that Vonage (and services like Vonage’s) are interstate services.^{147/}

As a result, the FCC has preempted the imposition of certain state regulatory requirements on information service providers that would have resulted in the application of inconsistent regulatory requirements at the state and federal levels. The Ninth Circuit upheld the FCC’s narrowly-tailored preemption because the FCC was able to demonstrate that it would preempt only those state regulations that would negate the FCC’s regulatory goals or otherwise frustrate the FCC’s purposes.^{148/}

Given the FCC’s previous preemption of state regulations governing information services in the *Computer Inquiry* proceedings and its most recent findings in the *pulver.com Order* and *Vonage Order*, state commissions’ ability to impose burdensome regulations on VoIP services could be limited if those regulations interfered with the FCC’s overarching national policy goals. Recent statements from members of the FCC also lend support to the conclusion that the FCC may preempt state regulation of all types of VoIP services. Chairman Powell has stated with respect to the jurisdictional nature of VoIP services that, “I don’t know whether it’s Internet or telephone, but I know it’s not local.”^{149/} He went on to say that the FCC, not the states, is the “principle regulatory authority” for VoIP services and the “first in line to set the initial regulatory environment” for VoIP services.^{150/} A single, national broadband policy for VoIP services appears to be at the forefront of the debate.

State regulators might find it difficult to determine the jurisdictional nature of IP-based services and to isolate the intrastate portion of those services. In its 1998 *Report to Congress*,

^{144/} *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (affirming the FCC’s authority to preempt state regulation of jurisdictionally mixed enhanced (information) services). In contrast, if the FCC, for example, had determined that cable modem service is a “cable service” subject to Title VI, the states would have limited authority over cable service with regards to access requirements, franchise requirements, and franchise fees. See *Cable Modem Ruling* ¶¶ 97-99; see also *pulver.com Order* ¶¶ 15-25.

^{145/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Report and Order, 104 F.C.C.2d 958 (1986) (subsequent history omitted).

^{146/} *pulver.com Order* ¶ 17.

^{147/} *Vonage Order* ¶ 14.

^{148/} *California v. FCC*, 39 F.3d at 932-33.

^{149/} *Wireline*, COMMUNICATIONS DAILY, Dec. 10, 2003, at 9.

^{150/} *Id.*

the FCC noted that it might be difficult for VoIP service providers themselves to determine whether VoIP calls are interstate or intrastate.^{151/} Likewise, in the *AT&T Phone-to-Phone Order*, the FCC noted that there may be difficulty in determining the jurisdictional nature of IP services.^{152/} Typically, to determine the jurisdictional nature of telecommunications traffic, regulators employ an end-to-end analysis that takes into account the origination and termination points of the communication. The FCC used this analysis to determine that DSL transmission used to provide Internet access services are interstate services.^{153/} The FCC also affirmed the application of this analysis in 2002 in its determination that cable modem service is an interstate service.^{154/}

In its *pulver.com Order* and *Vonage Order*, however, the FCC determined that the end-to-end analysis was inapplicable because the concept of “end points” has no relevance.^{155/} For example, pulver.com simply provides information on its server that its members can access. Each member must find its own means (*i.e.*, an ISP) to get to the server. In addition, Free World Dialup is portable in nature without fixed geographic origination or termination points. Thus, the FCC’s *pulver.com Order* presents a detailed analysis of when the end-to-end analysis is inappropriate or “unhelpful.” Similarly, in the *Vonage Order*, the FCC determined that Vonage’s service can be taken anywhere, and that this “total lack of dependence on *any* geographically defined location” renders application of the end-to-end analysis nearly impossible.^{156/} In its *IP-Enabled Services NPRM*, the FCC asks whether the findings made in the *pulver.com Order* should be extended to other IP-Enabled Services and whether the end-to-end analysis is appropriate for determining the jurisdictional nature of IP services.^{157/}

B. Functionality vs. Facilities

Both the FCC and some states have indicated that they make regulatory classifications based on the functionality provided to end users rather than the facilities used to provide those services. The FCC’s overarching principle in several of the proceedings discussed above is “to develop an analytical framework that is consistent, to the extent possible, across multiple platforms.”^{158/} In its 1998 *Report to Congress*, the FCC specifically noted that “Congress did not limit the definition of ‘telecommunications’ to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users.”^{159/} In that vein, the FCC has historically applied its regulatory authority consistent with the statutory definition

^{151/} *Report to Congress* ¶ 91; *see also* Level 3 Forbearance Petition at 17-19.

^{152/} *AT&T Phone-to-Phone Order* ¶ 20.

^{153/} *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTE Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 16 (1998).

^{154/} *Cable Modem Ruling* ¶ 59.

^{155/} *pulver.com Order* ¶ 21; *Vonage Order* ¶ 25.

^{156/} *Vonage Order* ¶¶ 24-25 (emphasis in original).

^{157/} *IP-Enabled Services NPRM* ¶40.

^{158/} *Wireline Broadband NPRM* ¶ 6; *Cable Modem Ruling* ¶ 85, n.315.

^{159/} *Report to Congress* ¶ 98.

of telecommunications service -- “the offering of telecommunications . . . regardless of the facilities used.”^{160/}

In the *Wireline Broadband NPRM*, the FCC reiterated the “function over facilities” principle, and concluded that the Act and the FCC’s prior rulings suggest that the FCC should take a functional approach to regulation that focuses on the nature of the service provided to consumers, rather than an approach that focuses on the technical attributes of the underlying architecture used to provide the services.^{161/} Likewise, in the *Cable Modem Ruling*, the FCC concluded that the classification of cable modem service turns on the nature of the functions that the end user is offered.^{162/} The New York PSC similarly relied upon the FCC’s functional approach in reaching its *US DataNet Decision*.^{163/} In the *AT&T Phone-to-Phone Order*, Chairman Powell noted that AT&T’s IP service was a telecommunications service because it does not “offer consumers any variation in experience or capability” and consumers “are in no discernable way receiving the transforming benefits of an IP-enabled service.”^{164/}

Thus, it is generally irrelevant what technology a provider utilizes to provide telecommunications services. For example, carriers using 39 GHz, microwave, or data packet switched technologies to provide voice and data communications have all been subject to the FCC’s common carrier (*i.e.*, Title II) regulations.^{165/} In addition, services that function as both telecommunications services and information services, but are inseparable from the end user’s perspective, have been deemed to be information services under the functional approach.^{166/}

Consistent with these proceedings, any future regulatory classification of VoIP would likely rely on the functions that are made available to consumers, not on the particular types of facilities used to provide those functions. While IP-Enabled Services may have provided functions similar to POTS in 1998, it is clear that these services are much more sophisticated today and, if left unfettered by regulation, will continue to evolve into services that offer

^{160/} 47 U.S.C. § 153(46).

^{161/} *Wireline Broadband NPRM* ¶ 7, n.10.

^{162/} *Cable Modem Ruling* ¶ 38.

^{163/} *US DataNet Decision* at 7; *see also* New York Public Service Commission Comments on AT&T Petition for Declaratory Ruling, at 4 (filed Dec. 18, 2002).

^{164/} *AT&T Phone-to-Phone Order*, FCC 04-97, Statement of Chairman Michael K. Powell.

^{165/} *See generally, e.g., Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service is a Basic Service; American Telephone and Telegraph Company Petition for Declaratory Ruling that All IXCs Be Subject to the Commission’s Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶¶ 22, 54 (1995) (finding that all interexchange carriers must offer packet-switched, frame relay service on a common carrier basis); *WINSTAR WIRELESS FIBER CORP. Request for Waiver of Sections 101.65(a)(3) and 101.305(d) of the Commission’s Rules*, Order, 14 FCC Rcd 118, ¶ 5 (1999) (noting that Winstar’s operations using fixed-wireless technology are common carrier in nature); *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission’s Rules*, Final Report and Order, 78 F.C.C.2d 1291, ¶ 2 (1980) (noting that the FCC received 2560 applications for the provision of common carrier services via microwave facilities).

^{166/} *Report to Congress* ¶¶ 39, 58, 60.

applications well beyond that of plain old telephone service. For instance, POTS is a “network-level function” whereas VoIP is an “an Internet application just like unregulated e-mail and file sharing” that can follow its users everywhere, over any network.^{167/} As Chairman Powell has stated, “Stop thinking of voice as just the telephone. It’s just an application running on an IP network.”^{168/} VoIP applications of tomorrow will combine voice and data in new and innovative ways, going far beyond the functionality offered by POTS. In light of the present and evolving functional differences between VoIP services and POTS, it may be inappropriate and stifling to nascent VoIP products to overlay legacy regulations designed for a “functionally” different service.

C. FCC Forbearance and Promotion of the Deployment of Advanced Services

To the extent the FCC determines that VoIP services are telecommunications services, the FCC has three tools that would permit it to refrain from imposing the full panoply of traditional telecommunications regulation on VoIP. First, the FCC could utilize its Section 10 forbearance authority to forbear from applying telecommunications regulation to VoIP services.^{169/} Under the Act, the FCC is required to forbear if it determines that: 1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory; 2) enforcement of the regulation is not necessary for the protection of consumers; and 3) forbearance is in the public interest.^{170/} The FCC has acknowledged that its forbearance obligation is a key component of the Act’s “pro-competitive, de-regulatory national policy framework” designed to ensure that all telecommunications markets are open to competition and to make advanced telecommunications and information technologies and services available to all Americans.^{171/} For these reasons, the FCC has asked in its *IP-Enabled Services NPRM* whether it should forbear from applying certain regulations to particular categories of IP-Enabled Services.^{172/} Notably, in the 1998 *Report to Congress*, the FCC stated it would have “to consider carefully” whether to forbear.^{173/}

^{167/} Herb Kirchoff, *VoIP Advocates Urge States to Keep Hands Off*, COMMUNICATIONS DAILY, Sept. 9, 2003.

^{168/} Speech of Chairman Michael K. Powell before the Academic and Telecom Industry Leaders at the University of California (UCSD) (Dec. 9, 2003); *see also* Level 3 Forbearance Petition at 11-14.

^{169/} 47 U.S.C. § 160. As noted above, Level 3 has asked the FCC to forbear from the application of access charges to some IP services. *See supra* Section I.B.

^{170/} 47 U.S.C. § 160(a); *see also Cellular Telecoms. & Internet Ass’n v. FCC*, 330 F.3d 502, 504-05 (D.C. Cir. 2003).

^{171/} *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd 2431, ¶ 6 (2002).

^{172/} *IP-Enabled Services NPRM* ¶ 48.

^{173/} *Report to Congress* ¶ 92; *see also* Opening Remarks of FCC Chairman Michael K. Powell at the FCC Forum on Voice over Internet Protocol (VoIP) (Dec. 1, 2003) (stating that VoIP should remain as free from economic regulation as possible and that the burden should be on those wanting to apply regulation to the service); Opening Remarks of Commissioner Jonathan S. Adelstein at the Voice over Internet Protocol Forum (Dec. 1, 2003) (remarking that the FCC’s VoIP policy should encourage efficient technologies while protecting the FCC’s other critical initiatives, such as universal service); Opening Remarks of FCC Commissioner Michael Copps at the FCC Forum on Voice over Internet Protocol (VoIP) (Dec. 1, 2003) (commenting that the FCC must examine VoIP and

Second, Section 706 of the Act imposes on the FCC an affirmative obligation to encourage the deployment of advanced services.^{174/} While Section 706 does not constitute an independent grant of authority to the FCC, the FCC may use the authority granted to it in other provisions of the Act (including forbearance authority under Section 10) to encourage the deployment of advanced services.^{175/} The FCC has interpreted Section 706 as a directive to the FCC to use the forbearance authority granted elsewhere in the Act to further Congress’s objective of opening all telecommunications markets to competition, including the market for advanced services.^{176/} In its recent *Vonage Order*, the FCC found that promotion of a national policy framework for advanced services required it to “preclud[e] multiple disparate attempts to impose economic regulations on [Vonage’s service] that would thwart its development and potentially result in it exiting the market.”^{177/}

Third, FCC actions also must consider Section 230 of the Act, which expressly states that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”^{178/} In the *Vonage Order*, the FCC determined that preemption of the Minnesota PUC’s entry regulations was required under Section 230 because the language of that section “embraces [Vonage’s] service.”^{179/} The FCC concluded that, “in interpreting [S]ection 230’s phrase ‘unfettered by Federal or State regulation,’ [it could not] permit more than 50 different jurisdictions to impose traditional common carrier economic regulations such as Minnesota’s on [Vonage’s service] and still meet [its] responsibility to realize Congress’s objective.”^{180/}

D. Taxation of VoIP Services

The tax implications for VoIP service depend heavily on how the service is classified by federal and state regulators. State and federal law generally exempts Internet access services from taxation, but telecommunications services remain subject to certain fees and taxes.

develop “good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeon-holes without adequate justification.”).

^{174/} 47 U.S.C. § 157nt.

^{175/} *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, ¶¶ 69-77 (1998) (“*Advanced Services Order*”); see also *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 176, n.564 (2003) (reaffirming the FCC’s earlier findings).

^{176/} *Advanced Services Order* ¶¶ 69-77.

^{177/} *Vonage Order* ¶ 36.

^{178/} 47 U.S.C. § 230(b)(2).

^{179/} *Vonage Order* ¶ 34.

^{180/} *Vonage Order* ¶ 35.

1. State Taxation

States generally have the ability to tax “telecommunications services,” but not “information services.” At the state level, the tax classification of VoIP services turns on how the state statutes and regulations define “telecommunications” or “telephone” services. Often, the definitions are broad enough to encompass the functionality provided to consumers via IP-Enabled Services.^{181/} If VoIP service is subject to taxation under a particular state’s law, the service could be subject to gross receipts taxes, sales and use taxes, or specific taxes imposed on telecommunications services.

2. Federal Excise Tax

Similarly, the federal taxation of VoIP services also depends on definitions at the federal level. A three percent federal excise tax (“FET”) is imposed on “toll telephone service,” which is defined as a communication for which “there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication” or “a service which entitles the subscriber, upon payment of a periodic charge, to the privilege of an unlimited number of telephonic communications.”^{182/} If an IP-Enabled Service fits within this definition, it may be subject to the federal excise tax.

The general application of the FET currently is being debated by the courts. In recent months, several district courts have reached different decisions regarding the application of the FET to general long distance service. In *ABIG*, the Southern District of Florida found that long distance service was taxable under the FET even though the charges were based on time and not distance.^{183/} In contrast, the Northern District of Ohio found that, under the plain meaning of the FET’s definitions, charges had to vary with both distance and elapsed time to be taxable under the FET.^{184/} Relying on these decisions, at least three other federal courts have found that traditional long distance services do not fall within the definition of “toll telephone service” based on time and distance, and thus, cannot be taxed under the FET.^{185/} The *Fortis* court, however, did find that the long distance services at issue might fall under the second part of definition of toll telephone service as a WATS service, and let the case proceed on that point.

^{181/} Under New York tax law, for example, “telecommunications services” are defined as “telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic laser, microwave, radio wave, satellites, or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent.” NY TAX § 186-e(1)(g).

^{182/} 26 U.S.C. §§ 4251, 4252(b); 26 C.F.R. §§ 49.4252.1(a), 49.4252-2(a).

^{183/} *American Bankers Insurance Group v. United States*, 308 F. Supp. 2d 1360 (S.D. Fla. 2004) (“*ABIG*”), *on appeal*, No. 04-10720 (11th Cir.).

^{184/} *OfficeMax v. United States*, 309 F. Supp. 2d 984 (N.D. Ohio 2004) (“*OfficeMax*”).

^{185/} *National Railroad Passenger Corp. v. United States*, No. 03-431, Memorandum Opinion and Order (D.D.C. Sept. 20, 2004); *Fortis, Inc. v. United States*, No. 03-5137, Opinion and Order (S.D.N.Y. Sept. 16, 2004). *Reese Brothers, Inc. v. United States*, No. 03-745 (W.D. Pa. Nov. 30, 2004).

The disagreement between the courts and the uncertainty surrounding the application of the FET to traditional long distance could impact any future application of the statute to VoIP services, especially those services that are provided in a manner consistent with either prong of the definition of “toll telephone service.”

3. Internet Tax Freedom Act

The Internet Tax Freedom Act (“ITFA”)^{186/} imposes a moratorium on state and local governments’ imposition of any “taxes on Internet access” or “multiple or discriminatory taxes on electronic commerce.”^{187/} This moratorium recently was extended through November 1, 2007 (subject to certain exceptions).^{188/} While some in the industry have argued that the ITFA could be used to exempt VoIP services from taxation, recent amendments to the ITFA would appear to eliminate that argument. Specifically, the recent amendments signed into law on December 3, 2004 state that nothing in the ITFA “shall be construed to affect the imposition of tax on a charge for voice or any other service utilizing Internet Protocol or any successor protocol.”^{189/}

Under the recently amended version of the ITFA, “Internet access” is defined as “a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. Such term does not include telecommunications services to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.”^{190/} In addition, the term “tax” means: “(i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or (ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity,”^{191/} while a “tax on Internet access” means a tax on Internet access, regardless of whether such tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to describe the tax (but excluding a tax levied upon or measured by net income, capital stock, net worth, or property value).^{192/} The ITFA, however, specifically excludes from the definition of “tax” franchise fees or other fees imposed by a state or local franchising authority pursuant to the Cable Act and any fees related to the obligations of telecommunications carriers under the Act.^{193/}

^{186/} 112 Stat. 261-719, 2681-724-726.

^{187/} ITFA § 1101(a).

^{188/} Congress recently amended the ITFA. *See* Internet Tax Nondiscrimination Act, Pub. L. No. 108-435 (2004) (“ITNA”).

^{189/} ITNA § 6.

^{190/} ITNA § 2(c).

^{191/} ITFA § 1104(8)(A).

^{192/} ITNA § 2(b)(2).

^{193/} ITFA § 1104(8)(B).

E. Potential Federal Regulation of VoIP Services

On the federal side, information service providers avoid access charges and universal service fees, as well as other federal surcharges, including the administration of the North American Numbering Plan, Local Number Portability administration, and the Telecommunications Relay Services Fund, all of which apply to providers of telecommunications services.^{194/} Federal privacy, access by individuals with disabilities, truth-in-billing, and CALEA obligations also do not extend to information service providers.

1. Universal Service Fund (“USF”) Contributions

The concept of “universal service” has been in place nearly since the birth of local phone service.^{195/} In their simplest form, universal service programs are designed to ensure that low-income consumers have access to local phone service at reasonable rates.^{196/} The FCC’s universal service program also provides financial support to companies that provide telecommunications services, Internet access, and internal connections to schools, libraries, and rural health care providers and in areas of America where the cost of providing service is high.^{197/} In addition to the federal fund, many states have established or are establishing some type of state universal service funding mechanism.^{198/}

Federal universal service obligations apply to all telecommunications carriers that provide interstate telecommunications services with each carrier contributing “on an equitable and nondiscriminatory basis.”^{199/} In addition, universal service obligations may be placed on “any other provider of interstate telecommunications” if the FCC believes the public interest would be served by doing so.^{200/} To fund universal service, all covered providers contribute a

^{194/} See, e.g., FCC Form 499-A, Telecommunications Reporting Worksheet, *available at* <http://www.fcc.gov/Forms/Form499-A/499a.pdf>.

^{195/} 47 U.S.C. § 151 (describing the obligation to provide service to all citizens of the United States). The FCC has found that “universal service historically consisted of high-cost loop support, which provides support to eligible carriers serving high-cost areas, and Lifeline/LinkUp, which provides support to low-income consumers for telephone service and installation. Section 254 of the Act also directed the Commission to create the schools and libraries program and the rural health care program, which both provide support to schools, libraries, and rural health care providers, respectively, for telecommunications services and Internet access. All of these mechanisms are referred to collectively as ‘universal service.’” *Wireline Broadband NPRM* at n.115.

^{196/} *Report to Congress* ¶ 7 (stating that before the passage of the Telecommunications Act of 1996, “charges to long distance carriers and rates for certain intrastate services provided to carriers and to end users were priced above costs, which enabled local telephone companies to keep rates for basic local telephone service at affordable levels throughout the country”). In the Telecommunications Act of 1996, Congress codified this commitment to universal service and directed that “[c]onsumers . . . in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to [those] in urban areas.” 47 U.S.C. § 254(b)(3).

^{197/} 47 U.S.C. § 254.

^{198/} National Exch. Carrier Association State Universal Service Fund Summaries, *available at* <http://www.neca.org/susfsum.pdf> (Aug. 24, 2000).

^{199/} 47 U.S.C. § 254(d).

^{200/} *Id.*

certain percentage of the amount billed to their residential and business customers for interstate and international telecommunications services into a central fund. The exact percentage that companies contribute is adjusted every quarter based on projected universal service demands.^{201/} States with universal service programs also have established contribution formulas.

In its 1997 *Universal Service Order*, the FCC found that Internet access services do not fall within the definition of “telecommunications service” and therefore ISPs were not required to make contributions to the universal service fund.^{202/} The FCC reasoned that, because Internet access services “alter the format of information through computer processing applications such as protocol conversion and interaction with stored data,” they are information services for purposes of universal service and not subject to contribution obligations.^{203/}

The FCC currently is considering whether “the accelerating development of new technologies like ‘voice over Internet’ increases the strain on regulatory distinctions such as interstate/intrastate and telecommunications/non-telecommunications, and may reduce the overall amount of assessable revenue reported under the current system.”^{204/} Some providers of VoIP services, and some FCC commissioners, have taken the position that universal service contribution recovery issues should be addressed prior to any obligation being imposed on VoIP or other broadband service providers.^{205/}

2. Intercarrier Compensation

“Access charges” are the payments that long distance carriers make to local exchange carriers to originate and terminate long distance calls over local carrier facilities. “Reciprocal compensation” is paid by one local exchange carrier to another for the transport and termination

^{201/} For example, for the proposed fourth quarter of 2004, the universal service contribution factor is 8.9 percent.

^{202/} *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 789 (1997) (“*Universal Service Order*”).

^{203/} *Universal Service Order* ¶ 789; see also *Report to Congress* ¶¶ 73–82 (discussing additional reasons to classify Internet access as an “information service,” e.g., Internet access providers do not offer a “pure transmission path,” but conceding that Internet access involves data transport elements).

^{204/} *Universal Service NPRM* ¶ 13; see also United States General Accounting Office, *Federal and State Universal Service Programs and Challenges to Funding*, GAO-02-187, at 21-23 (rel. Feb. 2002) (“IP Telephony may not be an immediate threat to federal funding of universal service but may threaten its long-term viability.”); *Report to Congress* ¶ 4 (“[O]ur duty and intention [is] to ensure that financial support for federal universal service support mechanisms is maintained”); *Wireline Broadband NPRM* ¶ 65 (the Commission will continue to pursue and protect the core objectives of universal service).

^{205/} See, e.g., Opening Remarks of Commissioner Michael J. Copps at the FCC’s Voice over Internet Protocol Forum (Dec. 1, 2003) (noting that addressing the VoIP issue may force the FCC to first deal with other pending proceedings); *Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Comments of SBC Communications, Inc., WC Docket No. 03-211 (filed Oct. 27, 2003) (arguing that the FCC first needs to act on pending proceedings dealing with other Internet-based issues); *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Comments of Level 3 Communications, Inc., WC Docket 02-361 (filed Dec. 18, 2003) (urging the FCC to take action on the pending intercarrier compensation proceeding in conjunction with any ruling on compensation for VoIP traffic).

of all other calls not subject to access charges.^{206/} As a general rule, FCC rules govern access charges for interstate long distance calls; state rules govern intrastate access charges.^{207/} The FCC, however, has primary jurisdiction over reciprocal compensation required by Section 251(b)(5) of the Act, which governs all telecommunications traffic.^{208/} The state commissions also have a role with respect to the implementation of reciprocal compensation through their oversight of interconnection agreements between incumbent and competitive local exchange carriers, which generally establish the specific rates and terms for reciprocal compensation.^{209/}

In its 1997 *Access Charge Reform Order*, the FCC concluded that ISPs are not subject to the existing access charge system because an ISP's use of the local telephone network is more akin to the manner in which the typical phone customer or "end user" makes use of the local telephone network, as opposed to the manner in which a long distance provider uses the network.^{210/} As a result, ISPs could purchase telephone lines in the same manner and at the same prices as a typical business customer, permitting the ISP to use local telephone networks to link their customers to the Internet at no additional cost for local network access.^{211/} Despite the exemption for ISPs and the FCC's statements in the 1998 *Report to Congress*, the FCC continued to ponder whether to impose access charges on providers of VoIP services. Eighteen months after the *Report to Congress*, in the *Advanced Services Remand Order*, the FCC reiterated that providers of phone-to-phone VoIP service might become subject to access charges in the future.^{212/}

^{206/} Section 251(b)(5) of the Act extends reciprocal compensation to all "telecommunications," subject to certain exceptions. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 34 (2001) ("ISP Order"), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (remanding, but not vacating, the ISP Order because the FCC had no basis to rely on Section 251(g) for its determinations), *petition for reh'g and reh'g en banc denied* (Sept. 24, 2002), *cert. denied sub nom.*, 123 S. Ct. 1927 (2003).

^{207/} 47 U.S.C. § 152; Compare 47 U.S.C. § 251(b)(5) with *Intercarrier Compensation NPRM* ¶ 69.

^{208/} 47 U.S.C. § 251(b); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding the FCC's authority to enact rules dealing with the local competition provisions added by the Telecommunications Act of 1996, including reciprocal compensation).

^{209/} 47 U.S.C. § 252.

^{210/} *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing, and End User Common Line Charges*, 12 FCC Rcd 15982, ¶¶ 344–48 (1997) ("*Access Charge Reform Order*"), *aff'd* by *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). The FCC reaffirmed this conclusion in *ISP Order* and *Intercarrier Compensation NPRM*. See *ISP Order* ¶ 11; *Intercarrier Compensation NPRM* ¶ 6.

^{211/} Similarly, the FCC has said that computer-to-computer IP telephony is not a telecommunications service, primarily because vendors who sell the software and hardware needed to make IP voice calls with a computer are merely selling customer premises equipment ("CPE"), not the transmission capacity contemplated in the Act's definition of "telecommunications service." Likewise, the FCC has reasoned that ISPs generally have no way of knowing whether their customers are using Internet access services to make computer-to-computer voice calls or simply to surf the web. See *Report to Congress* ¶¶ 77, 87.

^{212/} *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶¶ 37–38 (1999) (subsequent history omitted).

The majority of VoIP service providers have relied upon these findings and the exemption for ISPs to support their position that VoIP services are not subject to access charges. As discussed above, however, the FCC's decision in the *AT&T Phone-to-Phone Order* clarifies for the first time that services with certain characteristics are subject to access charges under the FCC's existing rules despite any previous statements made by the FCC. Indeed, several commissioners noted in the *AT&T Phone-to-Phone Order* that the FCC "muddied the waters" with opaque statements that created confusion.^{213/}

The FCC also emphasized in the *AT&T Phone-to-Phone Order* that its access charge and compensation rules may change as a result of the pending *Intercarrier Compensation* proceeding or the *IP-Enabled Services NPRM*. The FCC's 2001 decision regarding compensation for the termination of ISP-bound traffic may be instructive as to the FCC's likelihood of continuing to impose access charges or other intercarrier compensation regimes on services like AT&T's phone-to-phone IP service or other types of IP traffic. In 2001, the FCC refused to permit carriers to recover costs for ISP-bound traffic terminated on their networks if the carrier was not terminating such traffic prior to the issuance of the FCC's decision.^{214/} The FCC, in essence, established a "bill and keep"^{215/} regime for all carriers not yet terminating ISP-bound traffic. In the *Intercarrier Compensation NPRM*, the FCC tentatively concluded that carriers should move to a unified bill and keep regime for all intercarrier compensation payments. The FCC noted that a unified scheme is necessary to avoid opportunities for regulatory arbitrage, including the advantage some VoIP service providers obtained by being exempt from access charges when traditional interexchange carriers were not.^{216/} Based on the FCC's treatment of ISP-bound traffic and its recognition that the current intercarrier compensation regime is problematic, the FCC may be reluctant to impose intercarrier compensation requirements on IP-Enabled Services that do not meet the three characteristics outlined in the *AT&T Phone-to-Phone Order*.^{217/}

The FCC has been pondering how to proceed with respect to intercarrier compensation for more than three years. In the meantime, the incumbent LECs have sought to extend compensation obligations to third-party telecommunications service providers through their direct relationship with connecting carriers.^{218/} For example, incumbent LECs Verizon and SBC

^{213/} *AT&T Phone-to-Phone Order*, FCC 04-97, Statement of Kathleen Q. Abernathy; *AT&T Phone-to-Phone Order*, FCC 04-97, Statement of Commissioner Michael J. Copps.

^{214/} *ISP Order* ¶ 81.

^{215/} *ISP Order* ¶ 2, n.6. Bill and keep is defined as "an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. . . . Bill and keep does not, however, preclude intercarrier charges for transport of traffic between carriers' networks." *Id.*

^{216/} *Intercarrier Compensation NPRM* ¶¶ 2, 12.

^{217/} Even if intercarrier compensation rules were extended to VoIP service providers, the obligation of providers to pay compensation to local exchange carriers would depend upon whether, and the extent to which, they use the facilities of local exchange carriers to terminate calls. Generally, VoIP service providers would have to interconnect with local exchange carriers in order to terminate calls on the public switched telephone network.

^{218/} See Case 03-C-0578, *Petition of Cablevision Lightpath, Inc., Pursuant to Section 252 (b) of the Telecommunications Act of 1996, for Arbitration To Establish an Intercarrier Agreement with Verizon New York Inc.*, Arbitration Order, at 28-29 (N.Y.P.S.C. Oct. 24, 2003) (rejecting Verizon's attempt to impose access charges

have initiated court proceedings challenging how carriers they interconnect with route traffic originated by third parties.^{219/} Specifically, Verizon and SBC claim that certain carriers, including VoIP service providers, improperly route traffic to change the jurisdictional nature of traffic in an effort to avoid access charges. In addition, the incumbent LECs are now including provisions in their interconnection agreements with connecting carriers that would make the connecting carrier liable for all charges associated with traffic originated by a third-party at rates the incumbent LEC determines, which in most cases appears to be access charges.^{220/} In the regulatory arena, the FCC left the door open in the *AT&T Phone-to-Phone Order* of whether access charges may be applied retroactively to AT&T's service or other similar services. The FCC determined that the application of retroactive access charges was a fact-specific inquiry that should be made on a case-by-case basis.^{221/} Throughout the *AT&T Phone-to-Phone* proceeding the incumbent LECs contended that access charges apply to AT&T's "VoIP service" under existing law, and thus, the charges should be applied retroactively. Competitive providers and VoIP service providers, in contrast, argued that any FCC decision to impose access charges on AT&T's service (or other VoIP services) would be a change in law and must be applied prospectively only.^{222/} Legal challenges, the incumbent LECs' efforts to define regulatory policy through contractual relationships, and the FCC's continued inaction on a unified compensation regime for all carriers could have implications for the way in which VoIP service providers are required to compensate other carriers for the exchange of traffic.

3. Privacy

Under Section 222 of the Communications Act, telecommunications carriers are obligated to protect the privacy of the customer proprietary network information ("CPNI") of their subscribers.^{223/} In its 1998 *Report to Congress*, the FCC acknowledged that VoIP service

on Internet traffic); Level 3 Forbearance Petition at 23-31. Level 3 recognized the potential threat of incumbent LECs attempting to impose access charges on Internet traffic as part of interconnection agreements, but as the above arbitration proceeding reflects, this is not a future threat. Incumbent LECs have already begun to use their interconnection power to impose access charges on providers of IP-Enabled Services.

^{219/} See, e.g., Stephen Labaton, *MCI Faces Inquiry For Fraud On Fees For Long Distance*, N.Y. TIMES, July 27, 2003, at 1.

^{220/} See, e.g., Verizon Multistate Template Agreement at Section 8.3, available at http://newscenter.verizon.com/policy/nj/appendixh/tab_0001.pdf?PROACTIVE_ID=cecec7ccc6cecfcdc9c5cecfcfcc5cececdc8cbceccc8bfc6c5cf (Sept. 22, 2003) ("For any traffic originating with a third party carrier and delivered by ***CLEC Acronym TXT*** to Verizon, ***CLEC Acronym TXT*** shall pay Verizon the same amount that such third party carrier would have been obligated to pay Verizon for termination of that traffic at the location the traffic is delivered to Verizon by ***CLEC Acronym TXT***").

^{221/} *AT&T Phone-to-Phone Order* ¶ 23.

^{222/} Howard Buskirk, *FCC Probing Whether AT&T Should Be Subject to Retroactive Access Charges for VoIP Traffic*, TR DAILY, Jan. 6, 2003.

^{223/} 47 U.S.C. § 222; *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 13 FCC Rcd 8061 (1998), vacated in part, *US West Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), cert. denied, 530 U.S. 1213 (2000); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 16 FCC Rcd 16506 (2001);

might be subject to the FCC's CPNI requirements because it so closely resembles a telecommunications service.^{224/} In another rulemaking examining the use of IP-based telecommunications relay services ("IP Relay"),^{225/} the FCC likewise sought comment on the extent to which an end user's proprietary information would remain secure in the IP environment and how the FCC could best protect the privacy of calls made by IP Relay users and the caller profiles of those users.^{226/}

Many consumer protection advocates are concerned with the privacy ramifications of a move to IP-Enabled Services because IP-based networks place all data on a single line, which makes monitoring and surveillance much easier.^{227/} These consumer advocates have therefore urged VoIP service providers to integrate encryption technologies into their service to protect the privacy of IP-Enabled calls.^{228/}

4. Access by Individuals with Disabilities

Section 255 of the Communications Act requires providers of telecommunications services to ensure that their services are accessible and usable by individuals with disabilities.^{229/} While the Act limits this obligation to telecommunications service providers, the FCC has broadly interpreted this provision to include "all entities that make telecommunications services available,"^{230/} and has used its ancillary jurisdiction to extend Section 255 to providers of voicemail and interactive menu services, which are considered to be information services.^{231/}

Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 17 FCC Rcd 14860 (2002).

^{224/} *Report to Congress* ¶ 91, n.189.

^{225/} The FCC also has determined that IP Relay services are eligible for reimbursement. *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Petition for Clarification of WorldCom, Inc.*, 17 FCC Rcd 7779 (2002).

^{226/} *Consumer Information Bureau Seeks Additional Comment on the Provision of Improved Telecommunications Relay Service*, Public Notice, 16 FCC Rcd 13100 (2001).

^{227/} *See, e.g., Cost Savings Drive New Web Phone System*, IRISH TIMES, Oct. 20, 2000, at 60; James Gifford, *Is Your VoIP Secure?*, COMPUTER TELEPHONY, Sept. 1, 1999, at 99; Anthony Sawas, *VoIP Net Privacy Threat*, COMPUTER WEEKLY, Nov. 19, 1999, at 4.

^{228/} James Gifford, *Is Your VoIP Secure?*, COMPUTER TELEPHONY, Sept. 1, 1999, at 99.

^{229/} 47 U.S.C. § 255(c).

^{230/} *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*, 16 FCC Rcd 6417, ¶ 80 (1999) ("Section 255 Order" and "Further NOP").

^{231/} *Id.* ¶ 93. Notably, however, then Commissioner Powell issued a separate statement, expressing his "grave concerns" over the FCC's use of ancillary jurisdiction to reach these services given Congress's apparent intent to limit Section 255 to telecommunications services.

The FCC in 2002 issued a Further Notice of Inquiry seeking comment on the application of Section 255 to VoIP services.^{232/} In the *Further NOI*, the FCC asked about the status of industry efforts to develop accessible IP equipment, especially given the extent to which IP-Enabled Services would become an effective substitute for traditional circuit-switched technology.^{233/} Chairman Powell stated that the FCC would continue to focus on accommodating special needs, especially in areas the market would not address effectively.^{234/} The FCC favors voluntary industry action in this regard over government regulation, and recognized the Voice on the Net (“VON”) Coalition’s voluntary commitment to ensure that VoIP services are accessible to individuals with disabilities and that access needs are taken into account in the development of new products and services.^{235/}

There is no uniform standard for the assistive technologies (“ATs”) used by those with hearing disabilities, and therefore, ATs may not be compatible with the new technologies being deployed. As a result, the industry, along with the FCC’s Technology Advisory Council, continues to look at these issues and at possible solutions, such as creating “patches and adaptors” to allow new technologies to work with old AT or migrating persons with disabilities to new AT that may be more compatible with VoIP technology.^{236/} In addition, the FCC held a “Solutions Summit” on disability access issues in May 2004.^{237/} The Summit focused on the particular challenges and opportunities created for persons with disabilities. Consumer organizations, VoIP and information service providers, disability access advocates, and equipment manufacturers participated in the Summit.

5. Truth-in-Billing

Under the FCC’s rules, telecommunications common carriers have certain consumer protection obligations, including providing truthful, non-misleading telephone bills to their

^{232/} In addition, the FCC issued a declaratory ruling and Second Further Notice of Proposed Rulemaking regarding how Internet Protocol Telecommunications Relay Service calls should be classified for compensation purposes. *See generally Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Petition for Clarification of WorldCom, Inc.*, 17 FCC Rcd 7779 (2002).

^{233/} *Section 255 Order and Further NOI ¶¶ 179–82.* The FCC also asked for information regarding a new IP-Enabled Service being used by several carriers to provide relay services to persons with disabilities. *See, e.g., Consumer Information Bureau Seeks Additional Comment on the Provision of Improved Telecommunications Relay Service*, Public Notice, 16 FCC Rcd 13100 (2001); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 15 FCC Rcd 5140 (2000).

^{234/} FCC Chairman Michael Powell, Remarks Before the Federal Communications Bar Ass’n, *available at* <http://www.fcc.gov/Speeches/Powell/2001/spmkp105.html> (Jun. 21, 2001).

^{235/} *Section 255 Order and Further NOI ¶ 176; see also* Letter from Bruce D. Jacobs, Counsel to the VON Coalition, to Magalie R. Salas, Secretary, Federal Communications Commission, WT Docket No. 96-198 (filed July 7, 1999). The VON Coalition, a trade association with member companies involved in the development of voice services using data networks, including the Internet, includes service providers such as Delta Three, IDT, ITXC, and USA Global LINK, and their suppliers, including Cisco, Intel, Microsoft, Netspeak, and Vocaltec.

^{236/} John Spofford, *Voice-Over-IP Deployment*, COMMUNICATIONS DAILY, Sept. 19, 2002, at 6.

^{237/} *FCC Internet Policy Working Group To Hold Second “Solutions Summit” on Friday, May 7*, News Release (rel. Mar. 11, 2004).

subscribers.^{238/} These rules require that consumer telephone bills be clearly organized, identify the service provider, contain full and non-misleading descriptions of service offerings, and provide contact information for each service provider on the bill.^{239/} The FCC has described its “truth-in-billing” rules as “fundamental statements of fair and reasonable practices,” and, while it rejected the idea that certain carriers should be wholly exempted from them “solely because competition exists in the markets in which they operate,” it declined to impose the full panoply of truth-in-billing rules on the wireless industry given the lack of consumer complaints about their billing practices.^{240/}

Even before VoIP service providers become a significant source of competition for traditional local exchange carriers, they may find themselves subject to these or other similar consumer protection obligations either because they are held to be common carriers or because the FCC asserts ancillary jurisdiction to extend these obligations to them. Moreover, if states perceive a void in this area, they may attempt to impose consumer protection requirements of their own on providers of IP-Enabled Services.^{241/} The FCC’s truth-in-billing rules specifically state that they do not “preempt the adoption or enforcement of consistent truth-in-billing requirements by the states.”^{242/}

6. Communications Assistance for Law Enforcement Act (CALEA)

Congress enacted CALEA to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology.^{243/} CALEA applies only to “telecommunications carriers,” which are defined under CALEA to include any “person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.”^{244/} As discussed above, the DOJ and FBI now are asking the FCC to find that this definition includes broadband access providers (*i.e.*, cable modem providers) and broadband telephony providers (*i.e.*, VoIP service providers).

The FCC, in its 1999 order implementing CALEA, found that facilities that are used to provide both telecommunications and information services are subject to CALEA, but facilities “used solely to provide” information services are not.^{245/} The FCC indicated that it did so in

^{238/} 47 C.F.R. §§ 64.2400-01.

^{239/} 47 C.F.R. § 64.2401.

^{240/} *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, ¶¶ 13-14 (1999).

^{241/} *See, e.g., Rulemaking on the Commission’s Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Interim Opinion Adopting Interim Rules Governing the Inclusion of Non-Communications-Related Charges in Telephone Bills, 212 P.U.R.4th 282 (Cal. P.U.C. July 12, 2001) (establishing rules to implement billing safeguards for non-communications related products and services in telephone bills).

^{242/} 47 C.F.R. § 64.2400(c).

^{243/} 47 U.S.C. §§ 1001–21.

^{244/} 47 U.S.C. § 1001(8).

^{245/} *Communications Assistance for Law Enforcement Act*, 15 FCC Rcd 7105, ¶ 27 (1999) (“*CALEA Second Report and Order*”).

order to reach only those “services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications.”^{246/} Moreover, the FCC has authority under CALEA to reach any provider of “wire or electronic communication switching or transmission service to the extent that . . . such service is a replacement for a substantial portion of the local telephone exchange service.”^{247/} A finding that VoIP is an information service for regulatory purposes^{248/} therefore would not necessarily relieve providers from complying with CALEA, as demonstrated by the FCC’s tentative conclusions in the *CALEA NPRM* discussed above.

The application of CALEA requirements to VoIP becomes of greater importance in a time of increased homeland security. Some in the industry predicted in 2002 that the FBI’s stricter enforcement of CALEA requirements would “eliminate the ability to deploy VoIP networks” given that CALEA is an integral part of homeland security.^{249/} Recognizing the inherent difficulties in VoIP networks meeting CALEA’s requirements, the industry is working together “to create [an] interoperable IP network capable of replacing today’s circuit switched network.”^{250/} Despite these voluntary efforts, after the September 11th attacks, it may be difficult to convince regulators that VoIP networks are not required to comply with CALEA obligations. The FCC’s quick action in response to the DOJ/FBI’s petition for rulemaking described above provides further support for regulators’ views on the importance of CALEA requirements in today’s society.

7. Access to Numbers

Verizon, Qwest, and BellSouth (the “BOCs”) submitted a White Paper in 2002 to the North American Numbering Council regarding the implications of VoIP on the FCC’s number allocation policies,^{251/} claiming VoIP service providers threatened to exhaust the pool of telephone numbers. The companies urged the FCC to consider how numbers get distributed to VoIP service providers. The provision of foreign exchange services (*i.e.*, customers in California having telephone numbers with New York area codes) was the primary concern raised in the paper. In response, AT&T submitted a paper questioning whether VoIP numbering issues were

^{246/} *CALEA Second Report and Order* ¶ 11. For example, the FCC included an “illustrative” list of providers subject to CALEA, including LECs, long distance providers, competitive access providers, cellular carriers, PCS providers, satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public. *Id.* ¶ 10.

^{247/} 47 U.S.C. § 1001(8)(B)(ii).

^{248/} See, e.g., *Communications Assistance for Law Enforcement Act*, 14 FCC Rcd 16794, ¶ 55 (1999) (asking TIA to study CALEA solutions for packet-mode technology); *vacated in part and remanded, United States Telecomm. Ass’n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).

^{249/} John Spofford, *Regulation and Security to Shape VoIP Standards, Experts Say*, COMMUNICATIONS DAILY, Aug. 14, 2002, at 2-3.

^{250/} *Id.*

^{251/} BellSouth, Qwest and Verizon, *VoIP Numbering Issues* (Nov. 12, 2002) (White Paper presented to the North American Numbering Council at the Nov. 19-20, 2002 Meeting), available at http://www.nanc-chair.org/docs/Nov/Nov02_VoIP_White_Paper.doc.

“much ado about nothing” and recommended against any changes in the current guidelines.^{252/} In other contexts, the FCC has noted that changing the current rating and use of foreign exchange services “raises billing and technical issues that have no concrete, workable solutions.”^{253/}

In their White Paper, the BOCs also asked whether the number assignment rules should apply to VoIP service providers. These rules currently do not apply to VoIP service providers because VoIP service providers do not have an independent right to obtain numbers. Arguably, if the numbering rules are to be applied to VoIP service providers, they should also be given direct access to numbers. This issue has become more important in light of SBC IP Communications’ request to obtain number resources directly from the numbering administrator. On June 17, 2004, the FCC granted SBC IP’s request for Special Temporary Authority to obtain numbering resources directly from the Pooling Administrator for use in a limited, non-commercial trial of VoIP services.^{254/} The FCC determined that allowing SBC IP to receive numbers directly would permit SBC IP to interconnect with the PSTN on a trunk-side basis at a centralized switching location, which would allow SBC IP to more efficiently use its softswitch and gateways.

On July 7, 2004, SBC IP filed a petition seeking permanent authority to access numbering resources directly from the North American Numbering Plan Administrator and/or the Pooling Administrator without obtaining the necessary carrier certification. The FCC asked for comments on SBC IP’s request. Many commenters argued that SBC IP’s waiver request cannot be resolved in isolation and the FCC should address the issues in an integrated fashion to provide market certainty to all VoIP service providers. Others urged the FCC to remain cautious when considering SBC IP’s request given SBC IP’s privileged status as a BOC affiliate.

8. Pole Attachments

Under current law, both cable operators and telecommunications carriers are subject to certain fees for utilizing pole attachments, with varying fees depending on the type of attacher.^{255/} Under current law, VoIP service providers should not be subject to additional fees for the use of poles in the provision of VoIP services. The Supreme Court has determined that “the addition of a service does not change the character of the attaching entity -- the entity the attachment is ‘by.’ And this is what matters under the statute.”^{256/} For this reason, the Supreme Court determined that cable operators offering Internet access services (such as cable modem service) over such attachments were within the rates established for cable operators under the

^{252/} AT&T, *VoIP Numbering Issues - Much Ado About Nothing?* (Jan. 22, 2003) (White Paper presented to the North American Numbering Council at the Jan. 22, 2003 Meeting), available at <http://www.nanc-chair.org/docs/documents.html>.

^{253/} *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.*, 17 FCC Rcd 27039, ¶ 301 (2002).

^{254/} *Administration of the North American Numbering Plan*, 19 FCC Rcd 10708 (2004).

^{255/} 47 U.S.C. § 224 (requiring the FCC to regulate “any attachment by a cable television system” or “pole attachment used by telecommunications carriers to provide telecommunications services”).

^{256/} *National Cable & Telecomms. Assoc. v. Gulf Power*, 534 U.S. 327, 333 (2002).

Act.^{257/} Under current law, VoIP service providers also are not subject to pole attachment rates as telecommunications carriers because they are not a “telecommunications carrier” using the attachment “to provide telecommunications service.”^{258/} As with most of these requirements, classification of the service dictates what regulation and fee obligations will apply to the service provider.

F. Possible State Regulation of VoIP Services

State authorization is required prior to providing “telecommunications services” between two points within a state. State authorization for the provision of information services has not been required because information services have been determined to be interstate in nature and the FCC has preempted states from regulating information services.^{259/} A finding by a state that VoIP services are “telecommunications services” and the interstate and intrastate components of the transmission are capable of being identified separately, would permit the state to impose authorization requirements on VoIP service providers and any other traditional telecommunications regulations it determined to be in the public interest with respect to the intrastate services.^{260/} This is precisely what the Minnesota PUC attempted to do, but it was overturned by the Minnesota federal district court.^{261/} The application of VoIP technology for the provision of local exchange services raises a host of new issues beyond universal service, access charges, and other federal obligations identified above. These include whether providers of local IP-Enabled Services should be subject to the same basic local exchange service requirements that traditional local exchange carriers are subject to, such as the requirement to provide 911 emergency services; equal access to long distance carriers; state entry regulation; tariffing and other regulatory compliance obligations including miscellaneous surcharges; number portability; resale; and interconnection.

1. 911 Emergency Services

Most states require local exchange carriers to provide access to public safety and emergency services as a requirement for offering service in the state.^{262/} Such requirements are

^{257/} *Id.* at 339.

^{258/} 47 U.S.C. § 224.

^{259/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Report and Order, 104 F.C.C.2d 958 (1986) (subsequent history omitted); *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (affirming the FCC’s authority to preempt state regulation of jurisdictionally mixed enhanced (information) services); *see also Cable Modem Ruling* ¶ 98 (“We note that the courts have recognized the Commission’s authority under Title I to preempt non-Federal regulations that negate the Commission’s goals, including regulations affecting enhanced services.”).

^{260/} 47 U.S.C. § 152(b) (giving the states authority over intrastate communications).

^{261/} Docket No. P-6214/C-03-108, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance (Minn. P.U.C. Sept. 11, 2003), *overturned by Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, Civil No. 03-5287 (MJD/JGL), Memorandum and Order (D. Minn. Oct. 16, 2003).

^{262/} *See, e.g., Case 94-C-0095, Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to*

usually imposed on all providers of local exchange service, regardless of the technology used to provide that service. Providing access to 911 emergency services over IP-based networks appeared to be technically feasible as of 2001.^{263/}

While state law generally governs local 911 service, the FCC has recognized its importance for all telecommunications end users,^{264/} and the FCC currently is investigating whether to apply some form of 911 requirements to VoIP services.^{265/} The FCC acknowledged that the use of VoIP technology raised significant technical issues in relation to the provision of callback and location information to the relevant PSAP.^{266/} Because the selective routers that handle E911 calls have difficulty processing the protocols associated with VoIP, an additional network element might be needed to accomplish the necessary protocol conversion.

Given the federal and state interest in ensuring access to emergency services for all Americans, providers of IP-based local telephone services may be required to provide access to 911 services for their customers. Even if IP-Enabled Services are marketed as a “secondary” or “no frills” offering, regulators may not be willing to tolerate the possibility that the inability to reach an emergency service provider over an IP line could lead to death or serious injury.

A greater challenge for VoIP service providers, however, may be ensuring that customers can complete calls in an emergency. The electricity that comes in over the phone line, which allows phones to continue to operate even during a power outage, powers most conventional single line phones.^{267/} Because packet-switched networks do not have the same built-in power source that circuit-switched networks do, they are far more likely to be subject to service outages.^{268/} To address similar reliability concerns, many states currently require cable operators

Competition in the Local Exchange Market, Opinion and Order Adopting Regulatory Framework, at 13 (N.Y.P.S.C. May 22, 1996).

^{263/} See, e.g., *Stalking the IP Golden Egg*, CED MAGAZINE, available at <http://www.cedmagazine.com/ced/0004/0004b1.htm> (Apr. 2000) (stating that both Telcordia and Cisco have developed IP software with 911 capabilities); *PROGNOSIS IP Telephony Manager - Overview*, INTEGRATED RESEARCH, available at <http://www.ir.com/avvid2.asp?Id=225> (July 12, 2001) (advertising IP telephony management software that includes 911 applications).

^{264/} Providing nondiscriminatory access to 911 services to new entrants is a prerequisite for Bell operating companies seeking FCC authorization to provide interLATA service under Section 271. 47 U.S.C. § 271(c)(2)(B)(vii). In fact, Ameritech’s failure to provide such access contributed to the dismissal of its application to provide interLATA service in Michigan. See *Application of Ameritech Michigan, Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶ 5 (1997) (rejecting application for failure to provide nondiscriminatory access to operations support system, interconnection, and 911 and E911 services). The FCC also requires wireless carriers to provide access to emergency services for their subscribers. 47 C.F.R. § 20.18

^{265/} *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 25576, ¶ 113 (2002) (“911 NPRM”); *IP-Enabled Services NPRM* ¶¶ 51-57.

^{266/} *911 NPRM* ¶ 113.

^{267/} Harry Newton, NEWTON’S TELECOM DICTIONARY 19 (15th ed. 1999). If the AC power fails, the telephone system can still operate by switching to a backup battery power supply, often called an uninterruptible power supply. *Id.* at 618.

^{268/} David Wallace, *Using the Internet to Cut Phone Calls Down to Size*, N.Y. TIMES (July 19, 2001).

that provide telecommunications services to supply a backup power source or a “network reliability unit.”^{269/} VoIP service providers may be subjected to similar backup power requirements as they become more prevalent substitutes for circuit-switched services.^{270/}

As is the case with conventional wireline telephone service, state regulators may impose a 911 requirement on providers of intrastate IP-Enabled Services. Even without such requirement, VoIP service providers may face civil liability for failure to connect emergency calls if death or injury results. Providers may attempt to reduce their liability in emergencies by conspicuously disclosing the limitations of their service to prospective customers, but such disclosures are unlikely to prevent lawsuits. The risk of liability will remain as long as there is a possibility that customers will not be able to complete calls in an emergency, and may increase if IP service providers market their services as seamless substitutes for traditional phone service. Compliance with 911 regulations made applicable to VoIP service may be the most effective protection against such lawsuits.^{271/}

2. Equal Access to Long Distance Carriers

Local exchange carriers providing wireline services must provide their subscribers with equal access to long distance providers under the FCC’s rules.^{272/} Equal access allows end users to access the facilities of the long distance carrier of their choice by dialing “1” or a five-digit access code (10XXX).^{273/} Competitive LECs have offered subscribers equal access, in large part, because state regulations require them to,^{274/} although their obligation to do so under federal law has been unclear.^{275/} The FCC did not even propose to apply equal access obligations to all

^{269/} See, e.g., Docket No. 00-03-09, *DPUC Investigation into CoxCom, Inc. D/B/A Cox Comm. Conn.’s Installation of Ground-Mounted Back-Up Generators*, Decision (Conn. D.P.U.C. Feb. 7, 2001).

^{270/} See, e.g., Press Release, American Power Conversion, American Power Conversion Offers Industry’s First Power Protection Solution Designed for Cable Telephony and Fixed Wireless Comm., available at <http://www.apcc.com/corporate/press-room/> (July 27, 1999) (announcing “PowerShield” which supplies eight to ten hours of battery backup for communication services during power outages); Product Introduction, *CyberFone Appliance*, available at <http://www.cyberfone.com/products.html> (2001) (offering a “telephony appliance” that offers at least 30 minutes of backup power).

^{271/} Cf. Pub. L. No. 106-81, § 4 (giving wireless carriers the same protection from liability as landline carriers in processing emergency calls).

^{272/} 47 U.S.C. § 251(g); see also *MTS and WATS Market Structure Phase III*, 100 F.C.C.2d 860, 862 (1985).

^{273/} *Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C.2d 911, ¶ 1 (1985).

^{274/} See generally Case Nos. 00-C-0897, 00-C-0188, *Complaint of AT&T Communications of New York, Inc. Against Bell Atlantic-New York Concerning Bell Atlantic-New York’s Management of the Primary Interexchange Carrier (PIC) Program, Proceeding on Motion of the Commission to Examine the Migration of Customers Between Local Carriers*, Notice Inviting Comments (N.Y.P.S.C. Dec. 28, 2000) (investigating the development of a system for freeze administration that will address the alleged shortfalls of the presubscription system); Docket No. 00-11-08, *Application of Verizon New York to Introduce Rates and Regulations for Unauthorized ISP PIC Changes*, Decision (Conn. D.P.U.C. Dec. 27, 2000) (approving Verizon’s tariff for rates and regulations for unauthorized ISP PIC changes so that the charges will be assessed to the alleged unauthorized ISP carrier).

^{275/} Compare 47 U.S.C. § 251(g) (requiring “each local exchange carrier” to provide equal access) with *Universal Service Order* ¶ 79 (explaining that statutory and policy considerations prevent the extension of “symmetrical” equal access obligations to all carriers receiving universal service support); see also *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange*

wireless carriers until 1994, twelve years after the first cellular licenses were awarded.^{276/} It may be likely to be hesitant to apply equal access requirements to other emerging technologies like IP-Enabled Services.^{277/} The related ban on unauthorized changes of a subscriber's carrier selection, or "slamming," also applies to all telecommunications carriers except CMRS providers.^{278/}

3. Entry Regulation, Resale, Number Portability, and Interconnection

State commissions vary radically in their application of entry regulations. Most states continue to require any entity engaged in the provision of intrastate telecommunications services to seek authority prior to providing such services, and in many instances, these requirements apply to carriers providing only dedicated services or even resold services.^{279/} Consequently, if phone-to-phone IP-Enabled Services were determined to be intrastate telecommunications services, the provision of such services by a new entrant might be subject to entry regulations.

Once such services are deemed to be telecommunications services, the provider becomes subject to all local exchange carrier requirements of the Act, including number portability, resale, and interconnection obligations.^{280/} These obligations may pose special problems for local VoIP service providers utilizing new technologies to offer their services. Alternatively, where such services are not determined to be telecommunications services and VoIP service providers are not recognized carriers, these providers have no legal right to interconnect with other carriers^{281/} or right to obtain telephone number resources. Both of these components are critical to a successful local voice service offering and could pose a practical barrier to entering or sustaining a position in the local marketplace.

Carriers, 17 FCC Rcd 4015 (2002) (examining whether competitive LECs should be subject to equal access obligations).

^{276/} *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, 9 FCC Rcd 5408, 5412–50 (1994). These equal access requirements were later repealed with respect to wireless carriers. 47 U.S.C. § 251(g) (applying equal access obligations to local exchange carriers providing wireline services).

^{277/} *But see Provision of Directory Listing Information Under the Communications Act of 1934, as Amended; The Use of N11 Codes and Other Abbreviated Dialing Arrangements; Administration of the North American Numbering Plan*, 17 FCC Rcd 1164, ¶ 15 (2002) (seeking comment on whether to apply equal access requirements to 411 service).

^{278/} 47 C.F.R. §§ 64.1100–90.

^{279/} *See, e.g.*, 16 CONN. GEN. STAT. 247(a)(1); NY CLS PUB SER § 99.

^{280/} 47 U.S.C. § 251(b) (outlining the obligations of all local exchange carriers).

^{281/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 995 (1996) (subsequent history omitted).