

Faster...Easier...Cheaper...
**Can Regulators Keep Up with the Thriving Market for
Cable-Provided VoIP Services?**

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TABLE OF CONTENTS

I. OVERVIEW OF HISTORICAL AND RECENT FEDERAL AND STATE ACTIONS RELEVANT TO ASSESSING THE REGULATORY TREATMENT OF IP-ENABLED SERVICES.....	1
A. FCC Actions Relevant to Assessing the Future Regulation of IP-Enabled Services.....	2
1. 1998 Report to Congress.....	2
2. Cable Modem Classification Proceedings	3
3. pulver.com Free World Dialup Order.....	5
4. AT&T Phone-to-Phone Order.....	6
5. Vonage Order.....	7
6. BellSouth Petition for Declaratory Ruling on State Regulation of Broadband Internet Access Services.....	9
7. Madison River Communications, LLC Decision.....	10
8. SBC Petition for Forbearance Decision.....	10
9. E911 Requirements for IP-Enabled Service Providers.....	11
10. CALEA Report and Order and NPRM	14
11. Wireline Broadband Classification Report and Order.....	17
II. PENDING FCC PROCEEDINGS, STATE ACTIONS, AND CONGRESSIONAL EFFORTS THAT LIKELY WILL FURTHER SHAPE THE REGULATORY LANDSCAPE FOR IP-ENABLED SERVICE PROVIDERS	19
A. FCC Proceedings.....	19
1. Cable Modem NPRM	19
2. IP-Enabled Services NPRM.....	20
3. E911 IP-Enabled Services Further Notice of Proposed Rulemaking	22
4. CALEA Outstanding Issues from NPRM and Further Notice of Proposed Rulemaking.....	22
5. Broadband Consumer Protections NPRM	24
6. Intercarrier Compensation NPRM.....	24
7. Petitions For Access Charge Reform Concerning IP-Enabled Services.....	25
8. Universal Service Proceedings	27
9. Petitions for Declaratory Ruling and Forbearance.....	28

B. State Regulation of IP-Enabled Services	30
1. Minnesota.....	30
2. California	31
3. New York.....	33
4. Florida.....	34
5. Colorado.....	35
6. Nebraska	36
7. Other States.....	36
C. Congressional Efforts to Define the Regulatory Regime for IP Services	39
III. THE REGULATORY UNCERTAINTY SURROUNDING THE APPLICATION OF CURRENT REGULATION TO IP-ENABLED SERVICES	41
A. Tension between Federal and State Jurisdiction	41
B. Functionality vs. Facilities	43
C. FCC Forbearance and Promotion of the Deployment of Advanced Services.....	44
D. Taxation of VoIP Services	46
1. State Taxation	46
2. Federal Excise Tax.....	47
3. Internet Tax Freedom Act.....	48
E. The Potential Application of Other Federal Regulations on VoIP Services Providers.....	49
1. Universal Service Fund (“USF”) Contributions	49
2. Intercarrier Compensation	51
3. Privacy	54
4. Access by Individuals with Disabilities.....	55
5. Truth-in-Billing.....	57
6. Access to Numbers	58
7. Pole Attachments	59

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.” Section I provides an overview of historical and recent FCC actions that are relevant to assessing the regulatory treatment of IP-enabled services. Section II reviews the pending FCC proceedings, state actions, and Congressional efforts that may further shape the regulatory landscape for VoIP service providers. Section III analyzes the degree of regulatory uncertainty over the application of current regulations to IP-enabled services.

I. OVERVIEW OF HISTORICAL AND RECENT FEDERAL AND STATE ACTIONS RELEVANT TO ASSESSING THE REGULATORY TREATMENT OF IP-ENABLED 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 service providers have avoided regulation through providers’ claims that such services fall into the category of information services.

Over the past several years, 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

^{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”); Elizabeth M. Gillespie, *Deal with MCI Allows only Outbound Calls at First; Test to Begin this Week*, SAN JOSE MERCURY NEWS, Dec. 13, 2005 (reporting that Microsoft and MCI will

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 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

soon offer services that allow consumers to place phone calls from their personal computers and noting that Yahoo and America Online already allow instant-messaging users to receive calls and make calls using conventional phones); *Skype Pursues U.S. Consumer Mainstream Via RadioShack*, N.Y. TIMES, Nov. 21, 2005; Peter Grant, *Ready for Prime Time*, WALL ST. J., 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*, BOSTON GLOBE, Jan. 8, 2004, at E1 (reporting that Verizon is launching a multibillion-dollar overhaul of its network to provide local VoIP services).

^{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/} *Id.* ¶¶ 83, 89.

^{8/} *Id.* ¶ 88.

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/}

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 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

^{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.

^{10/} *Report to Congress* ¶ 90.

^{11/} *IP-Enabled Services*, 19 FCC Rcd 4863 (2004) ("*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.

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/}

Several groups appealed the FCC's finding that cable modem service was an interstate information service.^{17/} 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 (a decision that pre-dated the FCC's *Cable Modem Ruling* and was 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.^{18/} 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,^{19/} which was denied by the court.^{20/} The court did, 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.^{21/} 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.^{22/} 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, then FCC Chairman Powell stated: "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."²³

^{15/} *Id.* ¶ 39.

^{16/} *Id.* ¶ 41.

^{17/} *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).

^{18/} *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

^{19/} *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 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).

^{20/} *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).

^{21/} *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).

^{22/} *FCC v. Brand X Internet Services; NCTA v. Brand X Internet Services*, Nos. 04-281, 04-277, Certiorari Granted (Dec. 3, 2004).

^{23/} *Chairman Powell Reacts to Supreme Court Cable Modem Decision*, News Release (Dec. 3, 2004).

On June 27, 2005, the Supreme Court issued its opinion ruling that the FCC’s finding that broadband cable modem services are exempt from mandatory common carrier regulation is a lawful construction of the Communications Act.^{24/} The Supreme Court stated that the Ninth Circuit should have applied the *Chevron* framework to its analysis of the FCC’s interpretation of “telecommunications service.”^{25/} Thus, it found the FCC’s interpretation of the word “offering” within the Act’s “telecommunications service” definition was entitled to deference. The Court found that an “offering” could be, as the FCC had determined, the offer of a finished Internet service product.^{26/} The Supreme Court also held that the transmission component of a cable modem service is “sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering.” Accordingly the Court upheld the Commission’s decision that Internet Service Providers offer Internet access as an integrated service.^{27/}

The Court held that the FCC’s decision to allow cable broadband services to function in a minimal regulatory environment was within the FCC’s discretion in light of its findings about marketplace competition. Moreover, it stated there was “nothing arbitrary or capricious about applying a fresh analysis to the market.”^{28/} The Court also acknowledged that the FCC is in a “far better position to address” matters of a “technical, complex, and dynamic” nature than the courts.^{29/}

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 FCC rejected Free World Dialup’s position that it did not offer an information service.

^{24/} *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2691 (June 27, 2005).

^{25/} *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984)

^{26/} *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2691, 2692 (June 27, 2005).

^{27/} *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2691, 2710 (June 27, 2005).

^{28/} *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2691, 2711 (June 27, 2005).

^{29/} *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2691, 2712 (June 27, 2005).

^{30/} *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Mem. Op. and Order, 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*, Petition, WC Docket No. 03-45 (filed Feb. 5, 2003).

Instead, the FCC concluded that the service fell squarely within the definition of an information service^{32/} Had the FCC found otherwise; Free World Dialup arguably would have been beyond the FCC's jurisdictional reach. The *pulver.com Order* also emphasizes the FCC's long-standing policy of keeping consumer Internet services free from burdensome regulation at both the federal and state levels,^{33/} which will be discussed further below.^{34/}

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.^{35/} 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.^{36/} 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.^{37/} 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."^{38/} 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.

^{32/} *pulver.com Order* ¶¶ 11, 15.

^{33/} *pulver.com Order* ¶ 21.

^{34/} See *infra* Section II.A.

^{35/} *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").

^{36/} *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Petition, WC Docket No. 02-361 (filed Oct. 18, 2002).

^{37/} *AT&T Phone-to-Phone Order* ¶ 1.

^{38/} *AT&T Phone-to-Phone Order* ¶¶ 18, 17; see also *id.*, Statement of Chairman Michael K. Powell ("it is important to be guided by the perspective of the consumers that are purchasing service, in determining how a service should be understood").

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 a provider of “telephone service” and to impose entry, rate, and 911 requirements on Vonage as a condition of offering service in the state.^{39/}

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 previous 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. The FCC found that, if it 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.

^{39/} *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Mem. Op. and Order, 19 FCC Rcd 22404 (2004) (“*Vonage Order*”).

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 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.

Several state commissions and the National Association of State Utility Consumer Advocates ("NASUCA") have appealed the FCC's *Vonage Order*. The case will be heard by the Ninth Circuit Court of Appeals, the first circuit in which the appeal was filed (by the California Public Utilities Commission).^{40/} The appeals filed in the Second Circuit (by the New York Public Service Commission),^{41/} the Sixth Circuit (by the Public Utilities Commission of Ohio),^{42/} and the Eighth Circuit (separate appeals filed by NASUCA and the Minnesota Public Utilities Commission)^{43/} were transferred to the Ninth Circuit. Numerous private entities, including Vonage, AT&T Corp, Time Warner, Inc., SBC Communications and Verizon filed motions to intervene on behalf of the Federal Communications Commission.^{44/} The State of California subsequently asked the court to dismiss its motion, citing the three similar claims that were before the Ninth Circuit.^{45/} The request was granted and the court dismissed the case without prejudice.^{46/}

^{40/} *California v. FCC*, No. 05-70007 (9th Cir. filed Jan. 3, 2005).

^{41/} *New York v. FCC*, No. 05-1060 (2d Cir. filed Jan. 7, 2005).

^{42/} *Public Utils. Comm'n of Ohio v. FCC*, No. 05-3056 (6th Cir. filed Jan. 7, 2005).

^{43/} *Minnesota Pub. Utils. Comm'n v. FCC*, No. 05-1069 (8th Cir. filed Jan. 6, 2005); *National Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-1122 (8th Cir. filed Jan. 11, 2005).

^{44/} The following entities submitted and were granted motions to intervene on behalf of the FCC: Vonage Holdings Corp.; AT&T Corp.; 8x8 Inc.; The Voice on Net Coalition, Inc.; pulver.com; BellSouth Corp., Qwest Communications International, Inc., SBC Communications, Inc. and the Verizon telephone companies; MCI, Inc.; Time Warner, Inc.; Time Warner Cable, Inc., and America Online, Inc.; Level 3 Communications LLC; the High Tech Broadband Coalition; Charter Communications, Inc.; and Pac-West Telecomm, Inc. See Order, *California v. FCC*, No. 05-70007 (9th Cir. Feb. 18, 2005).

^{45/} Motion for Voluntary Dismissal, *California v. FCC*, No. 05-70007 (filed April 12, 2005).

^{46/} Order, *California v. FCC*, No. 05-70007 (9th Cir. April 15, 2005).

6. **BellSouth Petition for Declaratory Ruling on State Regulation of Broadband Internet Access Services**

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”).^{47/} 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*⁴⁸ 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 issued a decision in March 2005. The FCC agreed with BellSouth that state commissions could not require incumbent LECs to provide digital subscriber line (“DSL”)

^{47/} *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).

⁴⁸ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*), *aff’d in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973) (collectively referred to as *Computer I*); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff’d sub nom. Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II*); *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); *see also Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Dockets Nos. 95-20 & 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (collectively referred to as *Computer III*). Together with *Computer I*, *Computer II* and *Computer III* are referred to as the “*Computer Inquiries*.”

service to an end user customer over the same UNE loop facility that a competitive LEC used to provide voice services to that end user.^{49/} The FCC found that state decisions imposing such an obligation were inconsistent with and would substantially prevent implementation of the FCC's federal policies. While this proceeding did not directly address the treatment of VoIP, it did require a review of the classification, jurisdictional, and regulatory treatment of certain broadband services.

7. **Madison River Communications, LLC Decision**

In March 2005, the FCC Enforcement Bureau issued an Order announcing its adoption of a Consent Decree with Madison River Communications, LLC ("Madison River"),^{50/} an authorized local exchange carrier (*i.e.*, common carrier). In the Consent Decree, the FCC agreed to terminate its investigation of Madison River's compliance with Section 201(b) of the Act.^{51/} The investigation stemmed from allegations that Madison River blocked customer ports used for VoIP applications. The alleged actions affected customers' ability to use VoIP through different service providers. In order to "avoid the expenditure of additional resources" Madison River paid a fine and more importantly, agreed not to "block ports used for VoIP applications or otherwise prevent customers from using VoIP applications."^{52/} The quick resolution of the case (the Enforcement Bureau had issued an initial Letter of Inquiry to Madison River only a few weeks prior to the Consent Decree) was consistent with past federal and state actions to swiftly enforce common carriers obligations to provide services to all customers in a just and reasonable manner.

8. **SBC Petition for Forbearance Decision**

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.^{53/} 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 addition, SBC filed a petition for forbearance from the application of traditional common carrier regulation to its IP platform service.^{54/}

^{49/} *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*, First Mem. Op. and Order and NOI, 20 FCC Rcd 6083 (rel. Mar. 25, 2005).

^{50/} Order, *In the Matter of Madison River Communications, LLC and Affiliated Companies*, 20 FCC Rcd 4295 (2005) ("*Madison River Decision*").

^{51/} The FCC Enforcement Bureau was also investigating Madison River Communication, LLC's parent company Madison River Telephone Company, LLC and its affiliated companies.

^{52/} *Madison River Decision* ¶ 5.

^{53/} *Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services*, Petition, WC Docket No. 04-29 (filed Feb. 5, 2004).

^{54/} *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Petition, WC Docket No. 04-29 (filed Feb. 5, 2004).

On May 5, 2005, the FCC denied SBC's request for forbearance because, in part, it was unclear whether the regulation at issue actually applied to SBC's services.^{55/} The FCC found that Section 10 of the Act supports the interpretation of "barring grants of forbearance from obligations that may or may not otherwise apply."^{56/} It stated that an "interpretation permitting petitions seeking such relief would regularly require us to prejudge important issues pending in broad rulemakings and otherwise distort the Commission's deliberative process."^{57/} Moreover, the FCC declared that granting forbearance petitions from regulations that may in fact apply to the service would "create serious administrability [sic] concerns and would threaten the Commission's ability to determine its own priorities and set its own agenda."^{58/}

The FCC also found SBC's petition was not "sufficiently specific" to determine if its request satisfied the requirements of Section 10 of the Act. In particular the FCC found that SBC did not state with precision which "facilities and services its request for forbearance is meant to include" and failed to address from which provisions of Title II it wished to be exempt^{59/} The FCC emphasized its reticence concerning the issuance of "rushed, and potentially poor" decisions that may have significant regulatory implications.

9. E911 Requirements for IP-Enabled Service Providers

On June 3, 2005, the FCC released a First Report and Order ("*E911 VoIP Order*") and Notice of Proposed Rulemaking concerning the requirements for certain VoIP service providers to offer enhanced 911 ("E911") services to their subscribers.^{60/} The rules apply to those VoIP services that can be used to receive telephone calls that originate on the PSTN and can be used to terminate calls to the PSTN -- "interconnected VoIP services".^{61/} Specifically, for purposes of the *E911 VoIP Order*, interconnected VoIP services are defined as those that "(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to" the public switched telephone network. The FCC also emphasized that the *E911 VoIP Order* applies to all VoIP services that are encompassed within the scope of the *Vonage Order*. The *E911 VoIP Order* regulatory obligations do not apply to providers of other IP-based services, such as instant messaging or Internet gaming because customers of those services cannot place calls to and receive calls from the PSTN.^{62/}

^{55/} Memorandum Opinion and Order, *SBC Communications Inc. Petition for Forbearance From the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, ¶¶ 4-5 (2005).

^{56/} *Id.* ¶ 12.

^{57/} *Id.* ¶ 9.

^{58/} *Id.* ¶ 10.

^{59/} *Id.* ¶¶ 14-16.

^{60/} *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and NPRM 20 FCC Rcd. 10245 (rel. June 3, 2005) ("*E911 VoIP Order*").

^{61/} *E911 VoIP Order* ¶ 24.

^{62/} *Id.* at n. 78.

The FCC's decision was based on its findings that consumers expect that VoIP services interconnected with the PSTN will function like a "regular telephone" service; especially if a VoIP service subscriber is able to receive calls from the PSTN and is able to place calls to the PSTN. Although the FCC acknowledged its commitment to allow VoIP services to evolve without undue regulation, it stressed its obligation to promote "safety of life and property" and to facilitate "a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.^{63/}

All interconnected VoIP providers were required to provide E911 services by November 28, 2005. By this date providers had to ensure that all 911 calls, with callback number and the caller's location, were routed to the appropriate public safety answering point ("PSAP"), designated statewide default answering point, or appropriate local emergency authority.^{64/} The calls must be routed using ANI,^{65/} and if necessary, pseudo-ANI^{66/} via the dedicated Wireline E911 Network, and the customer Registered Location must be available from or through the ALI database.^{67/} The FCC also stated that incumbent local exchange carriers ("ILECs"), as common carriers, are subject to Sections 201 and 202 of the Act and it indicated that it will closely monitor these efforts and take any further actions necessary if interconnected VoIP service providers are not getting the necessary access to the 911 tandems of the ILECs.^{68/}

In addition, interconnected VoIP service providers must obtain, prior to the initiation of service, the physical location at which the service will first be utilized (Registered Location) and provide their end users one or more methods of updating information regarding the user's physical location. Customer notification requirements were also established requiring all interconnected VoIP providers to advise every subscriber, both new and existing, of the circumstances under which E911 service may not be available or may in some way be limited as compared to traditional E911 service. Interconnected VoIP providers must obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood the advisory regarding the E911 capabilities of the service. The providers must also submit compliance filings to the FCC.^{69/}

^{63/} *Id.* ¶ 4.

^{64/} *Id.* ¶ 37. On November 7, 2005 the FCC released a Public Notice announcing that it would not require VoIP providers to disconnect customers in areas where the provider cannot provide full E911 service by November 28, 2005. The FCC stated that it does expect interconnected VoIP providers to discontinue marketing and accepting new customers in those areas after that date. The FCC also announced that it would require each interconnected VoIP provider to submit a Compliance Letter by November 28, 2005. *See Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice over Internet Protocol 911 Compliance Letters*, Public Notice, DA 05-2945 (rel. Nov. 7, 2005).

^{65/} Defined in 47 C.F.R. § 20.3.

^{66/} Defined in 47 C.F.R. § 20.3.

^{67/} *E911 VoIP Order* ¶ 37.

^{68/} *Id.* ¶ 40.

^{69/} *Id.* ¶¶ 48-50. The FCC also ordered all interconnected VoIP providers to submit a letter to the FCC detailing their compliance with the FCC's rules. The FCC emphasizes that failure to comply with its rules "cannot and will not be tolerated" and interconnected VoIP providers that do not comply fully with the rules will be subject to "swift enforcement," including substantial proposed forfeitures, cease and desist orders, and proceedings to revoke any FCC licenses held by the interconnected VoIP provider. On July 26, 2005, the FCC Enforcement Bureau issued a public notice announcing that it would not enforce the July 29, 2005 deadline and extending it to August 30,

The FCC reaffirmed its previous findings that it has statutory authority under Sections 1, 4(i), and 251(e)(3) of the Act to determine which entities should be subject to the FCC's 911 and E911 rules.^{70/} While the FCC acknowledged that there are generally intrastate components to interconnected VoIP service and E911 service, the FCC rejected any argument that 911/E911 services are purely intrastate; thereby establishing its jurisdiction over the matter. The FCC declined to adopt rules regarding the funding of 911 services by interconnected VoIP providers.^{71/} It also declined to exempt providers of interconnected VoIP service from liability under state laws related to E911 services.^{72/} The Commission also issued an NPRM seeking comment on additional steps it should take to ensure that VoIP services provide reliable and ubiquitous 911 services. The NPRM will be discussed in further detail below.

The FCC issued two public notices clarifying the obligations under the rules and allowed providers to continue providing interconnected VoIP services despite failing to fully comply with the regulations by the November 28, 2005 deadline. The FCC did call on non-compliant providers to cease marketing their VoIP services and refrain from accepting new customers for their respective services in all areas where they are not transmitting 911 calls to the appropriate PSAP in full compliance with its rules.^{73/} Providers have publicly questioned the FCC's ability to regulate advertising regulations.^{74/} FCC Chairman Kevin J. Martin stated that providers that requested waivers from the Order are not absolved from the FCC's announcement on marketing restrictions.^{75/} At least one provider, Vonage, indicated that it intended to continue its marketing efforts even if found noncompliant because it filed for a waiver.^{76/}

2005. *See Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, Public Notice, DA 05-2085 (rel. July 26, 2005). Many providers met the Sept. 28, 2005 deadline, although, despite significant efforts, some failed to receive acknowledgment from all of their subscribers. On October 31, 2005 the Enforcement Bureau announced another extension. In finding "evidence of providers' substantial efforts to comply with the Commission's rules, as well as significant progress in obtaining acknowledgements from all of their customers," the Enforcement Bureau extended its deadline for 100% notification for providers that have gathered more than 90% acknowledgments from subscribers. Providers that did not obtain 100% must file an additional compliance report by November 28, 2005. *See Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, Public Notice, DA 05-2874 (rel. Oct. 31, 2005); *See also Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice over Internet Protocol 911 Compliance Letters*, Public Notice, DA 05-2945 (rel. Nov. 7, 2005).

^{70/} *Id.* ¶ 19.

^{71/} *Id.* ¶ 59. (The FCC found that the rules it adopted will neither contribute to the diminishment of 911 funding nor require a substantial increase in 911 spending by state and local jurisdictions.)

^{72/} *Id.* ¶ 54. (The FCC found that, to the extent individual interconnected VoIP providers believe they need liability protection, they may seek to protect themselves from liability for negligence through their customer contracts and through their agreements with PSAPs.)

^{73/} *See Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice over Internet Protocol 911 Compliance Letters*, Public Notice, DA 05-2945 (rel. Nov. 7, 2005).

^{74/} *FCC's VoIP 'E911' Marketing Ban Raises Issues for Internet Ads*, TR DAILY, Dec. 15, 2005.

^{75/} *Martin Adamant on VoIP Provider E-911 Compliance*, COMMUNICATIONS DAILY, Dec. 15, 2005.

^{76/} *Id.*

The FCC's decision has not been well-received by some VoIP service providers. Petitions for review of the *E911 VoIP Order* have been filed with the FCC and with the United States Court of Appeals for the District of Columbia.^{77/} The parties generally claim that the FCC's decision was "arbitrary and capricious" and that the decision falls outside of the Commission's statutory jurisdiction. Furthermore, some petitioners stated that it was functionally impossible to implement the FCC's requirements by the deadline and have asked for temporary stays of the order.^{78/} Petitions were filed in United States Court of Appeals for the District of Columbia. Based on representations by the FCC that it would not require interconnected VoIP providers to discontinue service by the deadline, the court ruled against Nuvio's motion for emergency stay.^{79/} The Nuvio appeal is pending and the court recently issued a calendar of briefing dates.

10. CALEA Report and Order and NPRM

Cable operators that provide broadband Internet services or voice over Internet protocol ("VoIP") services to their subscribers are required by a recent Federal Communications Commission ("FCC" or "Commission") to comply with the Communications Assistance for Law Enforcement Act ("CALEA"), which compels carriers to provide assistance to law enforcement authorities to obtain access to communications that may be part of an ongoing investigation. Assistance is required in the forms of both cooperation and system capability. The FCC's application of CALEA to broadband Internet services is being challenged in federal court. Even

^{77/} Nuvio Corporation ("Nuvio") filed a petition for review of the *E911 VoIP Order* with the United States Court of Appeals for the District of Columbia on July 11, 2005. See Petition for Review, *Nuvio Corp. v. FCC*, Case No. 05-1248 (D.C. Cir. filed July 11, 2005). The court subsequently consolidated Nuvio's petition with the petition filed by Lightyear Network Solutions, Inc.

^{78/} On October 24, 2005, Nuvio, Lightyear Network Solutions, LLC, Lingo, and i2 Telecom International, Inc. filed a joint motion for a partial stay with the FCC concerning WC Docket 05-196 and 04-36 to the FCC. In particular, the parties request a stay of sections 9.5(b) and 9.5(c) of the FCC's rules, which require interconnected VoIP providers to supply E911 services by Nov. 28, 2005 at any location that the user may register. The parties argue that the FCC should grant the stay because the Order's 120 day requirement is arbitrary and capricious, runs "counter to evidence in record" and "is inconsistent with the Commission's past decisions regarding implementation of E911 capabilities." The parties argue that they will be irreparably harmed because they will be forced to disconnect existing customers if the FCC enforces the 120-day deadline. *IP Enabled Services, E911 Requirement for IP-Enabled Service Providers*, Motion for Partial Stay, WC Docket No. 05-196 and No. 04-36 (filed Oct. 24, 2005). On November 1, 2005, VoIP providers Nuvio, Lightyear, Lingo and i2 Telecom filed for an emergency stay of the FCC's E911 deadline. The parties stated that they may have to cease operations if they're unable to employ a 911 solution across their systems by that deadline, November 28, 2005. They argued that they don't have "the resources, capital or time" to create and deploy their own dedicated systems by that date and that no out of the box solutions exist that cover the entire U.S." See Emergency Motion for Partial Stay, *Nuvio Corp. v. FCC*, Case No. 05-1248 (D.C. Cir. filed Nov. 1, 2005). On November 3, 2005, RNK, Inc. ("RNK") filed for a limited waiver with respect to the November 28, 2005 deadline with the FCC. It stated that it needed an extension in order to satisfy all of the FCC's requirements. Specifically it requests a six-month extension to cover its subscriber base in parts of New Jersey and Florida; as well as a one year extension to cover the remained of its subscriber base. See *IP Enabled Services, E911 Requirement for IP-Enabled Service Providers*, Request of RNK, Inc. for a Limited Waiver, WC Docket No. 04-36 and No. 05-196. (filed Nov. 3, 2005).

^{79/} *Wireline*, COMMUNICATIONS DAILY, Nov. 16, 2005.

if CALEA applicability to broadband is upheld, there are a number of questions and issues about application of CALEA that remain to be resolved by the FCC and the industry.

On August 5, 2005, the FCC adopted an order concluding that CALEA applies to “facilities-based broadband Internet access providers and providers of interconnected [VoIP] service.”^{80/} Providers of these types of services were given eighteen months to come into compliance with CALEA provisions.^{81/} Rather than issuing orders responding to all of the issues raised in the *CALEA Broadband NPRM*, the *CALEA Broadband Order* was purposefully limited to establishing that CALEA applied to these specific services.^{82/} The FCC explained its belief “that addressing applicability issues now is the best approach to commencing productive discussions between law enforcement agencies and industry” and that “[b]y identifying the providers that are covered today, we seek to ensure that the appropriate industry representatives will be party to those discussions.”^{83/}

As it suggested it might do in the *NPRM*, the FCC declared in the *Order* that VoIP and Broadband access are “telecommunications carriers” under CALEA, and therefore covered by CALEA provisions, even though they remain outside of the definition of “telecommunications services” under the Communications Act.^{84/} The Commission found the CALEA definition of telecommunications service to be broader than that in the Communications Act because of the CALEA provision that defines as a telecommunications carrier any service that acts as a “substantial replacement” for any part of the public switched telephone network (“PSTN”).^{85/} This substantial replacement provision (“SRP”) includes three components, each of which must be satisfied for the FCC to deem a service as a telecommunications carrier for CALEA purposes:^{86/} (1) the entity must be providing “wire or electronic communication switching or transmission service,”^{87/} the switching portion of which the FCC has defined as including “routers, softswitches, and other equipment that may provide intelligence functions for packet-

^{80/} The text of the *Order* was issued on September 23, 2005. *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further NPRM, 20 FCC Rcd 14989(Month Day, 2005) (“*CALEA Broadband Order*”). The FCC had defined “facilities-based” providers as those entities that “provide transmission or switching over their own facilities between the end user and the Internet Service Provider (ISP).” *Id.* at 14502, n.74; *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, NPRM and Declaratory Ruling, 19 FCC Rcd 15676, 15693 n.79 (Aug. 9, 2004) (“*CALEA Broadband NPRM*”). Interconnected VoIP services are those “that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.” *CALEA Broadband Order* at 14509; *E911 VoIP Order*.

^{81/} *CALEA Broadband Order* ¶ 46.

^{82/} *Id.*

^{83/} *Id.* ¶ 47.

^{84/} *Id.* ¶ 10 (“Congress intended the scope of CALEA’s definition of ‘telecommunications carrier’ to be more inclusive than the similar definition of ‘telecommunications carrier’ in the Communications Act.”); *id.* ¶ 26; *id.* ¶ 39.

^{85/} See *CALEA Broadband NPRM* ¶ 37.

^{86/} See *CALEA Broadband Order* ¶¶11-14.

^{87/} 47 U.S.C. § 1001(8)(B)(ii).

based communications;”^{88/} (2) the service must be “a replacement for a substantial portion of the local telephone service,”^{89/} which the FCC defines as satisfied if a service replaces “any significant part” of the functionality previously provided by the PSTN; and (3) the Commission must find that “it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA].”^{90/}

The Commission similarly interpreted the definition of “information service” under CALEA to be different from the definition of the term under the Communications Act and determined that broadband Internet access and interconnected VoIP services were not excluded information services under CALEA.^{91/}

Almost immediately, the *Order* was challenged in federal court as being arbitrary, capricious, and contrary to law. The two cases filed in the District of Columbia Circuit, now consolidated, are pending.^{92/} Petitioners included Comptel, Sun Microsystems, Pulver.com, the American Library Association, the American Council on Education (“ACE”), the Center for Democracy and Technology (“CDT”) and the Electronic Frontier Foundation (“EFF”). An ACE spokesperson expressed concern about the estimated \$7 billion costs of implementation for the nation’s colleges and universities, saying the ACE “hope[s] to convince the FCC that colleges and universities can provide the same access through alternative approaches.”^{93/} The EFF raised security concerns: “Many of the technologies currently used to create wiretap-friendly computer networks make the people on those networks more pregnable to attackers who want to steal their data or personal information.”^{94/} The central concern, however, appears to be the impact the ruling could have on innovation on the Internet. A CDT spokesperson expressed concern that “extending a law written specifically for the public telephone network to these emerging technologies will stifle the sort of innovation that has been a hallmark of the Internet revolution.”^{95/} The ruling, according to the CDT, would force the VoIP industry to get approval from Law Enforcement before it can roll out any new technology for public use.^{96/}

^{88/} *CALEA Broadband NPRM* ¶ 43.

^{89/} 47 U.S.C. § 1001(8)(B)(ii).

^{90/} 47 U.S.C. § 1001(8)(B)(ii).

^{91/} *CALEA Broadband Order* ¶¶ 15-23.

^{92/} *Amercian Council on Educ. v. FCC*, No. 05-1404 (D.C. Cir. filed Oct. 24, 2005) (consolidating *Comptel v. FCC*, No. 05-1408 (D.C. Cir. filed Oct. 25, 2005)).

^{93/} Elliot Smilowitz, *Groups Battle FCC’s Wiretap Act Extension*, UPI, Oct. 30, 2005, <http://www.upi.com/Hi-Tech/view.php?StoryID=20051028-025706-9246r>.

^{94/} *Id.*

^{95/} Roy Mark, *VoIP Wiretap Order Heads to Court*, INTERNETNEWS.COM, Oct. 25, 2005, <http://www.internetnews.com/bus-news/print.php/3559066>.

^{96/} Smilowitz, *supra* note 29.

11. Wireline Broadband Classification Report and Order

The FCC initiated the *Wireline Broadband* proceeding to determine “the appropriate legal and policy framework for wireline broadband Internet access service....”^{97/} This decision primarily provided relief to incumbent LECs and provided parity in treatment among wireline broadband Internet access service providers and cable modem service providers. In the Order the FCC affirmed its tentative conclusion “that wireline broadband Internet access service provided over a provider’s own facilities is an information service.” The classification was based on the FCC’s finding that Internet access offers “a single, integrated service” to end users and it “inextricably combines the offering of powerful computer capabilities with telecommunications.” The FCC also stated that it will not classify services based on the owner of the transmission facilities. It reiterated that its decision was based on the “end product” delivered to the user. The FCC noted that in classifying wireline broadband Internet access services and cable modem services as “information services” it can move towards “crafting an analytical framework that is consistent... across multiple platforms that support competing services.”^{98/}

The FCC also eliminated access obligations for wireline broadband Internet access providers for four overarching reasons. First, it found that broadband Internet access services are offered by at least two platform providers in every market and emerging platforms are continuously expanding into markets. Second, current regulations constrain technological advances and deter broadband infrastructure investment. Third, regulations limited the ability of providers to efficiently respond to the technological advances in the marketplace. Fourth, the “marketplace should create incentives for facilities-based wireline broadband providers to make broadband transmission available on a wholesale basis.”^{99/}

The FCC also eliminated the long-standing *Computer Inquiry* requirements; finding that they are no longer appropriate because the broadband marketplace “is markedly different from the narrowband marketplace” that existed when the regulations were adopted.^{100/} Citing the rapid

^{97/} *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and NPRM, 20 FCC Rcd 14853 (rel. Sept. 23, 2005) (“*Wireline Broadband Order*”). The Commission defined wireline broadband Internet access service as “a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities.” *Id.* ¶ 9. It defined “Internet access service” as a “service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups.” *Id.* Wireline broadband Internet access service was compared to cable modem service and defined as a “functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission. *Id.*”

^{98/} *Id.* ¶ 17.

^{99/} *Id.* ¶ 19.

^{100/} Although the Commission addressed comments concerning competition in particular geographic markets, it found that the comments did not reflect the overall marketplace and failed to “recognize all of the forces that influence broadband Internet access service deployment and competition.” The Commission stated that there is “vigorous” competition between platform providers and increasing competition at the retail level. Among broadband customers, the Commission found that “approximately 60.3 percent received cable modem service, while approximately 37.2 percent received DSL service and other broadband services provided by incumbent LECs and

evolutionary nature of the broadband technology market, the FCC concluded that the costs of the *Computer Inquiry* regulations outweighed the benefits and no longer achieved the desired regulatory objectives. The FCC also stated that it is not appropriate to make findings about dominance or non-dominance with respect to the retail market for broadband Internet access because of the characteristics of the marketplace.^{101/}

The Commission affirmed that facilities-based carriers providing wireline broadband Internet access services are immediately relieved of “subsidiary, CEI, and ONA obligations.”^{102/} Furthermore, subject to a one-year transition period for existing services, wireline broadband Internet access service providers are no longer required to separate and offer transmission components of wireline broadband Internet access services as a stand-alone telecommunications service under Title II.^{103/} The FCC determined that the wireline broadband Internet access service providers may offer transmission either on a non-common carrier or a common carrier basis.^{104/} It noted that in order to comply with statutory requirements, wireline broadband Internet access providers may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and non-common carrier basis. But, entities may provide one *type* of “broadband Internet access transmission on a common carrier basis and *another type of such transmission* on a non-common carrier basis.”^{105/}

The FCC required current unbundled Title II wireline broadband Internet access transmission services to remain available during a one-year transition period so that ISPs may continue to operate until new agreements are negotiated.^{106/} The FCC also found, for regulatory classification purposes, that the transmission component of a broadband Internet access service is a “mere ‘telecommunications’ and not a ‘telecommunications service’” and therefore is not subject to Title II obligations.^{107/}

In regards to LEC obligations under Section 251, the Commission determined that “competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled... [s]o long as a competitive LEC is offering an ‘eligible’ telecommunications service.” It reiterated that “nothing in this Order changes a requesting

competitive LECs. It also noted that both the cable and incumbent LECs have upgraded to provide faster connections and better services to broadband customers. *Id.* ¶ 51.

^{101/} *Id.* ¶ 85.

^{102/} *Id.* ¶ 41.

^{103/} *Id.* ¶ 86. The FCC stated that it is not eliminating the carriers’ ability to offer wireline broadband transmission on a Title II basis.

^{104/} *Id.* ¶ 86. The Commission also announced that entities that offer services as a common carrier “may do so on a permissive detariffing basis.” Alternatively, the provider may post the rates, terms, and conditions under which they will provide broadband Internet access transmission service on their websites. Providers that offer specific services on a tariffed common carrier basis are subject to the terms contained in its tariff. *Id.* ¶¶ 90, 95.

^{105/} *Id.* ¶ 95.

^{106/} *Id.* ¶ 104.

^{107/} The FCC rejected arguments that its decision concerning classification requires additional approval by the Network Reliability and Interoperability Council.

telecommunications carrier's UNE rights under section 251 and our implementing rules."^{108/} The FCC also affirmed that wireline broadband access service providers must continue to contribute to Universal Service on current levels of reported revenue for their transmission component and that all providers are subject to CALEA requirements.^{109/}

FCC Chairman Kevin J. Martin stated the *Wireless Broadband Order* represents the end of "regulatory inequalities that currently exist between cable and telephone companies in their provision of broadband Internet services."^{110/} Furthermore, Chairman Martin reiterated that broadband deployment is "vitaly important to our nation as new, advance services hold the promise of unprecedented business, educational, and healthcare opportunities for all Americans."^{111/}

II. PENDING FCC PROCEEDINGS, STATE ACTIONS, AND CONGRESSIONAL EFFORTS THAT LIKELY WILL FURTHER SHAPE THE REGULATORY LANDSCAPE FOR IP-ENABLED SERVICE PROVIDERS

A. FCC Proceedings

1. Cable Modem NPRM

In the NPRM portion of the *Cable Modem Ruling*, 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 forbear from common carrier regulation where a cable operator was offering a stand-alone telecommunications service to ISPs or subscribers.^{112/} 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.^{113/}

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.^{114/} It also invited "comment on any other forms

^{108/} *Id.* ¶ 108.

^{109/} The FCC noted that the universal service obligation will be maintained for a 270-day period or until it adopts a new contribution rules in the pending *Universal Service Contribution Methodology* proceeding. *Id.* ¶ 112.

^{110/} *Id.*, Statement of Chairman Kevin J. Martin.

^{111/} *Id.*

^{112/} *Cable Modem Ruling* ¶ 93.

^{113/} *Id.* ¶ 95.

^{114/} *Id.* ¶¶ 96-108.

of State and local regulation that would discourage investment in advanced communications facilities, or create an unpredictable regulatory environment.”^{115/} 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.^{116/} 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.^{117/}

2. IP-Enabled Services NPRM

The FCC has held VoIP Forums and Solution Summits to gather information concerning advancements, innovations, and regulatory issues related to VoIP services.^{118/} During one Forum, several commissioners intimated that the FCC will likely continue its “hands-off” approach to regulating VoIP services.^{119/} These comments, coupled with others by the commissioners,^{120/} suggest recognition of the rapidly changing nature of VoIP services.

In February 2004, the FCC adopted a generic NPRM governing the legal and regulatory framework for IP-enabled services, including VoIP services.^{121/} While the NPRM asked many questions regarding the appropriate framework for IP-enabled services, the FCC did not offer

^{115/} *Id.* ¶ 99.

^{116/} *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Broadband Access to the Internet Over Cable Facilities*, (GN Docket 00-185), 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 (filed Dec. 1, 2000).

^{117/} *See, e.g., Id.*, Comments of the Texas Office of Public Utility Counsel at 5-6; Comments of the California Public Utilities Commission at 6; City of New York at 6, 17; Comments of the City Council of New Orleans at 4.

^{118/} *FCC Announces Agenda for the Voice over IP Forum to be Held on December 1, 2003*, Public Notice, DA 03-3777 (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; *FCC Internet Policy Working Group To Hold First “Solutions Summit” on Thursday, March 18, 2004*, News Release (Feb. 12, 2004) (discussing 911 issues); *FCC Internet Policy Working Group To Hold Second “Solutions Summit” on Friday, May 7, 2004*, News Release (Mar. 11, 2004) (discussing disability access issues).

^{119/} Michael K. Powell, Chairman, Opening Remarks at the FCC Forum on VVoIP (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); Jonathan S. Adelstein, Commissioner, Opening Remarks at the VoIP 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).

^{120/} *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); Jonathan S. Adelstein, Commissioner, FCC, 21st Annual Institute on Telecommunications Policy & Regulation: “Accessing the Public Interest: Keeping America Well-Connected” (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.”).

^{121/} *IP-Enabled Services*, 19 FCC Rcd 4863 (2004) (“*IP-Enabled Services NPRM*”).

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*.^{122/} Accordingly, the FCC asked 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.^{123/} 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,^{124/} or whether forbearance may be appropriate for some types of services.^{125/}

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.^{126/} 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.^{127/} 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.^{128/}

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^{129/}

^{122/} See *id.*, Statement of Commissioner Kathleen Q. Abernathy ("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."); *id.*, Statement of Commissioner Jonathan S. Adelstein ("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.

^{123/} *IP-Enabled Services NPRM* ¶¶ 35-37.

^{124/} For IP-enabled services provided over wireless or cable, the FCC asks whether Title III or Title VI regulation should apply. See *id.* ¶¶ 67-70.

^{125/} *Id.* ¶¶ 46-48.

^{126/} See, e.g., *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 04-36: Comments of Cablevision Systems Corp. at 12, ; Comments of Qwest Communications International, Inc. at 33; Comments of 8x8 at 25, (filed May 28, 2004).

^{127/} See *id.*, Comments of Dialpad Communications, Inc. *et al.* at 4; and Comments of Level 3 Communications at 13-14 (filed May 28, 2004).

^{128/} See *id.*, Comments of Net2Phone, Inc. at 8-9; and Comments of the Consumer Electronic Association at 5 (filed May 28, 2004).

^{129/} See *id.*, Comments of the Nebraska Rural Independent Companies at 4-5; and Comments of MCI, Inc. at 8-9 (filed May 28, 2004).

and others supporting a functional equivalence approach.^{130/} 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.^{131/} Disagreements between commenting parties and the substantial number of issues raised in the *IP-Enabled Services NPRM*, have created speculation that the FCC may continue to rule on individual pieces of the regulatory framework for IP services, as it did with the E911 IP-Enabled services proceeding, rather than release one order addressing all of the issues raised by the NPRM.^{132/}

3. **E911 IP-Enabled Services Further Notice of Proposed Rulemaking**

In the *E911 VoIP Order*, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on additional steps it should take to ensure that providers of VoIP services offer reliable and ubiquitous 911 services. The FCC asked what it could do to help facilitate the development of techniques for automatically identifying the geographic location of VoIP users.^{133/} It also inquired about whether it should extend its E911 rules to other VoIP services, including any IP-based voice services that do not require a broadband connection. The FCC asked for comment concerning the application of 911/E911 requirements to wireless interconnected VoIP services. The FCC inquired about the potential role that states should play to help implement the E911 rules.^{134/} It also requested comment on whether it should take action to facilitate the states' ability to collect 911 fees from interconnected VoIP providers either directly or indirectly. Moreover, it asked whether it should adopt any consumer privacy protections related to the provision of E911 and requested comment on whether persons with disabilities can use interconnected VoIP services. Comments have been and FCC action is pending.

4. **CALEA Outstanding Issues from NPRM and Further Notice of Proposed Rulemaking**

Outstanding Issues from NPRM

As noted above, the FCC's *CALEA Broadband Order* was limited to the question of applicability of CALEA to broadband and VoIP services.^{135/} The *Order* explained that while the *NPRM* on which the *Order* was based also "sought comment on a variety of issues relating to identification of future services and entities subject to CALEA, compliance extensions, cost

^{130/} See *id.*, Comments of Time Warner Telecom at 4; and Comments of the Arizona Corporation Commission at 3 (filed May 28, 2004).

^{131/} See *id.*, Comments of Cbeyond Communications, LLC, *et al.* at 1-2; and Comments of the CompTel/ASCENT Alliance at 15 (filed May 28, 2004).

^{132/} Howard Buskirk, *FCC May Break Final VoIP Rulemaking into Easy-to-Digest Pieces, Official Says*, TR DAILY, Apr. 14, 2004; *Wireline*, Comm Daily, Aug. 10, 2004.

^{133/} *E911 VoIP Order* ¶ 57.

^{134/} *Id.* ¶ 61.

^{135/} See text accompanying note 18, *supra*.

recovery, and enforcement[.] . . . [the Commission] will address all of these matters in a future order.”^{136/} The FCC has established no specific timeline for issuing this future order. The following summaries of comments submitted with regard to these outstanding matters from the *CALEA Broadband NPRM* gives some flavor of the issues involved.

Use of Industry Standards as Safe Harbors. There was wide support for the development and use of industry standards. Many commenters suggested that the FCC’s proposal to limit standard setting to groups recognized by ANSI was unduly restrictive. Several parties also suggested that the FCC’s short implementation timelines would not allow sufficient time for development of high-quality industry standards. As reported above, the NCTA has proposed that CableLabs PacketCable specifications be recognized as an industry standard safe harbor for cable operators.^{137/}

Use of Trusted Third Parties to Meet CALEA Requirements. Most commenters felt the voluntary use of trusted third parties would be valuable, but opposed any action to make the use of trusted third parties mandatory. Commenters also opposed any declaration by the FCC that the ability of trusted third parties to obtain call identifying information would constitute *prima facie* evidence that such information was “reasonably available” to any specific carrier.

Implementation Timelines and the Extension/Waiver Process. There is general agreement (with the exception of Law Enforcement) that the current implementation time extension process and the FBI’s Flexible Deployment Program has worked well, should be continued, and should apply to any implementation of CALEA for broadband and VoIP services. Commenters widely opposed the FCC’s proposal to limit the waiver process to only rare and exceptional cases and to set a significantly higher standard for documentary evidence for granting waivers. It may be worth noting in light of the eighteen-month implementation period adopted in the *CALEA Broadband Order* that there was near-unanimous agreement among commenters that the fifteen-month implementation timeline the FCC proposed in the *NPRM* was unrealistically short. It is unlikely that most commenters would consider the additional three months sufficient to resolve the difficulties they foresaw.

Allocation of Costs for CALEA Implementation. The FCC’s tentative finding that carriers would be responsible for the costs of CALEA implementation was widely opposed, except by Law Enforcement. Several commenters suggested that carriers’ ability to charge the cost of CALEA implementation to Law Enforcement was a statutory right that the FCC had no power to change. Other parties suggested a special federal appropriation to fund the costs. There was general agreement among the parties that carriers should be allowed to pass along to their customers any CALEA costs that they may be forced to bear.

Enforcement of CALEA. Among those commenting on the matter, all except Law Enforcement suggest that FCC adoption of its own CALEA enforcement program would be a mistake. Several suggested that the FCC had no statutory authority to do so, since CALEA already provides a judicial enforcement program.

^{136/} *CALEA Broadband Order* ¶ 46.

^{137/} See text accompanying note 13, *supra*.

Further Notice of Proposed Rulemaking

The August 2005 Order also included a Further Notice of Proposed Rulemaking that sought comment on two additional matters: (1) Are there any other types of “managed” VoIP service, not included in the definition of interconnected VoIP made subject to CALEA by the Order, that should also be made subject to CALEA?; and (2) Should there be an exemption from CALEA for small and rural broadband providers or for educational and research institutions?^{138/} Comments on these additional issues were due on November 14, 2005, and reply comments are due December 12th.^{139/}

5. Broadband Consumer Protections NPRM

The FCC issued a Notice of Proposed Rulemaking seeking comment on consumer protection issues that may arise as the industry shifts to providing broadband services. These include: whether the FCC should extend privacy requirements “similar to the Act’s CPNI requirements” to broadband Internet access service providers;^{140/} whether it should impose current anti-slamming requirements on providers of broadband Internet access service; whether the truth-in-billing requirements should be applied to broadband Internet access service providers; whether it should impose network outage reporting requirements; and whether Section 254(g) policies concerning rural and urban rate parity should be applied to wireline broadband Internet access providers.¹⁴¹ The FCC concluded by requesting comments concerning federal-state involvement and how joint efforts should be coordinated. Comments are due on January 17, 2006 and reply comments are due on March 1, 2006.

6. Intercarrier Compensation NPRM

The FCC has been pondering how to proceed with respect to intercarrier compensation for several years. Section 251(g) of the Act froze the antiquated access charge regime in place pending FCC implementation of a new regime.^{142/} In April 2001, the FCC issued a NPRM seeking comment on the adoption of a unified regime for all traffic subject to intercarrier compensation.^{143/} After nearly four years of inaction, the FCC issued a Further NPRM in March 2005 seeking to refresh the record on the adoption of a unified regime.^{144/} In the *Intercarrier Compensation NPRM*, the FCC tentatively concluded that carriers should move to a unified bill

^{138/} *CALEA Broadband Order* ¶¶ 48-49.

^{139/} *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Public Notice, DA 05-2712 (Oct. 14, 2005).

^{140/} *Wireline Broadband Order* ¶ 149.

¹⁴¹ *Id.* ¶¶ 150-156.

^{142/} *See* 47 U.S.C. 251(g).

^{143/} *See Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) (“*Intercarrier Compensation NPRM*”).

^{144/} *Developing a Unified Intercarrier Compensation Regime*, Further NPRM, 70 FCC Rcd 15030(rel. Mar. 3, 2005).

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.^{145/} The Further NPRM reiterates many of the same questions raised in the 2001 NPRM and sought comment on various intercarrier compensation regimes proposed by the industry..

7. Petitions For Access Charge Reform Concerning IP-Enabled Services

Recently the FCC has received petitions for declaratory rulings concerning the applicability of access charges in the context of IP-enabled services. The petitions reflect the growing need to clarify how to treat IP or enhanced traffic and compensate entities for use of their infrastructures. The FCC is currently reviewing the petitions and has established comment periods to address each one.^{146/}

SBC Petition

The SBC Incumbent Local Exchange Carriers (“SBC”) seek a declaratory ruling that wholesale transmission providers using IP technology to transport long distance calls are liable for access charges.^{147/} SBC filed the petition after the United States District Court for Eastern Missouri dismissed its claim seeking access charge payments for long distance calls that were made using IP technology.^{148/} SBC argues that the FCC’s *AT&T Order* clearly implies that “IP-in-the-middle” long distance calls, whether transported by a single provider or multiple providers, are “telecommunications services” subject to access charges.

^{145/} *Inter-carrier Compensation NPRM* ¶¶ 2, 12.

^{146/} *Pleading Cycle Established for SBC’s and VarTec’s Petitions for Declaratory Ruling Regarding the Application of Access Charge to IP-Transported Calls*, Public Notice, DA 05-2514 (Sept. 26, 2005). See *Pleading Cycle Established for Grande Communications’ Petition for Declaratory Ruling Regarding Inter-carrier Compensation for IP-Originated Calls*, Public Notice, DA 05-2680 (Oct. 12, 2005). ; See also *Pleading Cycle Established for Frontier’s Petition for Declaratory Ruling Regarding The Application of Access Charges to IP-Transported Calls*, Public Notice, DA 05-3165 (Dec. 9, 2005).

^{147/} *Petition of the SBC ILECs for a Declaratory Ruling that Unipoint Enhanced Services, Inc. and Other Wholesale Transmission Providers are Liable for Access Charges*, Petition, WC Docket 05-276 (filed Sept. 19, 2005)

^{148/} *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, 2005 WL 2033416 (E.D. Mo. Aug. 23, 2005) (citing the FCC’s ongoing VoIP and IP-enabled services proceedings, the court dismissed the claim without prejudice upon deciding that its “entrance into these determinations [concerning PointOne’s IXC status and whether it owed intercarrier compensation] would create a risk of inconsistent results among courts and with the Commission.”) In another recent case, a United States Federal Bankruptcy court held that that debtor Transcom Enhanced Services, LLC’s wholesale transport system “fits squarely within the definitions of ‘enhanced service’ and ‘information service,’” and “falls outside the definition of ‘telecommunications service.’” The court determined that “Debtor’s system routinely makes non-trivial changes to user-supplied information (content) during the entirety of every communication.” The court held that the “Debtor’s service is not a ‘telecommunications service’ subject to access charges, but rather is an information service and an enhanced service that must pay end user charges.” The court also found that the service provided by Transcom is distinguishable from the service provided by AT&T that the FCC has found to be a telecommunications service because Transcom is not an IXC, does not hold itself out as an IXC and has no retail long-distance customers. See *In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11 (Bankr. N.D. Tex. Apr. 28, 2005)

SBC asks the FCC to declare that when wholesale transmission carriers use IP to carry “ordinary long distance calls that originate and terminate on the public switched telephone network,” they are acting as interexchange carriers for purposes of FCC’s rules and accordingly are subject to access charges. SBC contends that these transport providers are “common carriers.” Yet, it asserts that nothing in the Commission’s rules suggests that the term “interexchange carrier” in Rule 69.5(b) is confined to common carriers and it seeks a ruling that the transport providers are interexchange carriers for the purpose of access rate obligations.

VarTec Petition

VarTec Telecom, Inc. (“VarTec”) seeks a declaratory ruling that it is not required to pay access charges when enhanced services providers (“ESPs”) deliver calls directly to SBC or other LECs for termination or to other carriers that ultimately deliver calls to either SBC or a LEC for termination.^{149/} According to VarTec, it is reasonable for SBC to require payment from the ESPs or other carriers because those providers determine what service SBC provides and how it is provided. Imposing access charges on VarTec, it argued, is inappropriate because VarTec has not “subscribed” to any SBC access service, has not provided SBC with the information its tariff requires as a prerequisite to the provision of access services, and has no control over the requests for features, functions or specifications that SBC receives from the ESPs and other carriers. Therefore, according to VarTec, it is not SBC’s “customer” for the purposes of the calls. VarTec asked the FCC to declare that the ESPs and carriers other than VarTec are responsible for paying access charges to SBC or any other terminating LEC.

VarTec also seeks a ruling from the FCC stating that when VarTec serves as a transiting carrier for CMRS-originated calls, the terminating LEC may not impose access charges on VarTec if the call originates and terminates in the same MTA. VarTec argued that the FCC has determined that “‘section 251(b)(5) reciprocal compensation’ and not ‘access charges’ would apply ‘to traffic that originates and terminates within a local calling area,’” and that for purposes of applying section 251 to CMRS traffic, the MTA serves as the most appropriate definition of local calling area.

Grande Petition

Grande Communications, Inc. (“Grande”) filed a petition for declaratory ruling regarding the treatment of traffic terminated to end users of interconnected LECs through Grande in situations where the traffic is enhanced services traffic originating in voice over Internet protocol format.^{150/} Grande is a LEC that provides “termination services” by accepting traffic from VoIP

^{149/} *Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination*, Petition, WC Docket 05-276 (filed Aug. 24, 2004). VarTec is an interexchange carrier. For some of the long distance calls it receives from originating LECs or CMRS providers, VarTec pays ESPs or other telecommunications carriers to complete the calls. These providers then usually forward the calls to other carriers (primarily CLECs) for termination to SBC.

^{150/} *Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic*, Petition, WC Docket 05-283 (filed Oct. 3, 2005)

and other originating providers and forwarding it via local interconnection trunks to other LECs for termination to their end user customers. Grande asserted that some ILECs have taken the position that, despite the FCC's statements about the general treatment of IP telephony, such traffic is subject to access charges simply because it touches the PSTN. Grande states that the enhanced service traffic at issue are not equivalent to the calls the FCC found to be telecommunications traffic subject to access charges in either the *AT&T VoIP Declaratory Ruling* or the *AT&T Enhanced Prepaid Calling Card Order*.

Grande asked the FCC to rule that carriers like itself receive certification that the traffic at issue originated in an IP format, (1) may rely on that customer's self certification information to make determinations concerning the routing the traffic for termination; and (2) may send the certified enhanced traffic to other terminating LECs over local interconnections trunks. In addition, Grande requested a ruling that terminating LECs receiving certified traffic over local interconnection trunks must treat that traffic as local traffic for intercarrier compensation purposes and may not assess access charges.

Frontier Petition

Frontier Telephone of Rochester, Inc. (Frontier) filed for a declaratory ruling on November 23, 2005 asking for a finding that USA Datanet and other similarly situated carriers that transport IP traffic must pay originating access charges "for IP-transported Feature Group A calls that consist of the following interstate access rate elements: 1) end office common trunk port; 2) end office local switching; 3) local transport tandem transmission - fixed; and 4) local transport tandem transmission facility."^{151/} Frontier filed for the declaratory ruling with the FCC because the U.S. District court in Rochester, New York stayed its action until the FCC issues a decision concerning the IP-enabled services proceeding or addressed the VarTec petition.^{152/} Frontier asked for its petition to be considered in conjunction with SBC's and VarTec's petitions and the Commission agreed to consolidate the petition with the others due to the similarity of the issues raised.

8. 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."^{153/} Given the FCC's

^{151/} *Pleading Cycle Established for Frontier's Petition for Declaratory Ruling Regarding Application of Access Charges to IP-Transported Calls*, Public Notice, DA 05-3165 (Dec. 9, 2005).

^{152/} *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp.2d 144 (W.D.N.Y. 2005); *See also FCC Seeks Comment on Frontier Petition for IP Access Charges*, COMMUNICATIONS DAILY, Dec. 13, 2005.

^{153/} *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*").

commitment in the *Report to Congress* “to ensure that financial support for federal universal service support mechanisms [are] maintained,”^{154/} 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.

In its *Wireline Broadband Order*, the FCC stated that facilities-based wireline providers would continue to be subject to universal service obligations until it issued a decision concerning the Universal Service proceeding. The Commission noted that the decision should occur within a 270-day period. Therefore, a ruling should be issued by mid-July 2006.^{155/} Chairman Martin, speaking at a telecommunications conference, stated the current “interstate revenue-based method” is outdated.^{156/} He indicated his support for a universal support contribution system based on telephone numbers, arguing that the mechanism would be “competitively and technology neutral.”

9. 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.^{157/} 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.”^{158/} The ACTA petition also proposed potential bases for the FCC’s authority to regulate the Internet.^{159/} Predicting the worst, the petition asserted that the “new technology” would be used to circumvent the FCC’s rules and regulations to allow

^{154/} *Report to Congress* ¶ 4.

^{155/} Assuming that the Commission stated that the 270-day period would begin the day of publication in the Federal Register, the *Wireline Broadband Order* was published on October 17, 2005.

^{156/} Kevin J. Martin, Chairman, FCC, Address to TELECOM 05 Conference, USTA (Oct. 26, 2005) <http://www.fcc.gov/commissioners/martin/statements2005.html>.

^{157/} *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”).

^{158/} *Id.* at i, 4.

^{159/} *Id.* at 10; *see also* 47 U.S.C. § 151.

“gambling, obscenity, prostitution, drug traffic, and other illegal acts.”^{160/} 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.”^{161/}

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.^{162/} 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 packet-switched protocol that does not involve a net change in the form or content of the traffic. A public notice appear to have not ever been issued 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.^{163/} 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,^{164/} and was required to issue a decision by March 22, 2005.^{165/} Level 3 withdrew its petition the day before the FCC was scheduled to issue to decision. Commentators have speculated that Level 3 withdrew its petition because the FCC was poised to deny the petition.^{166/} Level 3, however, indicated that it withdrew its petition given the recent transition in leadership at the FCC and “[t]o alleviate the pressure of the deadline” on the FCC.^{167/}

^{160/} ACTA Petition at 10.

^{161/} Michael K. Powell, Commissioner, Speech before the America’s Carriers Telecommunications Association, McLean, VA (Dec. 15, 1997).

^{162/} *Petition of US WEST, Inc. for Declaratory Ruling Affirming Carrier’s Carrier Charges on IP Telephony*, (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., Quarterly Report (Form 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.

^{163/} *Level 3 Forbearance Petition*. (“”).

^{164/} *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 (Jan. 2, 2004).

^{165/} *Level 3 Forbearance Petition*, Order, 20 FCC Rcd 998(2004).

^{166/} Edie Herman and Howard Buskirk, *Level 3 Withdraws Access Charge Petition*, COMMUNICATIONS DAILY, Mar. 23, 2005.

^{167/} *Id.*

B. State Regulation of IP-Enabled Services

State action has decreased since the issuance of *Vonage Order*. Those states that have considered the question of how -- or whether -- they should regulate VoIP services have found few differences between IP-based voice services and traditional circuit-switched voice services.^{168/} Pending a definitive ruling from the FCC on the classification of VoIP services, states appear to be poised to jockey for jurisdiction.

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.^{169/} 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.”^{170/} 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.”^{171/}

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.^{172/} 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.^{173/} The

^{168/} 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).

^{169/} Docket No. P-6214/C-03-108, *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).

^{170/} *Id.* at 8.

^{171/} *Id.*

^{172/} *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 994 (D. Minn. 2003).

^{173/} *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 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).

court denied this request in January 2004, finding that the PUC did not provide an adequate basis for reconsidering the decision.^{174/}

The Minnesota PUC 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.^{175/} 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."^{176/} 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.^{177/}

In addition, as discussed above, Vonage filed a Petition for Declaratory Ruling with the FCC seeking to have the Minnesota PUC's decision preempted,^{178/} 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. Shortly after oral arguments, the Eighth Circuit issued a decision affirming the federal district court's imposition of an injunction on the Minnesota PUC's attempt to regulate Vonage.^{179/} The Eighth Circuit found that the FCC's recently issued *Vonage Order* (discussed above) was binding on the court, and therefore, affirmed the federal district court "on the basis of the FCC Order." The Eighth Circuit noted, however, that if a party prevails on a challenge of the FCC's *Vonage Order*, the Minnesota PUC remains free to challenge the injunction at that time. As discussed above, several parties have challenged the FCC's *Vonage Order*.

2. California

In February 2004, the California PUC instituted a proceeding to investigate the status of VoIP.^{180/} The PUC's preliminary analysis suggests that the functional nature of the service, rather 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

^{174/} *Id.*, Memorandum and Order (Minn. D. Ct. Jan. 14, 2004).

^{175/} *Minnesota Pub. Utils. Comm'n. 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.

^{176/} *Minnesota Pub. Utils. Comm'n v. Vonage Holdings Corp.*, No. 04-1434, Brief of the United States and the FCC as *Amicus Curiae* (8th Cir. filed Apr. 21, 2004).

^{177/} Margaret Boles, *FCC Urges Court to Hold Off on Ruling in Minnesota VoIP Case*, TR DAILY, Apr. 21, 2004.

^{178/} *Vonage Holding Corp.'s Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Petition, WC Docket No. 03-211 (filed Sept. 22, 2003).

^{179/} *Minnesota Pub. Utils. Comm'n v. Vonage Holdings Corp.*, No. 04-1434 (8th Cir. Dec. 22, 2004).

^{180/} 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 (Cal. P.U.C. adopted Feb. 11, 2004).

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.^{181/} 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.^{182/} 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.^{183/}

In addition, the California PUC initiated a rulemaking proceeding in December 2002 to amend its service quality standards.^{184/} 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."^{185/}

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.^{186/} 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. This finding is directly at odds with the FCC recent *Wireline Broadband Order*.

^{181/} Ben Charny, *California To License VoIP Providers*, CNET News.com, http://news.com.com/2100-7352-5084711.html?tag=guts_lh_7352 (Sept. 30, 2003).

^{182/} Gayle Kansagor, *VoIP Service Providers Decline to Seek California Certification*, TR DAILY, Oct. 23, 2003.

^{183/} Susan Kennedy, Opinion, *Let Internet Phone Service Evolve Without Rules*, SAN JOSE MERCURY NEWS, Nov. 3, 2003.

^{184/} 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 (Cal. P.U.C. Dec. 5, 2002).

^{185/} *Id.*

^{186/} 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,^{187/} 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.”^{188/} 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.^{189/} 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. The California PUC initiated a rulemaking, on its own motion, in April 2005 to reassess and revise its regulation of telecommunications utilities. Notably, it did not specifically mention VoIP services, but it does reference the 2004 VoIP proceeding which suggests that it may consider VoIP regulation. The Commission’s decision is expected in the Spring of 2006.^{190/}

3. New York

In late 2003, the New York Public Service Commission (“PSC”) asked for comment on a complaint filed by Frontier against Vonage.^{191/} 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.^{192/} 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.

^{187/} 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.”).

^{188/} *California DSL Decision* at 8-9.

^{189/} *Id.* at 9-10.

^{190/} Rulemaking No. 05-04-005, *Order Instituting Rulemaking for the Purpose of Assessing and Revising the Regulation of Telecommunications Utilities* (Cal. P.U.C. April 7, 2005)

^{191/} 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).

^{192/} *Id.*, *Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation* (N.Y.P.S.C. May 21, 2004).

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.^{193/} The court's order states that during the pendency of the injunction, Vonage will make "reasonable good faith efforts" to participate in PSC industry-wide workshops pertaining to 911 and service reliability of VoIP providers, and shall provide the PSC with a contact person in the event of network outages. 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. Vonage asked the federal district court to impose a permanent injunction in light of the FCC's *Vonage Order*.^{194/} In December 2005 the United States District Court for the Southern District of New York denied Vonage's request for a permanent injunction against the PSC, citing the FCC's pending rulemaking proceeding concerning the obligations of VoIP providers. The court held that Vonage would not suffer any irreparable harm from the requirements established in the 2004 preliminary injunction with regard to mandatory participation in policy talks to establish certain core principles for the advancement of IP-based service offerings for 911.^{195/}

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.^{196/} 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."^{197/}

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.^{198/} The Florida

^{193/} *Vonage Holdings Corp. v. New York State P. S.C.*, 04-CV-4306, Preliminary Injunction Order (S.D.N.Y. July 16, 2004).

^{194/} *Id.*, Motion for Permanent Injunction (S.D.N.Y. filed Dec. 20, 2004).

^{195/} *Vonage Holdings Corp. v. New York State P. S. C.*, 2005 WL 3440708 (S.D. N.Y. 2005).

^{196/} 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).

^{197/} 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).

^{198/} 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).

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.^{199/}

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.^{200/} The PUC never reached the merits of US WEST’s arguments.^{201/} 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.^{202/} Despite the court’s decision, in a series of interconnection arbitration decisions, the PUC repeatedly found that VoIP services should not be included in the definition of switched access service and should not be subject to access charges.^{203/}

More recently, the Colorado PUC officially closed its generic investigation on VoIP services.^{204/} 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.”^{205/} 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.”^{206/} The PUC also directed the staff to continue to monitor the FCC proceedings and comments made by parties related to VoIP.

^{199/} *Staff Workshop: Voice over Internet Protocol* (Fla. P.S.C. Jan. 27, 2003).

^{200/} 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).

^{201/} 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).

^{202/} *Qwest Corp., Inc. v. IP Telephony, Inc.*, Case No. 99-CV-8252, Order (Dist. Ct. Denver Jan. 12, 2001).

^{203/} *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).

^{204/} Docket No. 03M-220T, *Investigation into Voice Over Internet Protocol (VoIP) Services*, Order Closing Docket (Colo. P.U.C. Dec. 17, 2003).

^{205/} *Id.* at 1-2.

^{206/} *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.

6. Nebraska

The Nebraska PSC voted unanimously to assess a state universal service surcharge on the intrastate portion of *facilities-based* providers of VoIP services.^{207/} The order went into effect on June 1, 2005. In its order, the Nebraska PSC stated that the ultimate end points of a call determine the jurisdictional nature of the call, despite VoIP service providers' contentions that it is difficult or impossible to determine the location of the end points of VoIP calls. In addition, the PSC noted that the FCC, in its three previously released orders relating to VoIP services, has not addressed whether the assessment of a universal service surcharge on VoIP service is appropriate. The PSC noted that a VoIP service provider can establish separate prices for the information service and the telecommunications service components of a bundled service offering, and may use such prices in reporting service revenue subject to the universal service surcharge. This recent action contradicts the Nebraska PSC previous finding in 1999 that "IP telephony does not place the same burdens upon the network as does traditional switched telecommunications, [and thus] the obligations of its providers should not be the same."^{208/}

On April 22, 2005, Qwest Communications Corporation ("Qwest") filed a complaint in the United States Federal District Court for the District of Nebraska seeking declaratory and injunctive relief from the PSC's VoIP Order. Qwest argued that state regulation of IP-enabled offerings, including VoIP applications, is preempted by federal law. It also disputed the finding that IP-enabled offerings are "information services" and not "telecommunications services." It stated that the Order violates federal and Nebraska law permitting the PSC to require universal service contributions only from "telecommunications carriers" that provide "telecommunications services" that are "intrastate."^{209/} Contemporaneously, Qwest filed a similar complaint in a Nebraska state court as a "precautionary matter." The PSC appealed the federal filing, arguing that the federal court should not hear the case until the state court rules on the matter. The federal court ruled in the PSC's favor. It found that although it should retain jurisdiction over the case, it will allow the state court to issue its findings before proceeding. Accordingly, the federal court stayed the proceedings until the resolution of Qwest's state claim.^{210/}

7. 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

^{207/} Application No. NUSF-40/PI-86, *Nebraska Public Service Commission, on its own motion, to Determine the Extent to which Voice over Internet Protocol Services Should be Subject to the Nebraska Universal Service Fund Requirements, Findings and Conclusions* (Neb. P.S.C. Mar. 22, 2005).

^{208/} 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).

^{209/} Complaint, *Qwest Communications Corp. v. Nebraska Public Service Commission*, Case No. 8:05CV182 (filed Apr. 22, 2005).

^{210/} *Qwest Communications Corp. v. Nebraska Public Service Commission*, 2005 U.S. Dist. 23620 (Oct. 7, 2005). The state case is ongoing and a hearing has been scheduled for November 1, 2005.

such a proceeding it voted to hold the matter in abeyance.^{211/} 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.^{212/} In addition, Florida, Illinois, and Tennessee have held workshops to investigate the status of VoIP.^{213/}

Several state legislatures also have introduced or enacted bills that would regulate VoIP services in some way. For instance, New Jersey enacted legislation that requires VoIP service providers to collect 911 surcharges for each “voice grade access service line” provided to end user customers with a “service address” in New Jersey as part of the “telephone exchange services” provided to the end user.^{214/} Those fees must then be remitted to the state. Both the Colorado and Kansas legislatures have introduced similar measures.^{215/}

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.^{216/}

^{211/} 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); *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).

^{212/} 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).

^{213/} *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).

^{214/} Assembly No. 3112, 211th Leg., § 2.a.(2) (N.J. 2004) (signed June 29, 2004), *codified at* N.J. STAT §§ 52:17C-17 – 52:17C-20 (2004).

^{215/} House Bill 05-1158, 65th General Assembly (Colo. 2005); House Bill 2026, Session of 2005 (Kan. 2005).

^{216/} 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).

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.^{217/} 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.^{218/} 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 an in-depth examination of VoIP regulation."^{219/} The Texas PUC later approved Time Warner Cable's application to provide VoIP services in the state.^{220/} The Ohio Public Utilities Commission considered similar requests to intervene in Time Warner Cable's application proceeding there.^{221/} The Ohio commission ultimately found that Time Warner Cable could offer its services pending the outcome of Ohio's generic VoIP proceeding.^{222/} Time Warner Cable also was granted authority in California and South Carolina.^{223/}

^{217/} 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).

^{218/} 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).

^{219/} 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).

^{220/} 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).

^{221/} 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).

^{222/} 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).

^{223/} 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).

When previously 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.^{224/}

C. Congressional Efforts to Define the Regulatory Regime for IP Services

On May 18, 2005, Senator Bill Nelson introduced the “IP-Enabled Voice Communications and Public Safety Act of 2005.”^{225/} The legislation directs the FCC to prescribe regulations to establish a set of obligations on providers that would apply to IP-enabled voice 911 services and E911 services that are available to IP-enabled voice service customers. The bill requires (1) nondiscriminatory IP provider access to 911 and E-911 services; (2) IP providers to provide to customers a clear and conspicuous notice of the unavailability of 911 and E911 services; and (3) IP provider and user immunity in the provision and use of 911 and E911 services to the same extent as local exchange companies and other persons, respectively.^{226/} The bill is significant because it would require federal development of a nationwide plan for IP-based emergency services communications.

On July 27, 2005, the “Broadband Investment and Consumer Choice Act” was introduced by Senator John Ensign (R-NV).^{227/} The bill establishes rules that would apply to all communications related services. The Ensign Bill would require every “eligible” telecommunications carrier (a carrier that is eligible for federal universal service support) to offer basic telephone service (BTS) to business and residential customers throughout its service territory. The Ensign Bill prohibits a broadband service provider from blocking subscriber access to any content over broadband communications services; this concept is commonly known as “network (or net) neutrality.” The implementation of the “net neutrality” would also prohibit a broadband service provider from preventing a customer from using voice over Internet Protocol (VOIP) applications offered by a competitor. The bill delegates authority to the FCC to develop rules and regulations for telecommunications service providers, including billing and rules for disability access and federal quality standards for BTS services.

^{224/} 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”).

^{225/} S. 1063, 109th Cong. (2005) (“Nelson Bill”).

^{226/} *Id.*; See also H.R. 2418, 109th Cong. (2005).

^{227/} S. 1504, 109th Cong. (2005) (“Ensign Bill”).

The Ensign Bill requires facilities-based providers to establish commercial arrangements to interconnect with other facilities-based providers. Video service providers (VSPs) would be free from requirements to obtain a state or local video franchise; build out their video distribution system in any particular manner; or provide access to their distribution facilities and equipment to any other VSP. It also authorizes local governments to charge VSPs for the cost of managing public rights-of-way used by VSPs. The bill authorizes the FCC to enact regulations to promote competition and diversity in the multichannel video programming market.^{228/}

Late in the 2005 legislative session Senator Jim DeMint (R-S.C.) introduced a deregulatory telecommunication bill that would preempt almost all state regulation of telecommunications services.^{229/} The bill, titled the “Digital Age Communications Act,” would replace the 1934 Telecommunications Act and would eliminate the “public interest standard” that the FCC currently uses when issuing decisions and would replace it with an “unfair competition standard.”^{230/} The bill would integrate “federal, state, and local regulation of communications networks under ‘a single, unified minimally pervasive regulatory regime determined and generally implemented at the federal level.’^{231/} States would retain the authority to enforce federal rules and manage public rights-of-way. Franchises and franchise-fee obligations would be eliminated in four years and the universal service contribution mechanism would be altered to one based on phone numbers.^{232/}

There is another bill that has been drafted but has not been introduced to Congress, which directly addresses the regulation of IP-enabled services. The tentative Broadband Internet Transmission Act defines a transmission capability as a “broadband Internet transmission” or “BIT.” The offering of the transmission capability as a service to consumers is defined as “broadband Internet transmission service” or “BITS.” The bill also defines “VOIP service” as a packet-switched voice communications service, regardless of the facilities used, which enables subscribers to send or receive voice communications in IP over BITS to or from any subscriber with a telephone number.

The bill establishes federal jurisdiction over BITS and preempts any FCC or state or local regulation of BITS or any provider of BITS that is registered as required by the draft. Similar to existing law, the bill does not affect the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from a BIT or BITS provider, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis. The “net neutrality” concept was also included in the legislation. The bill provides that BITS providers shall have the duty to provide users with access to any lawful content, applications and services “provided over the Internet,” and may not block or interfere with such offerings except as may be necessary for network security.

^{228/} *Id.*

^{229/} S.2113, 109th Cong. (2005) (“DeMint Bill”).

^{230/} Lynn Stanton, *DeMint Introduces Deregulatory, Preemptive Telecom Bill*, TR DAILY, Dec. 16, 2005.

^{231/} *Id.*

^{232/} *Id.*

Representative Cliff Stearns (R-FL) and Representative Rick Boucher (D-VA) reintroduced a bill this year as “The Advanced Internet Communications Services Act of 2005.”^{233/} This VoIP bill was introduced Representatives Boucher and Stearns by in July 2004.^{234/} The “Advanced Internet Communications Services Act of 2005” 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.”^{235/} 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.

Congressional leaders on both sides of the aisle seem poised to support legislation that promotes the deployment of broadband and create new regulations to deal with aspects such as Universal Service reform, franchising, access to broadband networks, and access to emergency services. Congressional leaders have indicated that they will work vigorously to address the concerns of broadband providers and consumers.^{236/}

III. THE REGULATORY UNCERTAINTY SURROUNDING THE APPLICATION OF CURRENT REGULATION TO IP-ENABLED SERVICES

The level of regulatory uncertainty for the provision of VoIP services continues to be high despite the issuance of several decisions over the past year and a half. VoIP service providers still may be subject to a host of regulations, yet undefined, as indicated in the *CALEA First Order* and the *E911 VoIP Order*. The following attempts to outline the proceedings and laws that require ongoing attention until greater certainty is achieved.

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.^{237/} In its *Computer*

^{233/} H.R. 214, 109th Cong. (2005).

^{234/} H.R. 4757, 108th Cong. (2004) (“Stearns-Boucher Bill”).

^{235/} Stearns-Boucher Bill § 4(1).

^{236/} Greg Piper, *Affordable Broadband, Telecom Tax Credits in House Democrat Agenda*, COMMUNICATIONS DAILY, Nov. 16, 2005 at 4.

^{237/} *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

Inquiry proceedings, the FCC found that information services must remain free of state and federal regulations to promote the competitive growth of such services.^{238/} The FCC 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,^{239/} and its finding that Vonage (and services like Vonage's) are interstate in nature.^{240/}

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.^{241/}

Given the FCC's previous preemption of state regulations governing information services and its most recent findings in the *Wireline Broadband Order*, *pulver.com Order* and *Vonage Order*, state commissions' ability to impose burdensome regulations on VoIP services are likely to be limited if those regulations interfere with the FCC's overarching national policy goals. Statements from current and former leaders at the FCC also lend support to the conclusion that the FCC may preempt state regulation of all types of VoIP services. Previous FCC Chairman, Michael Powell 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."^{242/} 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.^{243/} Recently current FCC Chairman, Kevin Martin, stated that broadband deployment is "vitally important to our nation" and pledged to adopt policies that will "stimulate infrastructure development, broadband development, and competition in the broadband market."^{244/} A single, national broadband policy for VoIP services appears to be at the forefront of efforts to craft regulations and legislation.

The need for a national broadband policy that limits the role of the states is further supported by the FCC's recent findings in its *pulver.com Order* and *Vonage Order*. In both of those decisions the FCC determined that the end-to-end analysis was inapplicable because the concept of "end points" has no relevance.^{245/} For example, *pulver.com* simply provides

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.

^{238/} *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).

^{239/} *pulver.com Order* ¶ 17.

^{240/} *Vonage Order* ¶ 14.

^{241/} *California v. FCC*, 39 F.3d at 932-33.

^{242/} *Wireline*, COMMUNICATIONS DAILY, Dec. 10, 2003, at 9.

^{243/} *Id.*

^{244/} *Wireline Broadband Order*, Statement of Kevin Martin.

^{245/} *pulver.com Order* ¶ 21; *Vonage Order* ¶ 25.

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.^{246/} The FCC's reticence towards allowing states to regulate IP-enabled services was reiterated in the *Broadband Wireline Order*. The Commission emphasized that it seeks to adopt and implement a "comprehensive policy that ensures, consistent with the Act in general and section 706 specifically, that broadband Internet access services are available to all Americans."^{247/}

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."^{248/} 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."^{249/} In that vein, the FCC has historically applied its regulatory authority consistent with the statutory definition of telecommunications service -- "the offering of telecommunications . . . regardless of the facilities used."^{250/}

In the *Wireline Broadband Order*, the FCC adhered to the "function over facilities" principle, and concluded that the Act and its 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.^{251/} 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.^{252/} In the *AT&T Phone-to-Phone Order*, former FCC 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."^{253/}

^{246/} *Vonage Order* ¶¶ 24-25 (emphasis in original).

^{247/} *Wireline Broadband NPRM* ¶ 45.

^{248/} *Wireline Broadband NPRM* ¶ 6; *Cable Modem Ruling* ¶ 85, n.315.

^{249/} *Report to Congress* ¶ 98.

^{250/} 47 U.S.C. § 153(46).

^{251/} *Wireline Broadband Order* ¶ 17; *Wireline Broadband NPRM* ¶ 7, n.10.

^{252/} *Cable Modem Ruling* ¶ 38.

^{253/} *AT&T Phone-to-Phone Order*, Statement of Chairman Michael K. Powell.

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.^{254/} 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.^{255/}

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 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.^{256/} As former FCC Chairman Powell stated, "Stop thinking of voice as just the telephone. It's just an application running on an IP network."^{257/} 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, regulators must resist the temptation to focus on individual trees and ignore the forest. The regulation of VoIP products as telecommunications services simply because a single element of the enhanced offering looks like telecommunications service would be inappropriate and stifling to nascent VoIP products.

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

The FCC has three statutory tools that would permit it to refrain from imposing any traditional telecommunications regulation on VoIP even if it reaches a conclusion that these services are not information services. First, the FCC could utilize its Section 10 forbearance authority to forbear from applying telecommunications regulation to VoIP services.^{258/} Under the Act, the FCC is required to forbear if it determines that: 1) enforcement of the regulation is not

^{254/} 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).

^{255/} *Report to Congress* ¶¶ 39, 58, 60.

^{256/} Herb Kirchoff, *VoIP Advocates Urge States to Keep Hands Off*, COMMUNICATIONS DAILY, Sept. 9, 2003.

^{257/} Michael K. Powell, Chairman, Speech of before the Academic and Telecom Industry Leaders, University of California, Davis (Dec. 9, 2003); see also *Level 3 Forbearance Petition* at 11-14.

^{258/} 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.

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.^{259/} 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.^{260/} 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.^{261/} Notably, in the 1998 *Report to Congress*, the FCC stated it would have “to consider carefully” whether to forbear.^{262/}

Second, Section 706 of the Act imposes on the FCC an affirmative obligation to encourage the deployment of advanced services.^{263/} 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.^{264/} 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.^{265/} 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.”^{266/}

Third, FCC decision-makers 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

^{259/} 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).

^{260/} *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).

^{261/} *IP-Enabled Services NPRM* ¶ 48.

^{262/} *Report to Congress* ¶ 92; *see also* Michael K. Powell, Chairman, Opening Remarks at the FCC Forum on 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); Jonathan S. Adelstein, Commissioner, Opening Remarks at the VoIP 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); Michael Copps, Commissioner, Opening Remarks at the FCC Forum on VoIP (Dec. 1, 2003) (commenting that the FCC must examine VoIP and develop “good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeon-holes without adequate justification.”).

^{263/} 47 U.S.C. § 157nt.

^{264/} *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).

^{265/} *Advanced Services Order* ¶¶ 69-77.

^{266/} *Vonage Order* ¶ 36.

market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”^{267/} 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.”^{268/} 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.”^{269/}

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.

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. The telecommunication and tax statutes sometimes contain different definitions for such services further complicating the analysis regarding their application. In some instances, the definitions are broad enough to encompass the functionality provided to consumers via IP-enabled services.^{270/} 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.

Some states have issued “notices” stating that VoIP services are subject to state sales and use taxes. For instance, the Pennsylvania Department of Revenue stated in a recent tax bulletin that VoIP services are subject to Pennsylvania state and local sales taxes because VoIP services fall under the statutory definition of a “telecommunications service” and are not considered “enhanced telecommunications services” under Pennsylvania law.^{271/} Enhanced telecommunications services are defined as services offered over a telecommunications network,

^{267/} 47 U.S.C. § 230(b)(2).

^{268/} *Vonage Order* ¶ 34.

^{269/} *Vonage Order* ¶ 35.

^{270/} 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).

^{271/} Pennsylvania Department of Revenue, Sales Tax Bulletin 2005-02 (Jan. 28, 2005).

which employ computer processing applications that include one or more of the following: (1) acts on the format, content, code, protocol, or similar aspects of the purchaser's transmitted information; (2) provides the purchaser additional, different, or restructured information; or (3) involves the purchaser's interaction with stored information. Pennsylvania found that VoIP services do not fall within the enhanced telecommunications service exclusion because VoIP service uses computer processing applications solely for the management, control, or operation of a telecommunications system and not in any manner as prescribed by the definition. The New Jersey Division of Taxation has issued a similar notice indicating its belief that VoIP services fall within the definition of "telecommunications service" in the New Jersey sales and use tax statutes.^{272/}

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."^{273/} If an IP-Enabled Service fits within this definition, it may be subject to the federal excise tax.

Taxpayers have successfully challenged the IRS' position that the FET applies to all long-distance telecommunications services where charges are based on elapsed time, instead of only those where charges are based on both time and distance and those that resemble a "WATS" service. Every court to reach the issue, save one district court reversed on appeal, has rejected the IRS' broad reading of the statute.^{274/}

Though these decisions do not directly address VoIP, the implications are clear. According to the courts, the FET applies only to "local telephone service," "toll telephone service," and "teletypewriter exchange service" as narrowly defined by the statute. The conclusion that the FET does not apply to conventional long-distance telephone service where charges are not based on distance and do not resemble a "WATS" service applies *a fortiori* to VoIP service. Even if the FET does not account for technological innovations, the IRS may not reinterpret the statute. As stated by the Federal Court of Claims, "[c]onsequently, now forty years later, if the statutory language no longer fits the infrastructure of the industry, the IRS needs to ask for congressional action to bring the statute in line with today's reality. It cannot

^{272/} New Jersey Division of Taxation, Notice Regarding Voice over Internet Protocol Services: Sales Tax and Emergency Response Fee (9-1-1) (Feb. 23, 2005).

^{273/} 26 U.S.C. §§ 4251, 4252(b); 26 C.F.R. §§ 49.4252.1(a), 49.4252-2(a).

^{274/} *OfficeMax, Inc. v. United States*, 2005 U.S. App. LEXIS 23635 (6th Cir. 2005); *American Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005), *rev'g* 308 F. Supp. 2d 1360 (S.D. Fla. 2004); *America Online, Inc. v. United States*, 64 Fed Cl. 571 (Ct. Cl. 2005); *Honeywell Int'l, Inc. v. United States*, 64 Fed. Cl. 188 (Ct. Cl. 2005); *Amtrak v. United States*, 338 F. Supp. 2d 22 (D.D.C. 2004); *Hewlett-Packard Co. v. United States*, 2005 U.S. Dist. LEXIS 19972 (N.D. Cal. 2005); *Reese Bros. v. United States*, 2004 U.S. Dist. LEXIS 27507 (W.D. Pa. 2004); *Fortis, Inc. v. United States*, 2004 U.S. Dist. LEXIS 18686 (2004).

create an ambiguity that does not exist or misinterpret the plain meaning of the statutory language to bend an old law toward a new direction.”^{275/}

The IRS is continuing to defend its broad reading of the FET in litigation. In Notice 2005-79, 2005-46 I.R.B. 952, the IRS announced that it will continue to assess and collect the FET on all communications services that it deems taxable, even long-distance services where charges are not based on time and distance. The sustainability of this course is unclear in the face of the adverse judicial decisions.

Congress also recently joined the tax debate. In April 2005, Congressman Gary G. Miller (R-CA) introduced H.R. 1898, the “Telephone Excise Tax Repeal Act of 2005.” The bill would amend the Internal Revenue Code and repeal the excise tax on communication services.^{276/} 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”)^{277/} imposes a moratorium on state and local governments’ imposition of any “taxes on Internet access” or “multiple or discriminatory taxes on electronic commerce.”^{278/} This moratorium recently was extended through November 1, 2007 (subject to certain exceptions).^{279/} 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.”^{280/}

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.”^{281/} In addition, the term “tax” means: “(i) any charge imposed by any governmental entity for the purpose of generating revenues for

^{275/} *America Online* at 578 (internal citations and quotes omitted).

^{276/} H.R. 1898, 109th Cong. (2005) (“Telephone Excise Tax Repeal Act of 2005”).

^{277/} 112 Stat. 261-719, 2681-724-726.

^{278/} ITFA § 1101(a).

^{279/} Congress recently amended the ITFA. See Internet Tax Nondiscrimination Act, Pub. L. No. 108-435 (2004) (“ITNA”).

^{280/} ITNA § 6.

^{281/} ITNA § 2(c).

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;”^{282/} 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).^{283/} 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.^{284/}

E. The Potential Application of Other Federal Regulations on VoIP Services Providers

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, FCC regulatory fees, and the Telecommunications Relay Services Fund, all of which apply to providers of telecommunications services.^{285/} Federal privacy, access by individuals with disabilities, and truth-in-billing obligations also do not extend to information service providers or any other service not a telecommunications services or otherwise identified as subject to the regulation. The FCC has specifically inquired about the application of these requirements to IP-enabled service providers in the *Broadband Consumer Protections NPRM* that was issued in conjunction with the *Wireline Broadband Order*.^{286/}

1. Universal Service Fund (“USF”) Contributions

The concept of “universal service” has been in place nearly since the birth of local phone service.^{287/} In their simplest form, universal service programs are designed to ensure that low-income consumers have access to local phone service at reasonable rates.^{288/} The FCC’s universal

^{282/} ITFA § 1104(8)(A).

^{283/} ITNA § 2(b)(2).

^{284/} ITFA § 1104(8)(B).

^{285/} See, e.g., FCC Form 499-A, Telecommunications Reporting Worksheet, <http://www.fcc.gov/Forms/Form499-A/499a.pdf>.

^{286/} *Wireline Broadband Order* ¶¶ 146-159.

^{287/} 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.

^{288/} *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 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.^{289/} In addition to the federal fund, many states have established or are establishing some type of state universal service funding mechanism.^{290/}

Federal universal service obligations apply to all telecommunications carriers that provide interstate telecommunications services to end users with each carrier contributing “on an equitable and nondiscriminatory basis.”^{291/} 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.^{292/} To fund universal service, all covered providers contribute a 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.^{293/} 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.^{294/} 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.^{295/}

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.”^{296/} Although some

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).

^{289/} 47 U.S.C. § 254.

^{290/} National Exch. Carrier Association State Universal Service Fund Summaries, <http://www.neca.org/susfsum.pdf> (Aug. 24, 2000).

^{291/} 47 U.S.C. § 254(d).

^{292/} *Id.*

^{293/} For example, for the proposed fourth quarter of 2004, the universal service contribution factor is 8.9 percent.

^{294/} *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 789 (1997) (“*Universal Service Order*”).

^{295/} *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).

^{296/} *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

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,^{297/} the FCC temporarily imposed universal service obligations on facilities-based wireline Internet access providers in its *Wireline Broadband Order*. A decision concerning universal service reform is expected by mid-July 2006.

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 of all other calls not subject to access charges.^{298/} As a general rule, FCC rules govern access charges for interstate long distance calls; state rules govern intrastate access charges.^{299/} The FCC, however, has primary jurisdiction over reciprocal compensation required by Section 251(b)(5) of the Act, which governs *all* telecommunications traffic.^{300/} 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.^{301/}

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

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).

^{297/} See, e.g., Michael J. Copps, Commissioner, Opening Remarks at the FCC VoIP 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).

^{298/} 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).

^{299/} 47 U.S.C. § 152; *Compare* 47 U.S.C. § 251(b)(5) with *Intercarrier Compensation NPRM* ¶ 69.

^{300/} 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).

^{301/} 47 U.S.C. § 252.

network.^{302/} 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.^{303/} 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.^{304/}

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.^{305/}

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*. 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.^{306/} The FCC, in essence, established a "bill and keep"^{307/} regime for all carriers not yet terminating ISP-bound traffic. This aspect of the decision, known as the New Market Rule, was later determined not be in the public interest as discussed below.

^{302/} *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.

^{303/} 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.

^{304/} *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶¶ 37–38 (1999) (subsequent history omitted).

^{305/} *AT&T Phone-to-Phone Order*, Statement of Kathleen Q. Abernathy; *id.*, Statement of Commissioner Michael J. Copps.

^{306/} *ISP Order* ¶ 81.

^{307/} *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.*

The FCC addressed the New Market Rule in response to Core Communications, Inc.’s (Core Communications) petition for forbearance from certain provisions adopted in the *ISP Order*. The FCC found that Core Communications provided “only a cursory” analysis of how its petition would satisfy the three public interest criteria of Section 10. Although the FCC rejected Core’s petition for forbearance concerning the rate caps and the mirroring rule, it granted the petition for forbearance in regards to the New Market Rule and Growth Caps.^{308/} The FCC found that Growth Caps were no longer in the public interest citing the market developments that eased the concerns about the growth of dial-up ISP traffic. It stated that the growth caps were adopted to “prevent the continued expansion of the arbitrage opportunity presented by ISP-bound traffic.”^{309/} Subsequently, due to the declining use of dial-up ISP services, the FCC determined that “policies favoring a unified compensation regime outweigh any remaining concerns about the growth of dial-up Internet traffic.”^{310/} The FCC also found that application of the New Market Rule was no longer in the public interest. Similar to the Growth Cap regulation, the New Market Rule was adopted in order to “confine opportunities for regulatory arbitrage.”^{311/} It found that arbitrage concerns were outweighed by the concern to create a uniform intercarrier compensation regime and it determined that forbearance from the rule was consistent with the public interest.^{312/}

In the interim and in the absence of FCC action on intercarrier compensation, the incumbent LECs have sought to extend compensation obligations to third-party telecommunications service providers through their direct relationship with connecting carriers.^{313/} For example, incumbent LECs Verizon and SBC have initiated court proceedings challenging how carriers they interconnect with route traffic originated by third parties.^{314/} 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 now include 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

^{308/} *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from application of the ISP Remand Order*, Order, 19 FCC Rcd 20179 (rel. Oct. 18, 2004). (*Core Communications Order*)

^{309/} *Core Communications Order* ¶ 20.

^{310/} *Core Communications Order* ¶ 20; *See also ISP Order*, ¶¶ 23-24.

^{311/} *Core Communications Order* ¶ 21.

^{312/} *Id.*

^{313/} *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 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. *See also* Discussion of SBC Petition, Vartec Petition, Grande Petition, and Frontier Petition, *supra* Section II.

^{314/} *See, e.g.,* Stephen Labaton, *MCI Faces Inquiry For Fraud On Fees For Long Distance*, N.Y. TIMES, July 27, 2003, at A1.

in most cases appears to be access charges.^{315/} 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.^{316/} 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.^{317/} 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.^{318/} In its 1998 *Report to Congress*, the FCC acknowledged that VoIP service might be subject to the FCC's CPNI requirements because it so closely resembles a telecommunications service.^{319/} In another rulemaking examining the use of IP-based telecommunications relay services ("IP Relay"),^{320/} 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

^{315/} See, e.g., Verizon Multistate Template Agreement at Section 8.3, http://newscenter.verizon.com/policy/nj/appendixh/tab_0001.pdf?PROACTIVE_ID=cecec7ccc6cecfcdc9c5cecfcfcc5cececdc8cbcecccbcf6c5cf (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***").

^{316/} *AT&T Phone-to-Phone Order* ¶ 23.

^{317/} Howard Buskirk, *FCC Probing Whether AT&T Should Be Subject to Retroactive Access Charges for VoIP Traffic*, TR DAILY, Jan. 6, 2003.

^{318/} 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); *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).

^{319/} *Report to Congress* ¶ 91, n.189.

^{320/} 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).

profiles of those users.^{321/} 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.^{322/} These consumer advocates have therefore urged VoIP service providers to integrate encryption technologies into their service to protect the privacy of IP-enabled calls.^{323/}

In the recent *Wireline Broadband Consumer Protections NPRM* issued in conjunction with the *Wireline Broadband Order*, the FCC asked for comment on consumer privacy needs and whether consumer information will be used for marketing purposes by broadband Internet access service providers. The FCC also inquired whether it should extend privacy requirements, similar to the Act's CPNI requirements, to broadband Internet Access service providers.^{324/} In particular, it requested comment concerning whether it should adopt rules under its Title I authority. Moreover, it requested information about what type of CPNI broadband Internet access providers are collecting. It reiterated that it has long recognized privacy issues in regards to computer and Internet use and noted that it adopted some CPNI-related requirements in conjunction with its *Computer Inquiry* obligations.^{325/}

In addition, the FCC's June 2005 *E911 Further Notice of Proposed Rulemaking* inquired about the possible privacy implications related to the requirement that interconnected VoIP service providers transmit a customer's Register Location to the local PSAP in emergency situations.^{326/} The obligation requires the providers to keep lists of register locations and make it available to public safety personnel as needed. The FCC asked whether it should adopt privacy requirements that wireline and wireless carriers are already subject to in the context of interconnected VoIP service. It also inquired about its authority to adopt and implement the potential obligations.^{327/}

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.^{328/} 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

^{321/} *Consumer Information Bureau Seeks Additional Comment on the Provision of Improved Telecommunications Relay Service*, Public Notice, 16 FCC Rcd 13100 (2001).

^{322/} 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.

^{323/} James Gifford, *Is Your VoIP Secure?*, COMPUTER TELEPHONY, Sept. 1, 1999, at 99.

^{324/} See *Wireline Broadband Order* ¶¶ 148-149.

^{325/} *Id.* ¶ 149.

^{326/} *E911 Further Notice of Proposed Rulemaking (E911 VoIP Order)* ¶ 62.

^{327/} *Id.*

^{328/} 47 U.S.C. § 255(c).

available,^{329/} 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.^{330/}

The FCC in 2002 issued a Further Notice of Inquiry seeking comment on the application of Section 255 to VoIP services.^{331/} 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.^{332/} Chairman Powell stated that the FCC would continue to focus on accommodating special needs, especially in areas the market would not address effectively.^{333/} 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.^{334/}

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.^{335/} In addition, the FCC held a

^{329/} *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 NOI”).

^{330/} *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.

^{331/} 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).

^{332/} *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).

^{333/} FCC Chairman Michael Powell, Remarks Before the Federal Communications Bar Ass’n, *available at* <http://www.fcc.gov/Speeches/Powell/2001/spmcp105.html> (Jun. 21, 2001).

^{334/} *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.

^{335/} John Spofford, *Voice-Over-IP Deployment*, COMMUNICATIONS DAILY, Sept. 19, 2002, at 6.

“Solutions Summit” on disability access issues in May 2004.^{336/} 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.

In the June 2005 *E911 VoIP Order* the FCC issued an NPRM that addressed, among other matters, whether persons with disabilities can use interconnected VoIP services and other VoIP services to directly call a PSAP via a TTY “in light of the requirement in Title II of the Americans with Disabilities Act (ADA) that PSAPs be directly accessible by TTYs.”^{337/} It also discussed the *NOI* addressed above and asked commenters to “refresh the record” concerning the application of the disability accessibility provisions enunciated in Sections 251(a)(2) and 255 to IP telephony services.^{338/} Moreover, the FCC asked what steps it should take to ensure that persons with disabilities that use interconnected VoIP services have access to E911. Further, it inquired about its authority to implement such regulations.

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 subscribers.^{339/} 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.^{340/} 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.^{341/} 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.^{342/}

The FCC’s current truth-in-billing rules specifically state that they do not “preempt the adoption or enforcement of consistent truth-in-billing requirements by the states.”^{343/} Although

^{336/} *FCC Internet Policy Working Group To Hold Second “Solutions Summit” on Friday, May 7*, News Release (rel. Mar. 11, 2004).

^{337/} *E911 VoIP Order* ¶ 63.

^{338/} *Id.*

^{339/} 47 C.F.R. §§ 64.2400-01.

^{340/} 47 C.F.R. § 64.2401.

^{341/} *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, ¶¶ 13-14 (1999).

^{342/} *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).

^{343/} 47 C.F.R. § 64.2400(c).

the FCC recently has issued a Second Further NPRM that tentatively concludes that the FCC should preempt any state truth-in-billing rules applicable to interstate and wireless carriers that are inconsistent with the FCC's rules. It did inquire whether truth-in-billing should apply to broadband Internet access service providers in its *Broadband Consumer Protection NPRM*.^{344/} The FCC noted in the NPRM that it has received complaints about the billing practices of broadband Internet access service providers, in particular, complaints concerning double-billing and unexplained charges. Accordingly, it asked whether it should impose similar truth-in-billing requirements on broadband Internet access service providers.^{345/}

6. 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,^{346/} 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 "much ado about nothing" and recommended against any changes in the current guidelines.^{347/} 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."^{348/}

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.^{349/} The FCC determined that allowing SBC IP to receive

^{344/} *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55 (rel. Mar. 18, 2005); *Wireline Broadband Order* ¶¶ 152-153.

^{345/} *Wireline Broadband Order* ¶ 153.

^{346/} 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.

^{347/} 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>.

^{348/} *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).

^{349/} *Administration of the North American Numbering Plan*, 19 FCC Rcd 10708 (2004).

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 (“NANPA”) and/or the Pooling Administrator (“PA”) 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.

In February 2005, the FCC granted SBC IP permission to directly obtain numbering resources from the NANPA or PA for use in deploying VoIP services to residential and business customers.^{350/} The FCC found that granting SBC IP’s waiver request would expedite the implementation of IP-enabled services and enable SBC IP to deploy innovative new services. The FCC also indicated that it would grant similar relief to other parties seeking similar rights. SBC IP’s right to obtain numbers directly is conditioned on its compliance with the FCC’s number utilization rules and compliance filing requirements. SBC IP’s authority will remain in place until the FCC adopts final numbering rules for IP-enabled services. The FCC also asked the North American Numbering Council (“NANC”) to review whether the FCC’s current numbering rules should be modified to allow IP-enabled service providers to directly access numbering resources.

7. 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.^{351/} 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.”^{352/} 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 Act.^{353/} 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

^{350/} *Administration of the North American Numbering Plan*, CC Docket No. 99-200, Order, FCC 05-20 (rel. Feb. 2, 2005).

^{351/} 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”).

^{352/} *National Cable & Telecomms. Assoc. v. Gulf Power*, 534 U.S. 327, 333 (2002).

^{353/} *Id.* at 339.

telecommunications service.”^{354/} As with most of these requirements, classification of the service dictates what regulation and fee obligations will apply to the service provider.

^{354/} 47 U.S.C. § 224.