

VOIP REGULATION WHAT LESSONS CAN WE LEARN FROM WIRELESS?

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At the March 2004 Cellular Telecommunications & Internet Association (CTIA) convention in Atlanta, Voice over Internet Protocol (VoIP) was on everyone's minds and everyone's tongues. Federal Communications Commission (FCC) Chairman Michael Powell devoted much of his CTIA 2004 keynote discussion to VoIP as the next "killer app," which "is [not just] going to be a competitive revolution for the wireline [industry], but for the wireless guys as well." On regulatory panels throughout the three-day convention, other FCC officials and wireless industry representatives echoed the Chairman's position, citing VoIP as hottest issue before the Commission in 2004.

Wireless killer app or dud – only time will tell. Some wireless carriers already have introduced IP technology for voice applications into their repertoires in the form of "push-to-talk"TM services and others are actively upgrading their wireless networks to third generation technology via the incorporation of Wi-Fi and Wi-Max hotspots. It is still too early, however, to predict whether the promises of handsets that can jump seamlessly between cellular and Wi-Fi networks for the purpose of placing VoIP calls will amount to anything. And, even if technical standards can be developed to address wireless VoIP quality deficiencies, maintaining connections at high rates of speed (*e.g.*, in a moving vehicle), and facilitating call hand-off between hotspots, wireless carriers have yet to make a business case for offering VoIP service.

Regardless of their immediate business plans, wireless carriers are wise to weigh in on the VoIP regulatory front. Federal and state regulators are considering whether, and to what extent, they should impose so-called consumer protection and pro-competition rules on the provision of VoIP, and if wireless carriers decide to participate fully in the VoIP market, they presumably will favor a hands-off approach. Indeed, even if they only become minor VoIP players, wireless carriers will need to ensure that regulatory decisions do not create the opportunity for anticompetitive arbitrage. The current FCC administration appears to have a fondness for new, unlicensed spectrum technologies, and there remains the potential for VoIP policies to undermine the cellular/PCS business model. To the extent VoIP is accorded more favorable regulatory treatment than that enjoyed by the wireless industry today, wireless carriers will have to make every effort to be included under the VoIP regulatory umbrella.

In any event, all VoIP and potential VoIP providers – wired or wireless – should take heed. The FCC is looking seriously at the "wireless model" as an appropriate template for VoIP regulation and, while some VoIP providers have objected to such an approach, others see it as the lesser of numerous evils. At the end of the day, it may be that the wireless regime is the best attainable, but it would behoove VoIP providers to pay close attention now to what the wireless industry really gained and what it lost in the regulatory debate.

VoIP Providers Are Heading Down the Wireless Path.

While the technology under discussion may have changed from cellular and PCS to VoIP, the arguments for or against regulation are largely the same. Today, the VoIP industry is pushing heavily the theme of “a light touch by the government will spur innovation from the providers.” Echoing to the wireless carriers’ decades-old mantra, VoIP providers contend that the growth of VoIP services has been driven in part by the U.S. government’s hands-off approach. Their pleas for specific congressional or FCC action – or inaction – are also very familiar. Some examples:

- The FCC should not attempt to achieve social goals, such as enhanced 911 (E911), Communications Assistance for Law Enforcement Act (CALEA), and disability access, through unrealistic and open-ended directives to deploy costly technologies that are not ready for prime time.
- Contribution to the Universal Service Fund (USF) should be technologically neutral and all contributors should have equal access to the funds.
- VoIP is “inherently federal” and a patchwork of state regulation will hamper VoIP development.
- The current intercarrier compensation regime needs to be reformed; access charges should be scrapped in place of a “bill and keep” system.
- If not constrained, incumbent local exchange carriers (LECs) will leverage their dominance in the local telephony market and deny access to essential network inputs to impede competition.

Like wireless carriers before them, VoIP providers contend that they are poised to deliver old voice services in fundamentally new ways, resulting in dramatic cost savings for consumers, increased competition for communities, and better access for rural Americans. Given that some regulators are pushing the “wireless model” as a means to unleash the full promise and potential of VoIP technology, while at the same time protecting the public interest, it is worth taking a look at how well that model really works.

How Did Wireless Fare?

There is no question that wireless carriers have long benefited from being considered the “new technology” on the block. Their rates are not regulated and they do not have to obtain state-by-state authorizations to provide service. But, that does not mean wireless carriers have won the regulatory battles on all fronts or that there are not some shortcomings associated with the current regulatory approach. Below is a recap of how the wireless industry fared when it made the same arguments now being advanced by the VoIP companies.

“Social” Regulation

E911. The wireless industry argued vociferously that implementation of location capability for 911 callers would be cost prohibitive because the technology was not yet available. The FCC nevertheless adopted “Phase II” E911 requirements and, ignoring arguments about the lack of location equipment and the failure of other E911 stakeholders to meet their own obligations, the agency instituted enforcement actions against several large wireless carriers for alleged non-compliance. As predicted, the E911 implementation costs have risen into the hundreds of millions of dollars. Although most wireless carriers today are actively deploying Phase II E911 technologies throughout their networks, the public safety answering points (PSAPs) that receive the location data are balking at the high cost of upgrading their own equipment. Consumer expectations have been raised, but it will be many years before most Americans are able to enjoy the benefits of wireless E911 service.

CALEA. Certain classes of wireless carriers argued that because their offerings were limited to niche business markets or analog technology, imposition of CALEA obligations would have severe operational, technical, and financial effects on their businesses. The FCC nevertheless took an expansive view of the term “telecommunications carrier” and ruled that if a wireless carrier’s services are interconnected with the public switched network and provided to the public for profit, it would not be exempted from CALEA.

Disability access. As wireless carriers began converting their analog networks to digital, it became clear that digital technology presented certain challenges in connection with access for the deaf and hearing impaired. At that time, it was not feasible to transmit calls that had been placed through text telephone (TTY) devices over digital technology, and later, hearing-aid users found that many digital handsets caused interference to their hearing aids. Wireless carriers assured the FCC that they would continue to provide TTY service through their analog channels, but the FCC ordered wireless carriers to offer digital TTY transmission. In addition, the FCC recently adopted an aggressive timetable for the development and distribution of digital hearing aid compatible (HAC) phones notwithstanding wireless industry arguments that the technology is not yet available and that any rules should encourage hearing aid manufacturers to address the problem on their side as well.

Universal Service Fund

USF Contributions. The FCC ordered wireless carriers to contribute to the federal USF based on their interstate revenues and adopted an interstate revenue “safe harbor” because wireless carriers are not always able to determine the jurisdiction of calls on their networks. The FCC raised the safe harbor from 15% to 28.5% last year. Under the FCC’s proposed “flat-fee” assessment, which has been under consideration for several years, there would be no interstate safe harbor at all for wireless carriers. The FCC also rejected arguments that wireless carriers should not be subject to state USF contributions because the nature of their services is “interstate.”

USF Support. Although wireless carriers are permitted to receive funds from the USF, the Federal-State Joint Board for Universal Service recently recommended limiting support to the “primary line” into a consumer’s home. If the FCC adopts this proposal, the amount of funds available to wireless carriers will dwindle. The FCC is also considering additional ways of limiting USF support to the wireless industry, including requirements that wireless carriers provide services that they otherwise are not obligated to offer.

State Regulation

The wireless industry lobbied Congress heavily throughout the early 1990s, arguing that because of the “inherently interstate” nature of wireless service, a patchwork of state regulation would undermine the deployment of innovative wireless technology. Congress apparently paid attention, but it only went part of the way. It ousted states from regulating the “rates or entry” of wireless providers, but preserved state jurisdiction over the “other terms and conditions” of wireless service. The line between rates and entry on the one hand and terms and conditions on the other is far from clear, and the only guidance provided by Congress is one paragraph in the statute’s legislative history. As a result, many state public utility commissions feel entitled to regulate wireless services in the name of consumer protection, and wireless carriers remain subject to a plethora of consumer class action lawsuits in state courts. The FCC has proven to be extremely reluctant to preempt the agencies or courts under any circumstances.

Intercarrier Compensation

Wireless carriers, which are required to interconnect with and pay termination fees to incumbent LECs, have long argued that the FCC should replace its reciprocal compensation and access charge mechanisms with a “bill and keep” regime. The FCC thus far has declined. The most it has been willing to do for wireless carriers is to designate metropolitan calling areas (MTAs) as the “local” calling area for assessing when a wireless call is subject to access charges.

Incumbent LEC Regulation

The FCC confirmed last year that wireless carriers are eligible to purchase unbundled network elements (“UNEs”) – specifically transport facilities – from ILECs at cost-based rates. The D.C. Circuit Court of Appeals, however, overturned most of the FCC’s UNE rules, including those applying to wireless. As a result, wireless carriers must continue to purchase transport from incumbent LECs as “special access,” which is considerably more expensive than UNEs. Some wireless carriers continue to urge more stringent FCC oversight of special access services, but the FCC has not yet taken any action on those requests.

What Lessons Can Be Learned?

As the foregoing demonstrates, the wireless regulatory “template” may be a good starting point for VoIP regulation, but it should not necessarily be the VoIP industry’s end goal. Although it is increasingly clear that VoIP providers are not going to avoid many of the FCC’s “public interest” obligations, they should continue to urge the agency not to get out in front of the technology. To the extent VoIP providers have reasonable compromise proposals on E911, CALEA, and disability access, they should present them as soon as possible. As the wireless industry discovered to its detriment, flat requests for exemption did not carry it very far.

Even more important than limiting the scope of social regulation is settling the question of jurisdiction. While the wireless industry was pleased to escape state and local oversight of their rates and entry, it turns out that many categories of regulation do not necessarily fall within the strict ambit of “rates or entry.” Class action plaintiffs and state commissions have become emboldened by the FCC’s unwillingness to preempt, and wireless carriers increasingly find themselves defending lawsuits in state courts and hiring squads of state lobbyists to combat regulators’ incursions into their businesses. Congress’s and the FCC’s hands-off approach to wireless regulation means little if states are free to fill the alleged void with their own comprehensive regulatory regimes.

As many VoIP advocates know, it would not further their cause to focus solely on evading legacy telephone regulations and ignore the lessons recently learned by the wireless industry. To give VoIP an opportunity to prove it can really transform the way we communicate, it is essential that government and industry make every effort to avoid the pitfalls and embrace the successes of *all* regulatory regimes – wireless as well as wireline.