ASPEN PUBLISHERS

The COMPUTER & INTERNET Lawyer

Volume 25 ▲ Number 7/8 ▲ JULY/AUGUST 2008

Ronald L. Johnston, Arnold & Porter, LLP Editor-in-Chief*

VoIP Services Regulation 2008: Tracking the Evolving Regulatory Framework (Part I of II)

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This two-part series examines the rulings of the Federal Communications Commission (FCC), state agencies, and the courts with regard to voice over Internet protocol (VoIP) services, also commonly referred to as Internet telephony, IP telephony, or IP-enabled services. Part I provides an overview of historical and recent FCC, state, and judicial actions relevant to assessing the appropriate regulatory classification and treatment of VoIP services. Part II will review the FCC's reliance on its Title I ancillary jurisdiction under the Communications Act of 1934, as amended[1] and other sources of authority to impose a number of telecommunications regulations on interconnected VoIP service providers and broadband service providers. Part II also will review important issues for VoIP service providers relating to interconnection with telecommunications carriers to provide access to the public switched telephone network.

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Defining Federal Jurisdiction over VoIP Services

IP-enabled services[2] have historically developed and flourished in a marketplace free from the regulatory obligations imposed upon traditional providers of circuit-switched telecommunications services. The avoidance of these burdens rests upon statutory and regulatory distinctions established between "telecommunications services" and "information services." In general, a telecommunications service offers simple transmission of information of the user's choosing "without change in the form or content of the information,"[3] while an information service provides the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[4] Based on these classifications, telecommunications services, such as basic local telephone service and long distance service, have been subject to all of the trappings of both federal

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and state telecommunications regulation. Meanwhile, information services, such as email and text messaging, have flourished free from regulation. IP-enabled service providers generally have avoided regulation through providers' claims that such services more appropriately fall into the category of information services because they offer consumers much more than simply transmission of information between two points.

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.[5] The expansion of VoIP service to incorporate applications that extend to the local market, in particular, drew greater attention from regulators and providers of traditional plain old telephone services (POTS). This section provides an overview of current federal and state regulatory policies shaping the future regulatory treatment of VoIP services.

Is VoIP a Telecommunications Service, an Information Service, or Neither?

In its 2004 *IP-Enabled Services NPRM*,[6] the FCC raised the question of the appropriate regulatory classification of IP-enabled services, including VoIP services, specifically asking for comment on "[w]hich classes of IP-enabled services, if any, are 'telecommunications services' [and] . . . [w]hich, if any, are 'information services'?"[7] The FCC did so against a background of prior decisions and policy statements about the appropriate regulatory framework for VoIP services, other IP-enabled services, and the Internet access upon which such services often depend. Since that time, the FCC (while applying many telecommunications regulations to interconnected VoIP services) has consistently deferred classifying VoIP services as either a telecommunications service or an information service.[8] The following provides an overview of the history of the FCC and federal court rulings that are relevant to the FCC's consideration of the appropriate regulatory classification of VoIP services.

FCC Policy Statement on Broadband Deployment and Internet Access

The FCC issued a Policy Statement in September 2005 "to offer insight and guidance to its approach to the Internet and broadband that is consistent with . . . Congressional directives" as set forth in §§ 230 and 706 of the Communications Act.[9] The FCC asserted that its ancillary jurisdiction under Title I of the Communications Act is sufficient to empower it "to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner." To ensure "that broadband networks are widely deployed, open, affordable, and accessible to all consumers," the FCC adopted the following principles "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet":

- Consumers are entitled to access the lawful Internet content of their choice;
- Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- Consumers are entitled to connect their choice of legal devices that do not harm the network; and
- Consumers are entitled to competition among network providers, application and service providers, and content providers.

Broadband Internet Access Services Defined as Information Services

While the FCC continues to refrain from classifying VoIP services as either an information service or a telecommunications service, in separate rulings in 2002 and 2005 the FCC determined that cable modem broadband Internet access service and wireline broadband Internet access service were both information services and therefore exempt from regulation as either a cable service or a telecommunications service. Subsequently, the FCC allowed Verizon's petition for forbearance of Title II regulation of its broadband services to be "deemed granted by operation of law," and acted favorably on similar petitions from other wireline carriers. These rulings are important predicates to the appropriate classification of VoIP services.

Cable Modem Ruling: 2002

The FCC's 2002 *Cable Modem Ruling*[10] determined that cable modem service is properly classified as an interstate information service subject to Title I of the Communications 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.[11] The FCC defined cable modem service 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."[12]

The FCC found in the order that cable modem service is an integrated offering; the telecommunications component is not separable from the data processing or information service capabilities of the service.[13] Cable operators providing cable modem service over their own facilities are not offering telecommunications service to end users; rather, they are using telecommunications to provide end users with cable modem service.[14]

The Ninth Circuit panel determined that it was bound under the doctrine of *stare decisis* to follow its prior decision in *AT&T v. City of Portland* and find that cable modem service was both an information service and a telecommunications service.

Several groups appealed the FCC's finding that cable modem service was an interstate information service, and the appeals were consolidated in the Ninth Circuit.[15] In its ruling, the Ninth Circuit panel determined that it was bound under the doctrine of *stare decisis* to follow its prior decision in *AT&T v. City of Portland*[16] and find that cable modem service was both an information service and a telecommunications service.[17] The court did not address the substantive aspects of the classification issue, but ruled based on the longstanding legal tradition 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,[18] but the request was denied.[19] 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.[20] On June 27, 2005, the Supreme Court issued its opinion in *NCTA v. Brand X Internet Services*, holding 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.[21] The Supreme Court said that the Ninth Circuit should have applied the *Chevron* framework to its analysis and given deference to the FCC's interpretation of "telecommunications service."[22] 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 FCC's decision that Internet service providers (ISPs) offer Internet access as an integrated service.[23]

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 when a cable operator was offering a stand-alone telecommunications service to ISPs or subscribers.[24] 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 are just and reasonable and not unjustly or unreasonably discriminatory.[25]

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.[26] It also invited "comment on any other forms of state and local regulation that would discourage investment in advanced communications facilities, or create an unpredictable regulatory environment."[27] 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.[28] State and local governments argued that the FCC should not preempt state and local laws.[29] The comment cycle for the Cable Modem NPRM closed on July 16, 2002.[30] As of May 2008, the FCC had taken no further action in this proceeding.

Wireline Broadband Order: 2005

In the wireline broadband order, the FCC affirmed its tentative conclusion "that wireline broadband Internet access service provided over a provider's own facilities is an information service."[31] This decision primarily provided relief to incumbent local exchange carriers (ILECs) and provided parity in treatment between wireline broadband Internet access service providers and cable modem service providers. 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." Declaring that it would not classify services based on the owner of the transmission facilities, the FCC explained that its decision was based on the "end product" delivered to the user. The FCC noted that by classifying both wireline broadband Internet access services and cable

modem services as "information services" it had moved closer to "crafting an analytical framework that is consistent . . . across multiple platforms that support competing services."[32]

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."

As an outgrowth of this regulatory classification, the FCC affirmed that wireline broadband Internet access service providers would no longer be required to separate and offer transmission components of wireline broadband Internet access services as a stand-alone telecommunications service.[33] Wireline broadband Internet access service providers could choose to offer transmission either on a non-common carrier or a common carrier basis,[34] though in order to comply with statutory requirements they may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and non-common carrier basis. Nevertheless, 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."[35]

The FCC eliminated open 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 that emerging platforms are continuously expanding into markets. Second, then-existing regulations constrained technological advances and deterred broadband infrastructure investment. Third, the eliminated 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."[36] The FCC also eliminated the long-standing *Computer Inquiry* requirements,[37] finding that they were no longer appropriate because the broadband marketplace "is markedly different from the narrowband marketplace" that existed when the regulations were adopted.[38] Citing the rapid evolutionary nature of the broadband technology market, the FCC concluded that the costs of *Computer Inquiry* regulations outweighed the benefits and that they no longer achieved the desired regulatory objectives.[39]

The FCC required unbundled Title II wireline broadband Internet access transmission services to remain available during a one-year transition period so that ISPs could continue to operate until new agreements were negotiated.[40] 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.[41]

FCC Chairman Kevin J. Martin declared that the wireline broadband order represents the end of "regulatory inequalities that currently exist between cable and telephone companies in their provision of broadband Internet services."[42] Furthermore, Chairman Martin reiterated that broadband deployment is "vitally important to our nation as new, advance services hold the promise of unprecedented business, educational, and healthcare opportunities for all Americans."[43]

Accompanying the wireline broadband order, the FCC issued an NPRM 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;[44] whether the FCC 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 § 254(g) policies concerning rural and urban rate parity should be applied to wireline broadband Internet access providers.[45] The FCC concluded by requesting comments concerning federal-state involvement and how joint efforts should be coordinated.[46] Comments have been filed in response to the NPRM, but as of May 2008, the FCC has taken no further action in the proceeding.

Promoting Broadband Deployment through Forbearance

The FCC has granted ILECs forbearance from certain Title II[47] regulatory obligations in order to promote the deployment and availability of broadband.

On March 19, 2006, the FCC allowed Verizon's petition for forbearance from Title II and *Computer Inquiry* requirements, as applied to its broadband services, to be "deemed granted by operation of law."[48] Verizon had filed the petition for forbearance on December 20, 2004, seeking forbearance from Title II and *Computer Inquiry* requirements as applied "to any broadband services" that it offers.[49] Specifically, Verizon requested forbearance from Title II regulations as applied to its

"broadband services,"[50] including packet-switched services capable of 200 Kbps in each direction[51] and "non-TDM based optical networking, optical hubbing and optical transmission services."[52] Within a year of Verizon's filing, the FCC released its *Wireline Broadband* decision, which relieved facilities-based wireline broadband service providers from *Computer Inquiry* rules and other regulatory requirements.[53] The decision, in effect, rendered portions of Verizon's petition for forbearance moot. Subsequently, Verizon filed *ex parte* communications with the FCC that updated and redefined the scope of its request and on February 7, 2006, Verizon filed an *ex parte*, at the request of the FCC staff, narrowing the scope of its initial petition request. On February 17, Verizon filed another *ex parte* communication committing that universal service was not included in its request for forbearance from Title II regulations.[54]

Verizon requested and was granted relief by operation of law from Title II common carriage regulations for these services, regardless of the classification of the end user customer. In a Joint Statement by Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, the forbearance relief granted to Verizon was described as analogous to the relief provided in previous FCC decisions that eased or eliminated regulatory obligations for broadband providers.[55] The Joint Statement also indicated that the grant of Verizon's petition by operation of law furthered the FCC's goal to "relax regulations where competition [is] significant and where regulations acted as a disincentive to deploy new broadband technologies."[56]

AT&T and Qwest filed "me too" petitions, requesting similar relief and asking the FCC to apply its decision to all entities within the same class of providers.[57] Shortly thereafter, BellSouth, Embarq, and Frontier/Citizens also filed petitions for forbearance.[58] On September 11, 2007—one day before Qwest's petition would be granted by operation of law—the company withdrew its petition.[59] The next day Qwest filed another petition for forbearance from applying Title II to Qwest's broadband services and from applying *Computer Inquiry* rules to Qwest's broadband offerings. Qwest asked for an expedited ruling due to the "disparate regulatory treatment that currently exists between similarly situated providers of the broadband services in question."[60] It also stated in its cover letter accompanying the petition that it "is imperative that all providers of these [broadband] services operate on a similar regulatory footing with regard to these services."[61]

On October 12, 2007, the FCC granted, in part, AT&T's petition for forbearance.[62] Like Verizon and the other ILECs, AT&T asked for forbearance from dominant carrier regulations, Title II, and *Computer Inquiry* requirements with respect to the broadband services that it specified in its petition, as well as for any additional interstate broadband services it may choose to offer in the future. The requested relief from Title II regulations included the ability to offer any of its specified services on a private carriage basis and from the FCC's dominant carrier requirements. AT&T also asked for relief from *Computer Inquiry* rules, including the requirement that it separate out and offer any underlying transmission components of the AT&T-specified services on a common carrier basis. AT&T did not seek relief from the FCC's universal service requirements.

The FCC granted AT&T's petition with respect to forbearance from dominant carrier and *Computer Inquiry* requirements only for the broadband services that AT&T currently provided and did not extend the grant to any future broadband services.[63] Moreover, the FCC found that the record did not demonstrate that forbearance from Title II economic regulations as applied to nondominant telecommunications carriers and to ILECs meets the statutory forbearance criteria. The FCC stated that "AT&T asks us to go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow it to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in regulatory treatment between AT&T and its competitors."[64] The FCC also determined that granting "such preferential treatment would be inconsistent with the market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power." The FCC also found that AT&T had failed to establish that forbearance from Title II regulations as applied to LECs and forbearance from Title II public policy regulations meets the statutory forbearance criteria. Accordingly, the FCC denied AT&T's request for forbearance from Title II requirements.

Recognizing that its denial of AT&T's full request resulted in Verizon's receiving greater regulatory relief than its competitors, the FCC said that it would "ensure regulatory parity between Verizon on one hand, and AT&T on the other" by "issu[ing] an order addressing Verizon's forbearance petition [granted by operation of law in March 2006], as well as the other BOC forbearance petitions seeking comparable relief, on grounds comparable to those set forth in this order within 30 days."[65] The FCC has yet to revisit Verizon's grant of forbearance. On October 30, 2007, the FCC granted partial forbearance, virtually identical to that granted to AT&T, to Embarq and Frontier and Citizens.[66] Qwest's petition is pending.

FCC Generic Proceedings Attempt to Sort Out VoIP Classification Issue

While refraining from classifying VoIP services as either a telecommunications service or information service, the FCC has deliberated the question of classification of services in other recent decisions. When reviewing the question in relation to three particular voice products, the FCC considered specific characteristics of the systems in declaring one to be an information service, while determining the other two to be telecommunications services.

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1998 Report to Congress

In its 1998 Report to Congress,[67] the FCC analyzed "Phone-to-Phone IP telephony" services from the perspective of the two distinct classifications in the Communications Act,"telecommunications service"[68] and "information service"[69] and found that IP telephony blurred the line between telecommunications services and information services. Reviewing services available in the marketplace at that time, 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.[70]

The 1998 Report to Congress was the first time that the FCC had taken steps to distinguish between 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.[71] The FCC concluded that it would be inappropriate "to make any definitive pronouncements [about regulatory classification of VoIP services] in the absence of a more complete record focused on individual service offerings."[72] The FCC committed to address the regulatory status of VoIP services in upcoming proceedings where it would have the benefit of more focused records.

2004 IP-Enabled Services NPRM

In 2003 and 2004, the FCC held "VoIP Forums and Solution Summits" to gather information about advancements, innovations, and regulatory issues related to VoIP services.[73] During one forum, several commissioners intimated that the FCC would likely continue its "hands-off" approach to regulating VoIP services.[74] This is consistent with the FCC's Policy Statement that declared the FCC's intended approach was to be consistent with congressional directives, promote continued development of the Internet, preserve vibrant and competitive markets for the Internet, develop technologies that maximize user control over information received, and encourage deployment of advanced telecommunications capability to all Americans.[75]

The FCC has not adopted a comprehensive order in response to the IP-Enabled Services NPRM, but appears to have chosen to take a piecemeal approach to regulating IP-enabled services.

In February 2004, the FCC adopted a generic NPRM seeking comment on the appropriate legal and regulatory framework for IP-enabled services, including VoIP services.[76] While the IP-Enabled Services NPRM asked many questions about an appropriate framework for IP-enabled services, the FCC did not offer any tentative conclusions. The FCC recognized that rapid changes in technology will lead to a class of VoIP services that are significantly different from the traditional POTS to which VoIP services were compared in the 1998 Report to Congress.[77] 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; or
5. A private carriage or common carriage service.[78]

The FCC asked 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 asked whether 911/E911, disability access, intercarrier compensation, and universal service obligations should apply to IP-enabled services,[79] or whether forbearance may be appropriate for some types of services.[80]

Comments on the IP-Enabled Services NPRM were filed in May and July of 2004. There was widespread agreement among commenters that the FCC should not impose regulations that have the potential to curtail the deployment and investment in new and innovative IP-enabled services.[81] There were substantial differences between the parties, however, on the appropriate regulatory framework for IP-enabled services, with some parties supporting a "layers" model[82] and others supporting a functional equivalence approach.[83] Others used the proceeding to emphasize the need for VoIP service providers to have 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.[84] The FCC has not adopted a comprehensive order in response to the IP-Enabled Services NPRM, but appears to have chosen to take a piecemeal approach to regulating IP-enabled services as reflected by the individual decisions and pending proceedings described later in this article.[85]

The FCC Evaluates the Classification of Three Voice Services

The pulver.com Order: It's an Information Service

On February 12, 2004, the FCC adopted an order declaring pulver.com's Free World Dialup service to be an interstate information service.[86] In 2003, pulver.com filed a petition for declaratory ruling requesting the FCC rule that its Free World Dialup service is neither telecommunications nor a telecommunications service within the Communications Act's definitions.[87] The Free World Dialup service facilitates point-to-point broadband Internet protocol voice communications and is provided over the public Internet only within pulver.com's network of customers who subscribe to the service. The FCC agreed with pulver.com that its service does not fit within the statutory definitions of "telecommunications" or "telecommunications service" because Free World Dialup does not offer subscribers transmission services or telecommunications for a fee.[88] Free World Dialup does not transmit information without change in form or content, as required by the definition of telecommunications, but instead "provides new information: whether other FWD members are present; at what IP address a member may be reached; or, in some cases, a voicemail or an email response."[89] The FCC rejected, however, pulver.com's position that Free World Dialup did not offer an information service. Instead, the FCC concluded that the service fell squarely within the definition of an information service.[90] Had the FCC found otherwise, Free World Dialup 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.[91]

AT&T Phone-to-Phone Order: It's a Telecommunication Service

Responding to a petition for declaratory ruling filed by AT&T in 2002,[92] the FCC released an order on April 21, 2004, 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.[93] AT&T had argued that ILECs' efforts to impose access charges on this type of traffic was inimical to Congress's goal to preserve the vibrant and competitive free market that exists for the Internet and contrary to 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 because "[u]sers of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files."[94] The FCC emphasized that its decision was limited to the specific type of service described by AT&T in its petition: 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.[95] 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."[96] 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, which will be discussed later.

Prepaid Calling Cards Using IP Technologies: It's a Telecommunication Service

On June 30, 2006, the FCC released the Prepaid Calling Card order classifying as telecommunications services certain prepaid calling cards using Internet Protocol, including menu-driven prepaid calling card services.[97] The FCC deemed all menu-driven calling cards and calling cards that use IP transport to deliver all or a portion of the call as telecommunications services subject to Title II regulation as telecommunications carriers. Menu-driven services are accessed via toll-free dialing to a facility that allows the customer to make a call or access information such as sports, weather, entertainment, and other services.[98] The FCC cited the Supreme Court's ruling in *Brand X* to support classifying menu-driven services as telecommunications services. The *Brand X* court stated that the regulatory classification of a service as an information service turns on whether the telecommunication transmission component of the service is so indistinguishable from its enhanced component as to make it a single integrated offering to the end user. The FCC classified menu-driven services as telecommunications services because it found that the telecommunications transmission and enhanced components of the service were not sufficiently integrated as to warrant an information services classification.[99]

Following its rationale in the AT&T IP-in-the-Middle order,[100] the FCC also held that any prepaid interexchange services (*i.e.*, calling card services) provided via IP-transport is a telecommunications service if it: (1) uses ordinary customer premises equipment with no enhanced functionality; (2) originates and terminates on the public switched telephone network; and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP-technology.[101]

The FCC Continues to Decline to Classify VoIP Services

In other orders concerning VoIP services, the FCC has carefully avoided classifying VoIP services as either telecommunications services or information services, continually deferring that decision to a later date. In the Vonage order, for example, the FCC said such regulatory classification was "a determination we do not reach in this order."[102] The FCC said that its VoIP E911 order "in no way prejudges how the Commission might ultimately classify [VoIP] services."[103] The USF report & order reported that "[a]gain here [in this order], we do not classify these [VoIP] services."[104] The FCC also declined to classify VoIP services as either telecommunications services or information services in more recent orders extending customer proprietary network information (CPNI) requirements to VoIP services,[105] imposing regulatory fee obligations on VoIP services,[106] extending disability access and telecommunications relay services (TRS) responsibilities to VoIP services,[107] and extending local number portability (LNP) rights and responsibilities to VoIP services.[108]

Applying the Federal Statutory Scheme

The Communications Act's Functionality vs. Facilities Test for Classifying Services

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 is "to develop an analytical framework that is consistent, to the extent possible, across multiple platforms."[109] 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."[110] 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."[111]

In the Wireline Broadband order, the FCC adhered to the "function over facilities" principle and concluded that the Communications 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 facilities used to provide the services.[112] 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.[113] In the AT&T IP-in-the-Middle order, former FCC Chairman Powell noted that AT&T's IP service was determined to be 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."[114]

Thus, in deciding regulatory classifications, the FCC has generally considered it to be irrelevant what technology a provider uses 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 held to be subject to the FCC's common carrier (*i.e.*, Title II) regulations.[115] 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.[116]

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 offer applications well beyond that of plain old telephone service. For instance, POTS is a "network-level function" whereas VoIP is "an Internet application just like unregulated e-mail and file sharing" that can follow its users everywhere, over any network.[117] As former FCC Chairman Powell stated, "Stop thinking of voice as just the telephone. It's just an application running on an IP network."[118] VoIP service applications of today combine voice and data in new and innovative ways, going far beyond the functionality offered by POTS. In light of the current 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 the development of increasingly innovative VoIP products.

In light of the current and evolving functional differences between VoIP services and POTS, regulators must resist the temptation to focus on individual trees and ignore the forest.

1996 Act Grants FCC Forbearance Power and Mandates the Promotion 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 use its § 10 forbearance authority to forbear from applying telecommunications regulation to VoIP services.[119] Under the Communications Act, the FCC is required to forbear if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary for the protection of consumers; and (3) forbearance is in the public interest.[120] The FCC has acknowledged that its forbearance obligation is a key component of the Communications Act's "procompetitive, 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.[121] For these reasons, the FCC asked in its IP-Enabled Services NPRM whether it should forbear from applying certain regulations to particular categories of IP-enabled services.[122] Notably, in the 1998 Report to Congress, the FCC stated it would have "to consider carefully" whether to forbear from imposing telecommunications regulation on VoIP services.[123]

Second, § 706 of the Communications Act imposes on the FCC an affirmative obligation to encourage the deployment of advanced services.[124] While § 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 Communications Act (including forbearance authority under § 10) to encourage the deployment of advanced services.[125] The FCC has interpreted § 706 as a directive to the FCC to use its forbearance authority to further Congress's objective of opening all telecommunications markets to competition, including the market for advanced services.[126] In its 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."[127]

Third, FCC decision-makers also must consider § 230 of the Communications Act, which expressly states that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[128] In the Vonage order, the FCC determined that preemption of the Minnesota PUC's entry regulations was required under § 230 because the language of that section "embraces [Vonage's] service."[129] 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."[130]

In a series of decisions from 2002 to 2007, the FCC has repeatedly relied on these statutory tools to help fulfill the congressional goal of encouraging the rapid deployment of advanced services articulated in § 706 of the Communications Act and the national policy expressed in § 230 "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by

Federal or State regulation." Through these decisions, the FCC has established the preeminence of federal national policy and limited the ability of state and local governments to regulate broadband and other advanced services.[131]

The Question of Preemption of State Regulation of VoIP Services

The FCC's Vonage order set the stage for resolving questions of federal preemption of state regulation of VoIP services, but questions continue to be raised such as: Does the Vonage order preempt states from regulating "fixed" VoIP services? Is there any intrastate element of VoIP services that can be separated out for regulation by the states? What roles do the states retain with regard to such matters as E911 and state universal service programs where they have traditionally played a role? Does or should the ability to classify traffic for USF reporting purposes justify the elimination of preemption treatment?

The question of the jurisdictional nature of VoIP services was formally raised in the IP-Enabled Services NPRM, which sought comments on the subject in May and July of 2004. With the exception of the states, some consumer groups, and one competitive local exchange carrier, nearly every commenter argued that IP-enabled services are interstate services based on the principles set forth in the FCC's pulver.com order, the mixed-use theory, or the inseparability doctrine.[132] The commenters recommended that state authority over IP-enabled services be expressly preempted in order to preserve a national policy for deregulation of the Internet and Internet-based services.[133] Commenters also suggested that allowing states to individually regulate VoIP services would create an unmanageable, unworkable regulatory regime that would thwart continued deployment of IP-enabled services.

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.[134] In its *Computer Inquiry* proceedings, the FCC found that information services must remain free of state and federal regulations to promote the competitive growth of such services.[135] The FCC reaffirmed this finding in its ruling that pulver.com's Free World Dialup service is an interstate information service that must remain free from unnecessary regulation[136] and its Vonage order that Vonage (and services like Vonage's) are interstate in nature.[137]

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 has upheld the FCC's use of narrowly-tailored preemption when 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.[138]

The FCC's reticence towards allowing states to regulate IP-enabled services was reiterated in the Broadband Wireline order.

Given the FCC's previous preemption of state regulations governing information services and its findings in the Wireline Broadband order, pulver.com order and Vonage order, state commissions' ability to impose burdensome regulations on VoIP services should 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."[139] 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.[140] More 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."[141] 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 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.[142] For example, pulver.com's Free World Dialup simply provides information on its server that its members can access. Each member must find its own means (*i.e.*, an ISP) to get to the server. In addition, Free World Dialup is portable in nature without fixed geographic origination or termination points. Thus, the FCC's pulver.com order presents a

detailed analysis of when the end-to-end analysis is inappropriate or "unhelpful." Similarly, in the Vonage order, the FCC determined that Vonage's service can be taken anywhere and that this "total lack of dependence on *any* geographically defined location" renders application of the end-to-end analysis nearly impossible.[143] The FCC's reticence towards allowing states to regulate IP-enabled services was reiterated in the Broadband Wireline order. The FCC 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."[144] The FCC's recent statement in its VoIP USF order that the reporting of actual interstate usage by interconnected VoIP service providers could subject those providers to state regulation[145] suggests that the FCC may be backing away from its statutory mandates in §§ 230 and 706 to promote a national broadband policy and now intends to rest its preemption solely on the lack of an end-to-end analysis capability. If so, this would be a sharp deviation from the reasoning of nearly all of the FCC's recent decisions addressing IP-enabled services.[146]

The 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 (Minnesota PUC) that attempted to classify Vonage as a provider of "telephone service" and impose entry, rate, and 911 requirements on Vonage as a condition of offering service in the state.[147] In its Vonage order, the FCC determined that the Minnesota PUC's decision should be preempted because 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.[148] 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.[149] 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.[150] The FCC also rested its decision to preempt the Minnesota PUC's requirements on the FCC's statutory mandate to promote the policies and goals of §§ 230 and 706 of the Communications Act.[151] These provisions dictate that there should be a single national policy to ensure the continued development of advanced telecommunications services and Internet services unfettered by federal and state regulation.

The Vonage order applies 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.[152]

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.

The Vonage order did not address whether Vonage's service is a telecommunications service or an information service; those matters were left to the generic IP-Enabled Services proceeding. Arguably, the definition of IP-enabled services set forth in the Vonage order would prevent these services from being classified as "telecommunications services" and could be found to be more akin to the definition of "information services" because of the capabilities described in § 3 of the definition.

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.

In March 2007, a panel of the Eighth Circuit upheld the FCC's preemption of state regulation of Vonage's VoIP service.[153] Applying the doctrine of deference to administrative agency decisions that are not arbitrary, capricious, or an abuse of discretion, the court held it was unnecessary for the FCC to decide whether VoIP was an information service or a telecommunications service before acting to preempt state regulation.[154] The court also found that the FCC had not acted arbitrarily in determining the impossibility of separating out the intrastate components of VoIP service or in determining that state regulation of VoIP service conflicts with federal regulatory policies.[155] The court refused to decide, however, the argument raised by the New York Public Service Commission that the FCC's preemption should be limited to mobile or nomadic VoIP services like that offered by Vonage and should not be applied to "fixed" VoIP services, such as those typically offered by cable operators. The court held that the question was not ripe for adjudication because the FCC had merely speculated in the Vonage order that it would similarly preempt state regulation of VoIP services offered by cable companies, but had not acted to actually effect such preemption.[156]

The VoIP USF Order and Missouri PSC v. Comcast: Is Impossibility of Separation the Only Significant Factor and Does It Matter if VoIP Services Are "Fixed" or Nomadic?

The FCC based its preemption of state regulatory authority in the Vonage order, in part, on the impossibility of separating the intrastate components of VoIP communications from interstate components.[157] The FCC held that the "practical inseverability" of intrastate from interstate services would "likewise preclude state regulation to the same extent as described herein" for any VoIP service that required a broadband connection and IP-compatible CPE and offered users "a suite of integrated capabilities and features . . . that allows customers to manage personal communications dynamically . . . ."[158]

Later, in the VoIP USF order, the FCC appeared to suggest that it would apply the impossibility doctrine literally and potentially withdraw state regulatory preemption from VoIP service providers that may be able to separately identify intrastate traffic on their systems.[159] On its face, this suggests a significant narrowing of the basis for preemption of state VoIP regulation. In the Vonage order, however, the FCC reminded interested parties that "the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation."[160] Indeed, in the Vonage order, the FCC did not base its preemption action solely on impossibility of identifying separate intrastate services, but also on "Congress's clear preference for a national policy to accomplish [its] objective," expressed in § 230 of the Communications Act, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[161] The FCC also supported preemption as a means to advance the goal of § 706 to "encourage the deployment of advanced telecommunications capability to all Americans" by "precluding multiple disparate attempts to impose economic regulations" on VoIP services that "would thwart its development."[162]

In the VoIP USF order, the FCC appeared to suggest that it would apply the impossibility doctrine literally and potentially withdraw state regulatory preemption from VoIP service providers.

The FCC further observed that it could also rely on § 253 of the Communications Act, which provides the FCC additional preemption authority over state regulations that "prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service."[163] Thus, while the FCC did not rely on § 253 for support of its decision in the Vonage order, it went out of its way to note that it could have.

It is unclear at this time whether the FCC's comment in the VoIP USF order was intended to or could represent a policy shift by the FCC to the narrower proposition that preemption of state regulation is based solely on impossibility of separate identification of any intrastate component of VoIP services. The Vonage order preemption ruling is clearly premised on more than impossibility of separating traffic. If the courts or FCC ignore this reality it could have significant implications for VoIP services with a fixed location.[164]

This question is already being put to the test by the Missouri Public Service Commission (PSC). On September 21, 2006, Missouri PSC staff filed a complaint with the Missouri PSC against Comcast IP Phone of Missouri, LLC (Comcast) asking the Missouri PSC to find that Comcast "is providing local exchange and interexchange telecommunications service" in Missouri and require the company to obtain

a certificate of service authority as a telephone company.[165] Comcast immediately asked a federal district court to issue an injunction against any Missouri PSC action on the basis that the FCC had preempted state regulatory jurisdiction over VoIP services.[166] The court declined to issue the injunction, saying that the FCC's preemption in the Vonage order was based on the inseparability of intrastate and interstate communications with regard to Vonage's VoIP service, and that the FCC, in its order, "did not declare that all VoIP services could not be separated into interstate and intrastate communications."[167]

The Missouri PSC proceeded to issue an order on November 1, 2007, holding that Comcast's fixed VoIP must obtain a certificate of service authority because, it said, the FCC's Vonage order applied only to nomadic VoIP services and the FCC had yet to rule on fixed VoIP services such as that offered by Comcast.[168] The Missouri PSC's decision devoted no discussion to the FCC's Vonage analysis beyond the basis of impossibility of separation of intrastate and interstate components, holding that "[s]ince a call using a fixed VoIP service must originate from a fixed connection to a cable, the difficulty of separating intrastate calls from interstate calls that led the FCC to preempt state regulation of the services offered by Vonage does not apply to fixed VoIP service."[169] In addition to slighting the other legal grounds on which the FCC based its preemption decision, the Missouri PSC holding ignores the fact that the FCC held that even if separation of intrastate VoIP from interstate VoIP became technologically possible, VoIP providers should not be required to take on the "significant efforts and inefficiency" to undertake that separation where the provider has "no service-driven reason to incorporate such capability into its operations."[170] The Missouri PSC order also ignores the fact that nomadic capabilities is not among the three basic characteristics of a VoIP system the FCC said would preclude state regulation.[171] While recognizing that "the FCC predicted that it would likely also preempt state regulation of fixed VoIP services if that issue were presented to it in a future case," the Missouri PSC declared that it would "not defer its decision on the regulation of fixed VoIP service while waiting for the FCC to act."[172] Comcast has filed a petition for reconsideration with the Missouri PSC, asking for an expedited ruling so it would have time to seek court review before the December 31, 2007, effective date of the Missouri PSC order,[173] but the Missouri PSC rejected Comcast's reconsideration request. Comcast has appealed the decision to federal district court in Missouri and asked for injunctive relief.[174] Oral argument on the injunction is scheduled for late May 2008.

Vonage Holdings, Corp. v. Nebraska Public Service Commission

The federal District Court for Nebraska recently recognized that the FCC rested its preemption of state regulation of VoIP service providers in its Vonage order on several grounds.[175] Responding to a motion for preliminary injunction and declaratory relief filed by Vonage to prevent the Nebraska PSC from imposing on Vonage an obligation to assess and collect a Nebraska universal service fee from its customers, the court granted the requested relief, finding the Nebraska PSC was preempted by the FCC's Vonage order from imposing such obligations. The court referred to the FCC's reliance on the impossibility of Vonage being capable of separating its traffic between interstate and intrastate,[176] but also acknowledged the congressional mandate for a need for a national broadband policy. Specifically, the court concluded, "[u]ndeniably, there is a legitimate public interest served on both sides of the debate [joint state and federal jurisdiction versus exclusive federal jurisdiction], but . . .this factor weighs in favor of issuance of the preliminary injunction based on Congress's expressed intention that the Internet be free from undue regulation."[177] Thereafter, Vonage asked the court to grant it summary judgment and enter a permanent injunction that would prohibit the PSC from requiring the VoIP provider to contribute to the state USF, contending that there is "no dispute of a material fact regarding the merits of Vonage's preemption claim." Vonage asserted that the court has already ruled that the PSC's attempt to regulate Vonage is preempted by federal law.

In response, the Nebraska PSC sought a stay of the issuance of Vonage's request for a permanent injunction that would bar the PSC from requiring the VoIP service provider to contribute to the Nebraska universal service fund while the Eighth Circuit considers the PSC's appeal of the preliminary injunction. The PSC has asked the Eighth Circuit (St. Louis) to review the findings of the district court. In its most recent brief filed with the district court, the PSC argues that since it has filed an appeal the district court has been divested of its jurisdiction to consider the case any further. The PSC claims that Vonage's motion for summary judgment "requires consideration of an issue or matter involved in the appeal pending before the Eighth Circuit," explicitly whether the FCC has preempted the PSC from requiring Vonage to contribute to the state USF. Vonage, meanwhile, has argued that because the PSC's Eighth Circuit appeal is limited to review of the preliminary injunction, it does not divest the district court of jurisdiction to rule on Vonage's motion for summary judgment.

Aside from the jurisdictional issues, the PSC also argued that Vonage is not entitled to summary judgment

on its preemption claim. The PSC said that state assessment of a universal service collection and remittance requirement on Vonage is not a form of "traditional telephone company regulation" and therefore is not preempted by the FCC. The PSC opined that the FCC's VoIP "preemption" order, which stemmed from a dispute between the Minnesota Public Utilities Commission and Vonage, left open the possibility that states may regulate VoIP under certain conditions, and that state regulators are only prohibited from requiring VoIP providers to comply with certification, tariffing, or other related conditions.

In the next issue, Part II of this examination of the regulatory framework for VoIP service providers will review the FCC's increasing use of its ancillary jurisdiction and other authority to impose certain regulations to interconnected VoIP service providers and how interconnected VoIP service providers' business relationships are affected by the current regulatory framework.

Notes

1. 47 U.S.C. § 151, *et seq*.
2. "IP-enabled services" are services and applications that rely on the use of Internet protocol (IP) and are offered over IP-enabled networks, often the public Internet. The term IP-enabled services includes VoIP services, as well as a broad range of other services and applications.
3. 47 U.S.C. § 153(46) (defining "telecommunications service"); 47 U.S.C. § 153(43) (defining "telecommunications").
4. 47 U.S.C. § 153(20) (defining "information service"). The definition of information services encompasses what the FCC has termed in some contexts to be "enhanced services" and "value added services."
5. VoIP services available today include such advanced services as: (a) integrated multimedia conferencing, which allows multiple users to communicate with one another via voice and video while accessing data sources; (b) unified messaging, which routes emails, faxes, and voicemails to a single unified mailbox; (c) real-time call control and completion, which provides automated call return, outbound dialing from personal contact lists, and conversion of incoming voice messages to text messages; (d) availability awareness, which allows end users to specify whether they are free for a voice conversation, for video-conferencing, for email, or for gaming; (e) 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; and (f) unified communications, which integrates collaboration technologies such as instant messaging, presence awareness, click-to-call, web conferencing, and document collaboration to allow for intelligent routing of calls and information based on the user's calendar, presence status, and personal rules. *See, e.g.,* Tom Minifie, "Unified Communications Meets VoIP: A Marriage Made in Heaven," *Internet Telephony*, July 2005, available at *http://www.tmcnet.com/voip/0705/featurearticle-unified-communications-meets-voip.htm*. Additionally, a wide variety of technology providers are finding new, innovative ways to enhance existing applications with VoIP capabilities. *See, e.g.*, Ryan Kim, "An End to Phone Tag Era?," *S.F. Chron.*, Oct. 17, 2007, at C1 (announcing Microsoft's launch of Office Communications Server, a unified communications system that will allow users to make calls, view presence information, and initiate collaborative sessions from within software applications on their personal computers); "MySpace to Offer Calls Using Skype," *L.A. Times*, Oct. 17, 2007, at C7 (reporting that social networking site MySpace and VoIP provider Skype are partnering to integrate Skype's voice service into MySpace's existing instant messaging technology, allowing MySpace users to make free Internet phone calls to each other); David Pogue, "Overseas Calls Made Cheap, If Not Easy," *N.Y. Times*, Feb. 1, 2007, at C1 (explaining that VoIP provider Vonage offers V-Phone, a device that resembles and can store computer files like a flash drive but also allows users to make calls from any computer by plugging the device into the computer's USB port); Dean Takahashi, "Navigating Telecom Fees," *San Jose Mercury News*, Sept. 24, 2007 (profiling two start-ups that circumvent wireless roaming fees by converting mobile phones to make only local calls or free Internet calls via WiFi networking).
6. National Proposed Rulemaking.
7. IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, ¶ 43 (2004) (IP-Enabled Services NPRM).
8. *See, e.g.*, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Report and Order and Further Notice of proposed Rulemaking, 22 FCC Rcd. 6927, ¶ 54 (2007) ("Since we have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, nor do we do so today, we analyze the issues addressed in this Order under our Title I ancillary jurisdiction to encompass both types of services.") (footnotes omitted).
9. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Policy Statement, 20 FCC Rcd. 14986 (2005) ("Broadband Policy Statement").
10. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("Cable Modem Ruling").
11. *Id*. ¶ 7.
12. *Id*. ¶ 31.
13. *Id*. ¶ 39.
14. *Id*. ¶ 41.
15. 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).

16. AT&T v. City of Portland, 216 F.3d 871 (9th Cir. 2000).
17. Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).
18. 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).
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, Order (9th Cir. Mar. 31, 2004).
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. Apr. 9, 2004).
21. NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005).
22. Brand X Internet Servs., 545 U.S. at 840 (citing Chevron USA Inc. v. NRDC, 467 U.S. 837, 843-844 (1984)).
23. Brand X Internet Servs., 545 U.S. at 851.
24. Cable Modem Ruling ¶ 93.
25. *Id.* ¶ 95.
26. *Id.* ¶¶ 96-108.
27. *Id.* ¶ 99.
28. *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).
29. *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.
30. Pleading Cycle Established for Notice of Proposed Rulemaking Regarding the Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket No. 02-52, Public Notice, DA 02-909 (rel. Apr. 19, 2002).
31. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) ("Wireline Broadband Order"), *aff'd,* Time Warner Telecom, Inc. v. FCC, —F.3d—, WL 2993044 (3d Cir. Oct. 16, 2007). The FCC 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." Wireline Broadband Order ¶ 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.*
32. *Id.* ¶ 17.
33. *Id.* ¶ 86. The FCC stated that it is not eliminating the carriers' ability to offer wireline broadband transmission on a Title II basis.
34. *Id.* ¶ 86. The FCC 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.
35. *Id.* ¶ 95.
36. *Id.* ¶ 19.
37. 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) (*ComputerIII* 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, *Computer I*, *Computer II* and *Computer III* are referred to as the *Computer Inquiry*.

38. Although the FCC addressed comments concerning competition in particular geographic markets, it found that 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 FCC stated that there is "vigorous" competition between platform providers and increasing competition at the retail level. Among broadband customers, the FCC 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 competitive LECs. It also noted that both the cable and incumbent LECs have upgraded to provide faster connections and better services to broadband customers. Wireline Broadband Order ¶ 51.
39. Wireline Broadband Order ¶¶ 43-44. *But see id*. at 14860, n.15 ("This Order *does not* implicate the current rules or regulatory framework for the provision of access to narrowband transmission associated with dial-up Internet access services or other narrowband or broadband information services when provided by facilities-based wireline carriers.").
40. *Id*. ¶ 104.
41. The FCC rejected arguments that its decision concerning classification requires additional approval by the Network Reliability and Interoperability Council. *Id*. ¶ 119.
42. *Id*., Statement of Chairman Kevin J. Martin.
43. *Id*.
44. Wireline Broadband Order ¶¶ 148-149.
45. *Id*. ¶¶ 150-156.
46. *Id*. ¶ 158.
47. 47 U.S.C. § 201, *et seq*.
48. Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services is Granted by Operation of Law, WC Docket No. 04-440, Public Notice (rel. Mar. 20, 2006).
49. Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (filed Dec. 20, 2004) (Verizon Petition).
50. It defined "broadband services" as "services capable of transmitting 200 kpbs or greater in each direction." *See* Verizon 2/7/06 *Ex Parte* at 2.
51. Letter from Edward Shakin, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 7, 2006) (Verizon 2/7/06 *Ex Parte*) (noting that its request for packet-switched services included Frame Relay service, ATM services, IP-VPN services, and Ethernet services).
52. *Id*. at 3 (describing the services as "very-high speed transmission services—well over the FCC's 200 kbps definition for broadband—that are provided over optical facilities at OCn speeds . . . .").
53. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (Wireline Broadband Order).
54. Letter from Susanne A. Guyer, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 17, 2006) ("*Verizon Universal Service Ex Parte*").
55. Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, In the Matter of the Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, News Release, WC Docket No. 04-440, at 2, n.6-8 (rel. March 20, 2006) (citing to the FCC's previous rulemakings and forbearance decisions regarding "broadband services, packet switching, and fiber facilities") (Joint Statement).
56. *Id*.
57. Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket No. 06-125 (filed June 13, 2006); *see also* Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125 (filed July 13, 2006) (AT&T Petition).
58. Petition of BellSouth Corporation for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket 06-125 (filed July 20, 2006); *see also* Petition of Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, WC Docket No. 06-147 (filed July 26, 2006); Petition of Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. §160(c) From Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket 06-147 (filed Aug. 4, 2006).
59. Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC (filed Sept. 11, 2006, in Docket No. 06-125).
60. Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket No. 06-125 (filed Sept. 12, 2006).

61. Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC (filed Sept. 12, 2006, in Docket No. 06-125).
62. Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services, Memorandum Opinion and Order, FCC 07-180, ¶ 50 (rel. Oct. 12, 2007) (AT&T Forbearance Order).
63. AT&T Order ¶ 40.
64. AT&T Order ¶ 67.
65. AT&T Order ¶ 50.
66. Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, Memorandum Opinion and Order, FCC 07-184 (rel. Oct. 24, 2007).
67. Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501 (1998) (Report to Congress).
68. 47 U.S.C. § 153 (20).
69. 47 U.S.C. § 153 (46).
70. Report to Congress ¶ 88.
71. The FCC noted that computer-to-computer IP telephony was not a telecommunications service, primarily because vendors that 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.
72. Report to Congress ¶ 90.
73. "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," News Release (Mar. 11, 2004) (discussing disability access issues).
74. 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). *See also* 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.").
75. 47 U.S.C §§ 230(b), 706(a).
76. IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004) (IP-Enabled Services NPRM).
77. *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.
78. IP-Enabled Services NPRM ¶¶ 35-37.
79. 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.
80. *Id.* ¶¶ 46-48.
81. E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, Comments of Net2Phone, Inc. at 8-9; and Comments of the Consumer Electronic Association at 5 (filed May 28, 2004).
82. E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, Comments of the Nebraska Rural Independent Companies at 4-5; and Comments of MCI, Inc. at 8-9 (filed May 28, 2004).
83. E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, Comments of Time Warner Telecom at 4; and Comments of the Arizona Corporation Commission at 3 (filed May 28, 2004).
84. E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, Comments of Cbeyond Communications, LLC, *et al.*, at 1-2; and Comments of the CompTel/ASCENT Alliance at 15 (filed May 28, 2004).

85. Howard Buskirk, "FCC May Break Final VoIP Rulemaking into Easy-to-Digest Pieces, Official Says," *TR Daily*, Apr. 14, 2004; "Wireline," *Communications Daily*, Aug.10, 2004.
86. Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd. 3307 (2004) (pulver.com Order).
87. Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Petition (filed Feb. 5, 2003).
88. pulver.com Order ¶ 9.
89. *Id*. ¶ 9.
90. *Id*. ¶¶ 11, 15.
91. *Id*. ¶ 21.
92. Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, Petition (filed Oct. 18, 2002).
93. Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, Order, 19 FCC Rcd. 7457 (2004) (AT&T IP-in-the-Middle Order).
94. *Id*. ¶ 12.
95. *Id*. ¶ 1.
96. *Id*. ¶¶ 18, 17; *see also id*., Statement of Chairman Michael K. Powell ("[I]t is important to be guided by the perspective of the consumers that are purchasing service, in determining how a service should be understood.").
97. In the Matter of Regulation of Prepaid Calling Card Services, WC Docket No. 05-68, 21 FCC Rcd. 7290 (2006) (Prepaid Calling Card Order).
98. *Id*. ¶ 5.
99. *Id*. ¶ 7.
100. *See generally* AT&T IP-in-the-Middle Order.
101. Prepaid Calling Card Order ¶¶ 18-19.
102. Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶ 14 (2004) (Vonage Order).
103. IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶ 26 (2005) (VoIP E911 Order).
104. Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 35 (2006) (USF Report & Order).
105. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, ¶ 54 (2007) (CPNI Order) ("Since we have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, *nor do we do so today*, we analyze the issues addressed in this Order under our Title I ancillary jurisdiction to encompass both types of service.") (Emphasis added).
106. Assessment and Collection of Regulatory Fees for Fiscal Year 2007, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712 (2007) (2007 Regulatory Fees Order).
107. 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 Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Report and Order, 22 FCC Rcd. 11275, ¶ 21 (2007) (VoIP Disability Access Order) (applying Title I ancillary jurisdiction to extend disability access requirements to interconnected VoIP services).
108. Telephone Number Requirements for IP-Enabled Services Providers, WC Docket No. 07-243, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, FCC 07-188 (rel. Nov. 8, 2007) (VoIP LNP Order).
109. Wireline Broadband NPRM ¶ 6; Cable Modem Ruling ¶ 85, n.315.
110. Report to Congress ¶ 98.
111. 47 U.S.C. § 153(46).
112. Wireline Broadband Order ¶ 17; Wireline Broadband NPRM ¶ 7, n.10.
113. Cable Modem Ruling ¶ 38.
114. AT&T Phone-to-Phone Order, Statement of Chairman Michael K. Powell.
115. *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 Polices 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).

116. Report to Congress ¶¶ 39, 58, 60; *see also generally Brand X*; Wireline Broadband Order.
117. Herb Kirchoff, "VoIP Advocates Urge States to Keep Hands Off," *Communications Daily*, Sept. 9, 2003.
118. 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.
119. 47 U.S.C. § 160.
120. 47 U.S.C. § 160(a); *see also* Cellular Telecoms. & Internet Ass'n v. FCC, 330 F.3d 502, 504-505 (D.C. Cir. 2003).
121. 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).
122. IP-Enabled Services NPRM ¶ 48.
123. 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").
124. 47 U.S.C. § 157nt.
125. *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).
126. Advanced Services Order ¶¶ 69-77.
127. Vonage Order ¶ 36.
128. 47 U.S.C. § 230(b)(2).
129. Vonage Order ¶ 34.
130. Vonage Order ¶ 35.
131. Cable Modem Ruling ¶ 73 ("First and foremost, we are guided by our statutory mandates [under Section 706 and Section 230]."); pulver.com Order ¶ 18; Vonage Order ¶ 15 ("We conclude that preempting the Minnesota Vonage Order is compelled to avoid thwarting valid federal objectives for innovative new competitive services like DigitalVoice, finding consistency between our action here and Congress's articulated policies in sections 230 and 706 of the Act."); Wireline Broadband Order ¶ 19 ("[T]he directives of section 706 of the 1996 Act require that we ensure that our broadband policies promote infrastructure investment, consistent with our other obligations under the Act."); Broadband Policy Statement ¶ 2; VoIP E911 Order ¶ 31 ("[W]e are guided by section 706, which directs the Commission (and state commissions with jurisdiction over telecommunications services) to encourage the deployment of advanced telecommunications capability to all Americans . . . ."); USF Report & Order n.166; Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Report and Order and Further Notice of proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 18 (2006) ("We find that we also have the authority to consider the goals of Section 706 in addressing this problem under Section 621(a)(1)."); CPNI Order ¶ 59 ("We also are guided by section 706 of the Act . . . ."); VoIP LNP Order ¶ 29; AT&T Forbearance Order ¶ 47 ("[F]orbearance in this case is entirely consistent with section 706 of the 1996 Act and Congress's express goals . . . .").
132. *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).
133. E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, Comments of Dialpad Communications, Inc. *et al.,* at 4; Comments of Level 3 Communications at 13-14 (filed May 28, 2004).
134. California v. FCC, 39 F.3d 919, 931-33 (9th Cir. 1994) (affirming the FCC's authority to preempt state regulation of jurisdictionally mixed enhanced (information) services). In contrast, if the FCC, for example, had determined that cable modem service is a "cable service" subject to Title VI, the states would have limited authority over cable service with regards to access requirements, franchise requirements, and franchise fees. *See* Cable Modem Ruling ¶¶ 97-99; *see also* pulver.com Order ¶¶ 15-25.
135. 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).
136. pulver.com Order ¶ 17.
137. Vonage Order ¶ 14.
138. California v. FCC, 39 F.3d at 932-33.
139. "Wireline," *Communications Daily*, Dec. 10, 2003, at 9.
140. *Id*.
141. Wireline Broadband Order, Statement of Kevin Martin.
142. pulver.com Order ¶ 21; Vonage Order ¶ 25.
143. Vonage Order ¶¶ 24-25 (emphasis in original).
144. Wireline Broadband NPRM ¶ 45.
145. VoIP USF Order ¶ 56.
146. *See., e.g.*, Vonage Order ¶ 2; pulver.com Order ¶ 16; IP-Enabled Services NPRM ¶ 39.
147. Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (issued Sept. 11, 2003) (Minnesota Vonage Order).

148. Vonage Order ¶31.
149. Vonage Order ¶ 25; *see also* pulver.com Order ¶ 16.
150. Vonage Order ¶¶ 26-29.
151. Vonage Order ¶¶ 33-36.
152. Vonage Order ¶ 32.
153. Minn. Pub. Util. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).
154. *Id*. at 577-78.
155. *Id*. at 578-581.
156. *Id*. at 581-83; *see also* Vonage Order ¶ 32 ("Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.") (footnote omitted).
157. Vonage Order ¶ 31 ("Thus, to whatever extent, if any, [Vonage's] Digital Voice [VoIP service] includes an intrastate component, because of the impossibility of separating out such a component, we must preempt the Minnesota Vonage Order because it outright conflicts with federal rules and policies governing interstate Digital Voice communications.").
158. Vonage Order ¶ 32.
159. VoIP USF Order ¶ 56 "[W]e note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.").
160. Vonage Order ¶ 22.
161. Vonage Order ¶ 34; *see also* 47 U.S.C. § 230(b)(2).
162. Vonage Order ¶¶ 36-37 ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on [Vonage's] Digital Voice [VoIP service], which could severely inhibit the development of this and similar VoIP services."); *see also* 47 U.S.C. § 157 nt. (containing § 706 of the Communications Act).
163. Vonage Order at n.69; *see also* 47 U.S.C. § 253.
164. The term "fixed" VoIP is used to describe VoIP services that can be used only from a single location. It generally refers to VoIP services provided by cable operators, though it may include services provided by others. The term "nomadic" VoIP is used to describe VoIP services that can be used at multiple locations, generally wherever a subscriber has access to a broadband Internet connection. It generally refers to services such as those provided by Vonage or Skype.
165. Comcast IP Phone of Mo., LLC v. Mo. Pub. Serv. Comm'n, No. 06-4233, WL 172359, at *1 (Jan. 18, 2007).
166. *Id*.
167. *Id*. at *4. Recall that, as noted above, the Eighth Circuit, when reviewing appeals of the FCC's Vonage Order, declined to decide the question of whether preemption of state regulation applied to "fixed" VoIP services, holding the question was not ripe for adjudication. Minn. Pub. Util. Comm'n v. FCC, 483 F.3d 570, 581-583 (8th Cir. 2007).
168. Staff of the Pub. Serv. Comm'n of the State of Mo. v. Comcast IP Phone, LLC, Case No. TC-2007-0111, Report and Order (rel. Nov. 1, 2007) (Missouri PSC VoIP Order). The Missouri PSC cited the Eighth Circuit which, when reviewing appeals of the FCC's Vonage Order, declined to decide the question of whether preemption of state regulation applied to "fixed" VoIP services, holding the question was not ripe for adjudication. Minn. Pub. Util. Comm'n v. FCC, 483 F.3d 570, 581-83 (8th Cir. 2007).
169. Missouri PSC VoIP Order ¶ 13.
170. Vonage Order ¶ 29.
171. Vonage Order ¶ 32. The three characteristics are (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 that allows customers to manage personal communications dynamically. *Id*.
172. Missouri PSC VoIP Order ¶¶ 14-15.
173. "State Telecom Activities," *Communications Daily*, Nov. 15, 2007, at 15-16.
174. Comcast IP Phone, LLC and Comcast IP Phone of Missouri, LLC v. Davis, No. 08-4005-CV-C-WAK (filed Jan. 9, 2008).
175. Vonage Holdings, Corp. v. Nebraska Public Service Commission, No. 4:07CV3277, Memorandum and Order (issued Mar. 3, 2008).
176. *Id*. at 7.
177. *Id*. at 12.

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VoIP Services Regulation 2008: Tracking the Evolving Regulatory Framework (Part II of II)

By Chérie R. Kiser

The FCC Increasingly Relies on Its Title I Ancillary Jurisdiction and Other Authority to Apply Certain Telecommunications Rules to Interconnected VOIP Services

Despite its continuing deferral of any decision classifying VoIP services as either telecommunications services or information services, the Federal Communications Commission (FCC) has been increasingly aggressive about applying certain telecommunications service obligations to what it has defined as "interconnected VoIP services," services that enable consumers to both place calls to and receive calls from the public switched telephone network (PSTN).[1] In many instances this regulation has been driven in an effort to ensure public safety and/or consumer protection.

E911 Emergency Calling Requirements

On June 3, 2005, the FCC released an order requiring interconnected VoIP service providers to offer enhanced 911 (E911) services to their subscribers.[2] The VoIP E911 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.[3] The Notice of Proposed Rulemaking that was initiated with the VoIP E911 Order could expand the application of these requirements to many other providers.

The FCC's decision was based on its finding 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.[4]

All interconnected VoIP providers were required to provide E911 services to their subscribers 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.[5] The calls must be routed using automatic number identification (ANI),[6] and if necessary, pseudo-ANI[7] via the dedicated Wireline E911 Network and the customer Registered Location must be available from or through the automatic location information (ALI) database.[8] The FCC also stated that it would take any further actions necessary if interconnected VoIP service providers are not getting the necessary access to the 911 tandems of the ILECs.[9]

Interconnected VoIP service providers are also required to obtain, prior to the initiation of service, the physical location at which the service will first be used (Registered Location) and provide end users one or more methods to update information regarding the user's physical location. All interconnected VoIP providers must provide written notification to 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. Providers were also required to supply subscribers with a sticker for their VoIP CPE warning of the E911 limitations of their service. Interconnected VoIP providers are required to 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.[10] The FCC emphasized that failure to comply with its rules "cannot and will not be tolerated" and that interconnected VoIP providers that did not comply fully with the rules would 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.[11]

The FCC reaffirmed its previous findings that it has statutory authority under §§ 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.[12] While the FCC acknowledged that there are generally intrastate components to

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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.[13] It also declined to exempt providers of interconnected VoIP service from liability under state laws related to E911 services.[14] The FCC also issued an NPRM seeking comment on additional steps that it should take to ensure that VoIP services provide reliable and ubiquitous 911 services.[15] The NPRM asked what the FCC could do to help facilitate the development of techniques for automatically identifying the geographic location of VoIP users.[16] It also inquired about whether the FCC 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 also inquired about the potential role that states should play to help implement the E911 rules and requested comment on whether the FCC should take action to facilitate the states' ability to collect 911 fees from interconnected VoIP providers either directly or indirectly.[17]

The FCC declined to adopt rules regarding the funding of 911 services by interconnected VoIP providers. It also declined to exempt providers of interconnected VoIP service from liability under state laws related to E911 services.

The FCC issued several public notices clarifying providers' 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. Providers were required to cease marketing their VoIP services and refrain from accepting new customers for their services in areas where they are not able to transmit 911 calls to the appropriate PSAP in full compliance with the new rules.[18]

Shortly after the FCC issued the VoIP E911 Order, petitions for review were filed with the US Court of Appeals for the District of Columbia.[19] The parties claimed that the FCC's decision was "arbitrary and capricious" and that the decision fell outside of the FCC's statutory jurisdiction. Furthermore, some petitioners stated that it was functionally impossible to implement the FCC's E911 requirements by the deadline and asked for temporary stays of the order from both the FCC and the federal courts.[20] Based on representations by the FCC that it would not require interconnected VoIP providers to discontinue service by the deadline, the D.C. Circuit Court ruled against Nuvio's motion for an emergency stay.[21] The D.C. Circuit denied Nuvio's appeal on December 15, 2006, finding that the FCC had adequately considered the (1) technical and economic feasibility of the deadline, (2) inquiries made necessary by the ban against arbitrary and capricious decision making, and (3) the public safety objectives that the FCC is required to achieve.[22]

Legislative support for VoIP service providers in complying with E911 requirements was provided in November 2007 when the House of Representatives approved the 911 Modernization and Public Safety Act of 2007, requiring the FCC to enact regulations giving VoIP providers a right of access to 911 components on the same rates, terms, and conditions as other providers.[23] The legislation also provides that state 911 fees or charges to VoIP providers cannot exceed the amount of fees or charges applicable to telecommunications services, affords VoIP providers the same immunity for liability provided to wireless carriers, and requires the 911 Implementation and Coordination Office to develop a plan to move the nation from the current 911 system to an IP-enabled emergency network.[24]

Communications Assistance for Law Enforcement Act Requirements

On August 5, 2005, the FCC adopted an order concluding that provisions of the Communications Assistance for Law Enforcement Act (CALEA) apply to "facilities-based broadband Internet access providers and providers of interconnected [VoIP] service."[25] Providers of these types of services were given 18 months to come into compliance with CALEA provisions.[26] Rather than respond to all of the issues raised in the CALEA Broadband NPRM, the CALEA Broadband Order was limited to establishing that CALEA applied to these specific services.[27] The FCC explained "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."[28]

The FCC declared in the CALEA Broadband Order that providers of interconnected VoIP services and Broadband Internet access services are "telecommunications carriers" under the definition of the term set forth in CALEA, and therefore these providers are covered by CALEA provisions even though they have not been determined to be "telecommunications carriers"

under the Communications Act.[29] The FCC found the CALEA definition of telecommunications carrier to be broader than that in the Communications Act because the CALEA provision defines telecommunications carrier to include any provider of a service that acts as a "substantial replacement" for any part of the PSTN.[30] This substantial replacement provision (SRP) includes three components, each of which must be satisfied for the FCC to deem a service to be provided by a telecommunications carrier for CALEA purposes:[31] (1) the entity must be providing "wire or electronic communication switching or transmission service,"[32] the switching portion of which the FCC has defined as including "routers, softswitches, and other equipment that may provide intelligence functions for packet-based communications;"[33] (2) the service must be "a replacement for a substantial portion of the local telephone service,"[34] which the FCC defines as satisfied if a service replaces "any significant part" of the functionality previously provided by the PSTN; and (3) the FCC must find that "it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA]."[35]

The FCC used its authority under USF regulations and its Title I ancillary jurisdiction to find that interconnected VoIP service providers are "providers of interstate telecommunications" for purposes of USF.

The FCC 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.[36]

Almost immediately, the order was challenged in federal court as being arbitrary, capricious, and contrary to law. In a ruling issued June 9, 2006, the D.C. Circuit upheld the FCC's application of CALEA to VoIP and broadband services.[37] The panel majority found the FCC's interpretation to be a "reasonable policy choice" and refused to reject the FCC order. The court noted that it had no latitude under the Supreme Court's *Chevron* doctrine to substitute its own judgment, even should it consider another definition to be better. "The FCC offered a reasonable interpretation of CALEA, and *Chevron*'s second step requires nothing more."[38]

On May 12, 2006, the FCC released a follow-up order giving VoIP service and broadband providers additional direction on the FCC's expectations for CALEA implementation.[39] Rejecting a petition that asked for a delay in the implementation deadline, the FCC reaffirmed that VoIP and broadband services are required to become fully CALEA-compliant by May 14, 2007.[40] The FCC clarified that providers have the option to use trusted third parties to provide CALEA compliance solutions, though providers using trusted third parties remain responsible for ensuring that CALEA requirements are met.[41] Service providers are responsible for the capital costs of CALEA implementation and may not pass those costs on to law enforcement agencies.[42]

Noting that providers can attain CALEA compliance by use of equipment that implements an industry CALEA standard, the FCC observed that there were ongoing discussions between service providers and equipment manufacturers aimed at developing VoIP and broadband industry standards to be implemented by the May 2007 deadline.[43] The FCC said that it would continue to monitor this standards-development process, but that it would be premature for the FCC to insert itself into that process at this time.[44]

All broadband and interconnected VoIP service providers were required to come into compliance with CALEA systems security requirements within 90 days of the Second Order. The order also required providers to submit their written system security policies to the FCC for review and to submit CALEA implementation monitoring reports.[45]

Universal Service Fund Contribution Obligations

On June 27, 2006, the FCC released an order requiring interconnected VoIP service providers to begin contributing to the federal Universal Service Fund (USF) beginning in the fourth quarter of 2006.[46] The FCC used its authority under USF regulations and its Title I ancillary jurisdiction to find that interconnected VoIP service providers are "providers of interstate telecommunications" for purposes of USF.[47] Interconnected VoIP service providers must report and contribute to the USF on all their interstate and international end-user telecommunications revenues.[48] Providers may do so by:

1. Reporting actual interstate end user telecommunications revenues;[49]

2. Applying to their total end user telecommunications revenues the 64.9 percent interstate "safe harbor" percentage established in the order; or

3. Relying on a traffic study to establish an alternative percentage to apply to their total end-user telecommunications revenues.[50]

An interconnected VoIP service provider using a traffic study to determine an appropriate percentage of revenues to allocate to interstate revenues must submit its proposed study to the FCC.[51]

Interconnected VoIP service providers were required to use the same Form 499A and Form 499Q procedures and filing requirements as other contributors to the USF, beginning with the required Form 499Q filing on August 1, 2006.[52] The first annual Form 499A filing for interconnected VoIP service providers was on April 1, 2007.[53] All interconnected VoIP service providers, even those with revenues too small to require USF contribution,[54] were required to register with the FCC and obtain an FCC Registration Number (FRN).[55] Like other contributors to the USF, interconnected VoIP service providers may choose to recover USF contributions from their customers, in accord with existing FCC rules.[56]

Consumer advocates have urged VoIP service providers to integrate encryption technologies into their services to protect the privacy of IP-enabled calls.

To further refine the record while the FCC continued to examine more fundamental USF contribution methodology reform, the FCC sought comment on whether to change or eliminate the safe harbor percentage for interconnected VoIP service providers and on whether interconnected VoIP service providers can identify the actual amount of interstate and international telecommunications they provide.[57]

Shortly after the release of the VoIP USF Order, several parties challenged the order in the D.C. Circuit, asking the court to reverse the FCC's determination that interconnected VoIP service providers must contribute to the USF.[58] On June 1, 2007, the D.C. Circuit issued its ruling, upholding the central components of the VoIP USF Order, but vacating certain aspects of the order addressing the pre-approval requirement for interconnected VoIP traffic studies and the suspension of the carrier's carrier rule.[59] The court ruled that the FCC validly exercised its authority in requiring VoIP providers to make universal service contributions because VoIP providers supply telecommunications as a component of their service, thus bringing them under the FCC's jurisdiction for universal service contribution purposes.[60] The court also concluded that the FCC had acted reasonably in analogizing VoIP to wireline toll service, instead of wireless service, for purposes of setting the interstate and international revenue safe harbor percentage.[61]

The court, however, rejected the FCC's decision to require pre-approval for VoIP traffic studies, an alternative to the safe harbor percentage for determining the amount of interstate and international revenues upon which universal service contributions are calculated.[62] The court found that the FCC was not apportioning USF obligations on "an equitable and nondiscriminatory basis" by requiring pre-approval from VoIP providers when wireless carriers are not subject to such pre-approval requirement.[63] The court also vacated the FCC's temporary suspension of the "carrier's carrier rule" as applied to VoIP providers. The rule protects providers from double payment at the wholesale and retail level by basing USF contributions solely on end-user revenues. The court found unpersuasive the FCC's argument that allowing carriers to invoke the rule would result in a net decrease in universal service funds.[64]

Customer Proprietary Network Information Requirements

Under § 222 of the Communications Act, telecommunications carriers are obligated to protect the privacy of the customer proprietary network information (CPNI) of their subscribers.[65] 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.[66] In another rulemaking examining the use of IP-based telecommunications relay services (IP Relay),[67] the FCC likewise sought comment on the extent to which an end user's proprietary information would remain secure in the IP environment and how the FCC could best protect the privacy of calls made by IP relay users and the caller profiles of those users.[68] 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.[69] These consumer advocates have urged VoIP service providers to integrate encryption technologies into their service to protect the privacy of IP-enabled calls.[70]

In the 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.[71] 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. The FCC reiterated that it has long recognized privacy issues in regard to computer and Internet use and noted that it adopted some CPNI-related requirements in conjunction with its *Computer Inquiry* obligations.[72]

In an April 2007 order significantly tightening existing rules on protection and use of CPNI, the FCC used its ancillary jurisdiction under Title I of the Communications Act to extend all CPNI rules and requirements for telecommunications carriers to interconnected VoIP service providers.[73] The FCC reasoned that:

> American consumers . . . expect that their telephone calls [will be] private irrespective of whether the call is made using the services of a wireline carrier, a wireless carrier, or an interconnected VoIP provider, given that these services, from the perspective of a customer making an ordinary telephone call, are indistinguishable.[74]

Disability Access and Telecommunications Relay Services Requirements

Section 255 of the Communications Act requires providers of telecommunications services to ensure that their services are accessible and usable by individuals with disabilities.[75] While the Communications Act limits this obligation to telecommunications service providers, the FCC has broadly interpreted this provision to include "all entities that make telecommunications services available"[76] and has used its ancillary jurisdiction to extend § 255 to providers of voicemail and interactive menu services, which are considered to be information services.[77]

The FCC in 2002 issued a Further Notice of Inquiry (NOI) seeking comment on the application of § 255 to VoIP services.[78] 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.[79]

In the June 2005 VoIP E911 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 teletypewriter (TTY) "in light of the requirement in Title II of the Americans with Disabilities Act (ADA) that PSAPs be directly accessible by TTYs."[80] It also discussed the NOI addressed above and asked commenters to "refresh the record" concerning the application of the disability accessibility provisions enunciated in § 251(a)(2) and § 255 to IP telephony services.[81] Moreover, the FCC asked what steps it should to take to ensure that persons with disabilities that use interconnected VoIP services have access to E911.

On May 31, 2007, the FCC adopted an order to extend disability access and telecommunications relay service (TRS) requirements to interconnected VoIP services.[82] The order requires interconnected VoIP service providers to comply with all disability access requirements that currently apply to telecommunications carriers. The order also extends disability access requirements to manufacturers of equipment or customer premises equipment (CPE) that is specially designed to provide interconnected VoIP services. The FCC did not adopt specific standards on how interconnected VoIP service providers must achieve accessibility in their network and services, "[b]ecause the determination of what is readily achievable is entity specific." The FCC also declined suggestions to convene a working group to develop standards for VoIP service compliance, though the FCC said that it may later bring together such a working group, if circumstances suggest that it would be useful.[83]

Providers are required to ensure that their services are "accessible to and useable by individuals with disabilities, if readily achievable."

Under the order's provisions, interconnected VoIP service providers must begin making contributions to the federal TRS Fund upon the effective date of the order. TRS Fund contributions are calculated as a percentage of the provider's interstate end user revenues for the previous calendar year as reported on its annual Form 499-A submission.[84] The order reports that the TRS Fund Administrator will begin to bill interconnected VoIP providers "in the latter half of calendar year 2007 for the 2007-2008 TRS Fund Year," applying a prorated contribution "based on the end-user revenue data reported on the [provider's] FCC Form 499-A that is filed with USAC."[85]

Providers are required to ensure that their services are "accessible to and useable by individuals with disabilities, if readily achievable." Where this standard is not readily achievable, the provider "must ensure that the service is compatible with existing peripheral devices or specialized CPE commonly used by persons with disabilities to achieve access, if readily achievable." Information and documentation provided to customers in connection with offering the service must also be accessible, "if readily achievable."[86] In developing and maintaining

its service network, each provider is required to "consider accessibility of covered equipment and services throughout their design, development and fabrication, as early and consistently as possible." Providers must also consider accessibility in development of employee training. Records must be maintained of all the provider's efforts toward achieving and maintaining accessibility. Such records must be made available to the FCC in the event of a complaint from a customer with disabilities.[87] Each VoIP service provider must designate an agent for receipt and handling of disability access complaints and inquiries and file the designation with the FCC Consumer and Governmental Affairs Bureau.[88]

Providers are also required to make TRS available throughout their service areas.[89] TRS is defined as "[t]elephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication . . . with a hearing individual in a manner that is functionally equivalent to the ability" of a person without speech or hearing disabilities. Such services include TTY, speech-to-speech services, video relay services, and non-English relay services.[90] Services may be provided directly by the interconnected VoIP service provider or may be provided through a contract with a third party.[91] The order also requires VoIP providers to offer their customers access to TRS through the 711 abbreviated dialing code[92] and conduct ongoing education and outreach programs to publicize the availability of 711 access to TRS.[93]

On October 9, 2007, responding to several petitions,[94] the FCC further clarified the VoIP TRS Order.[95] Responding to the difficulties identified, the FCC granted a six-month waiver of the requirement that interconnected VoIP providers must transmit 711 calls to an appropriate relay provider and granted a six-month waiver of TRS providers' obligation to call an appropriate PSAP when receiving an emergency 711 VoIP call.[96] The FCC also sought comment on technical solutions to the identified problems.[97]

FCC Regulatory Fees

As part of its annual order-setting regulatory fees for 2007, the FCC ordered in August 2007 that interconnected VoIP service providers must begin making annual regulatory fee payments to the FCC.[98] Regulatory fees for interconnected VoIP services will be assessed at the same rate as fees for telecommunications services.[99] Those fees are based on annual interstate and international end-user revenues as reported on companies' annual Form 499-A Telecommunications Revenue Worksheet.[100] The telecommunications carrier regulatory fee for FY2007 was established in the order as .00266 per dollar of end-user revenue.[101]

While FY2007 regulatory fees for most entities were due in September 2007, the due date for fees for interconnected VoIP service providers was delayed because the FCC's decision to assess regulatory fees on VoIP providers could not become effective until at least 90 days after the FCC notified the Congress of the change.[102]

The FCC based its VoIP fee assessment decision on its statutory authority to assess regulatory fees to recover the costs of FCC regulatory activities. The FCC reasoned that, because it has begun regulating interconnected VoIP services for purposes of USF, E911 emergency calling, CPNI, and TRS, the statute gave it authority to assess fees to recover the costs of that regulation.[103]

Local Number Portability (LNP) Requirements

On November 8, 2007, the FCC released an order and declaratory ruling extending local number portability (LNP) requirements to interconnected VoIP service providers and addressing other LNP issues.[104] The release included an NPRM seeking comment on extending other LNP requirements and numbering rules to interconnected VoIP services.[105] Application of LNP rules to interconnected VoIP services becomes effective 30 days after publication of the order in the *Federal Register*.[106]

Noting that consumers increasingly expect their interconnected VoIP service to include regulatory protections afforded to regular telephone service and that the FCC has received numerous complaints from both consumers and telecommunications carriers about inability to port numbers to or from an interconnected VoIP service provider, the order requires VoIP providers and their "numbering partners"[107] to ensure that their customers have the ability to port their telephone numbers when changing providers to or from the interconnected VoIP service.[108] The order also clarifies that local exchange carriers (LECs) and CMRS providers have an obligation to port numbers to a VoIP service provider upon a valid port request.[109] This is a particularly useful ruling in light of the number of independent ILECs that have attempted to refuse to port numbers to VoIP service providers or to the competitive local exchange carriers (CLECs) providing the VoIP service providers' interconnection to the PSTN.

Under the order, VoIP service providers have "an affirmative legal obligation to take all steps necessary to initiate or allow a port-in or port-out . . . , subject to a valid port request, without unreasonable delay of unreasonable procedures that have the effect of delaying or denying porting of the number." Recognizing that in most cases the VoIP service provider does not execute the number port itself, the FCC requires each VoIP

provider to also "take any steps necessary to facilitate its numbering partner's technical execution of the port."[110] VoIP service providers and their numbering partners may not enter into agreements, including customer contracts that would prohibit or unreasonably delay an end user from porting a number between VoIP service providers or to or from a wireline carrier or CMRS provider.[111] The scope of the LNP requirements that must be followed by the VoIP provider depends upon the status of the VoIP service provider's numbering partner: Where the numbering partner is a wireline carrier, the LNP rules applicable to wireline carriers must be followed; where the numbering partner is a CMRS provider, the LNP rules applicable to CMRS providers must be followed.[112]

Under the order, VoIP service providers will also be required to contribute to meet the shared costs of LNP.[113] Similarly, because VoIP service providers use numbering resources, they will be required to contribute to the costs of numbering administration or North American Numbering Plan Administration (NANPA).[114] Revenue reporting requirements to implement the new contribution requirements were implemented with the April 1, 2008, Form 499-A filing, with invoices for LNPA and NANPA contributions sent to VoIP service providers for the 2008 funding year based on revenue reported for 2007 on the April 2008 FCC Form 499-A.[115]

Other Rules Under Consideration

In a number of other extant NPRMs, the FCC is seeking comment on whether to apply additional regulations on VoIP services.

Additional E911 Requirements

In the VoIP E911 Order, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on additional steps that 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.[116] 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.[117] 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.

Mobile VoIP E911 Accuracy Requirements

In an NPRM issued in June 2007, the FCC sought comment on its tentative conclusion that interconnected VoIP services that can be used in more than one location should employ an automatic location technology that meets the same E911 location accuracy standards that apply to wireless services.[118]

Abbreviated Number Dialing Requirements

In the LNP Order & NPRM, the FCC asked for comment on whether N11 abbreviated dialing requirements should be applied to VoIP service providers (beyond the 911 and 711 requirements already applied to VoIP).[119]

FCC Form 477 Information Collection Requirements

As part of an April 2007 NPRM proposing to expand the FCC's data collection on deployment of Internet broadband services, the FCC sought comment on proposals to require interconnected VoIP service providers to begin reporting as part of the FCC's semiannual Form 477 Local Telephone Competition and Broadband Reporting data collection. The FCC proposes to require that interconnected VoIP service providers begin supplying the following state-level data on Form 477:

1. The number of interconnected VoIP service subscribers for whom the filer is the service retailer;

2. The percentage of VoIP subscribers who are residential, as opposed to business, end users;

3. The percentage of retail VoIP subscribers who receive service over a broadband connection provided by the filer (or the filer's affiliate); and

4. VoIP service wholesalers would be asked to report the number of interconnected VoIP service subscribers they serve on a wholesale basis.[120]

Truth-in-Billing Rules

Under the FCC's rules, telecommunications common carriers have certain consumer protection obligations, including providing truthful, non-misleading telephone bills to their subscribers.[121] 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.[122] 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.[123] 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.[124]

Swift federal action is necessary to bring competition, advanced telecommunications, and broadband services to those parts of the country most in need.

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."[125] Nevertheless, the FCC issued a notice of proposed rulemaking in 2005 tentatively concluding 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.[126] The FCC also inquired in its Broadband Consumer Protection NPRM whether truth-in-billing rules should apply to broadband Internet access service providers.[127]

Interconnection Issues for VOIP Service Providers

To provide customers with the ability to receive calls from, and place calls to, other parties using the plain old telephone system, VoIP service providers must interconnect with the PSTN. To accomplish this, most VoIP service providers partner with a LEC. But as described below, even with a cooperating LEC, a VoIP service provider can have difficulty obtaining such interconnection.

In 2004, the President of the United States issued a directive that the mandates of the Act requiring "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"[128] be fully implemented by 2007, with "broadband technology to every corner of our country by the year 2007."[129] As we approach 2009, ILEC and state actions are undermining the realization of the President's goal. The FCC has the power and authority to enforce the well-established mandates of the Act and the federal regulations adopted to implement those laws. Swift federal action is necessary to bring competition, advanced telecommunications, and broadband services to those parts of the country most in need.

Time Warner Cable Petitions for Declaratory Ruling and Preemption

The following is an overview of the proceedings initiated by Time Warner Cable before the FCC regarding the refusal of rural incumbent local exchange carriers (RLECs) to interconnect with telecommunications carriers providing services to VoIP service providers and claims by RLECs that when telecommunications providers offer such services they are no longer "telecommunications carriers" entitled to exercise their rights under §§ 251 and 252 of the Act. The resulting FCC order is analyzed in light of Time Warner's requests. In addition, the following reviews several state and court proceedings addressing many of the same issues that Time Warner Cable has raised before the FCC.

Petition for Declaratory Ruling.[130] On March 1, 2006, Time Warner Cable filed a petition for declaratory ruling asking the FCC to find that telecommunications carriers are entitled to interconnect with ILECs, in particular RLECs, for the purpose of selling telecommunications services to entities like Time Warner Cable and other VoIP service providers.[131] Time Warner Cable asked the FCC to confirm that entities still operate as "telecommunications carriers" when they provide wholesale services to VoIP service providers rather than retail service directly to end users.

Time Warner Cable's petition was in response to orders issued by the South Carolina Public Service Commission (PSC) and the Nebraska PSC, both of which rejected attempts by telecommunications carriers (Verizon (formerly MCI) and Sprint, respectively) to interconnect with RLECs in order to provide underlying telecommunications services in support of Time Warner Cable's VoIP product. The South Carolina and Nebraska commissions found that, because Verizon and Sprint were not offering retail services directly to end users, those entities were not "telecommunications carriers" and thus were not entitled to interconnect with the RLECs or establish reciprocal compensation arrangements with the RLECs. Time Warner Cable and several other providers have explained to the FCC that § 251 of the Act and FCC precedent unequivocally authorize telecommunications carriers to obtain interconnection to exchange traffic on behalf of third-party service providers, and denying VoIP service providers access to the PSTN through arrangements with CLECs is inconsistent with Act's and the FCC's goals for promoting pro-competitive policies.

Petition for Preemption.[132] On March 1, 2006, Time Warner Cable filed a petition for preemption asking the FCC to preempt a ruling by the South Carolina PSC denying Time Warner Cable's affiliate, Time Warner Cable Information Services (South Carolina), LLC (TWCIS(SC)), an expanded certificate of public convenience and necessity (CPCN) to offer services in geographic areas served by RLECs (TWCIS(SC) already had been granted a CPCN to serve certain portions of South Carolina).[133] Although the South Carolina PSC previously found that TWCIS(SC) could enter into interconnection agreements with RLECs by virtue of its status as a "telecommunications carrier," RLECs in South Carolina claimed that TWCIS(SC) cannot obtain interconnection without having certification from the PSC to offer service in those RLEC territories. By denying TWCIS(SC)'s request to expand its CPCN, the South Carolina PSC barred TWCIS(SC) from entering certain rural areas of South Carolina, and the lack of certification in certain rural areas has made it impossible for TWCIS(SC) to obtain direct interconnection with RLECs without which Time Warner Cable cannot provide residential VoIP services.

FCC Decision. The FCC issued its decision on March 1, 2007, holding that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to § 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.[134] The FCC determined that "the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 351(a) and (b), and [that] . . . providers of wholesale telecommunications enjoy the same rights as any 'telecommunications carrier' under those provisions of the Act."[135] Moreover, the FCC found that "the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251."[136] "[E]nsuring the protections of section 251 interconnection is a critical component for the growth of facilities-based local competition,"[137] the FCC said, and because VoIP is often accessed over broadband facilities, "affirming the rights of wholesale carriers to interconnect for the purpose of exchanging traffic with VoIP providers will spur the development of broadband infrastructure."[138] The FCC cautioned that its decision is limited "to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider."[139] The FCC did not find it appropriate to address the application of § 251(b)(5) or the classification of VoIP services in the order.[140] The FCC also did not address Time Warner's petition for preemption filed in conjunction with the petition for declaratory ruling.[141] In addition to the problems that led Time Warner Cable to seek its declaratory ruling from the FCC, there have been numerous other interconnection disputes at the state level in which VoIP service providers have faced difficulties obtaining interconnection to the PSTN.[142]

Intercarrier Compensation for Exchange of Traffic Between Networks Can Be Critical Component of Interconnection

"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 calls not subject to access charges.[143] As a general rule, FCC rules govern access charges for interstate long distance calls; state rules govern intrastate access charges.[144] Access charges for exchange access services provided to interexchange carriers prior to 1996 were permitted to continue to apply under the Act until the FCC enacted new regulations.[145] The FCC, however, has primary jurisdiction over reciprocal compensation required by § 251(b)(5) of the Act, which governs *all* telecommunications traffic.[146] 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.[147]

The FCC has been pondering how to proceed with respect to intercarrier compensation for several years. In April 2001, the FCC issued a NPRM seeking comment on the adoption of a unified regime for all traffic subject to intercarrier compensation.[148] After nearly four years of inaction, the FCC issued the Intercarrier Compensation further NPRM (FNPRM) in March 2005 seeking to refresh the record on the adoption of a unified regime.[149] In May 2008, the FCC once again issued a public notice to refresh the record. In the Intercarrier Compensation NPRM, the FCC tentatively concluded that carriers should move to a unified bill and keep regime for all intercarrier compensation payments. The FCC noted that a unified scheme is necessary to avoid opportunities for regulatory arbitrage, including the advantage some VoIP service providers obtained by being exempt from access charges when traditional interexchange carriers were not.[150] The Intercarrier Compensation FNPRM reiterated many of the same questions raised in the 2001 NPRM and sought comment on various intercarrier compensation regimes proposed by the industry.

The rules of the FCC require interexchange carriers (IXCs) to pay access charges to LECs for the termination of interstate long-distance calls on the LEC networks.[151] In addition, state rules generally allow LECs to impose access charges on IXCs for the termination of intrastate toll calls. In accordance with certain FCC decisions, however, information services providers (ISPs), also known as enhanced service providers (ESPs), are currently exempt from the payment of access charges when calls are originated in IP format. Instead, ESPs "are charged pursuant to the same rules that apply to local end users and are exempt from access . . . charges, even though the calls they send and receive generally travel outside the local service area."[152]

In the 1998 Report to Congress, the FCC predicted that future proceedings would require it to consider "the regulatory status of various specific forms of telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to consider that they are 'telecommunications carriers.'"[153] While the FCC did initiate the intended relevant proposed rulemakings, they remain pending.[154] In the 2001 Interstate Commerce Commission (ICC) NPRM, the FCC stated IP-enabled traffic "is exempt from the access charges that traditional long-distance carriers must pay."[155] In 2004, the FCC sought comment in its IP-Enabled NPRM about whether VoIP-originated calls should continue to be exempt from access charges.[156] Later that same year, when it found that IP-in-the-middle calls may be subject to access charges, the FCC again stressed that the access charge exemption is the rule for IP-originated calls.[157] Thus, the FCC's ruling on this matter is reflected in its recently restated policy that the regulatory regime for access charges is not applicable to IP-enabled traffic.[158]

The FCC's more recent AT&T IP-in-the-Middle Order is consistent with its prior rulings. If the FCC's position was that all "non-local" phone-to-phone IP-enabled calls should be subject to access charges then there would not have been the need for the FCC to issue this order. In its decision, the FCC separated the type of service described by AT&T—that is, one that uses ordinary CPE, originates and terminates on the PSTN, and undergoes no net protocol conversion and provides no enhanced functionality to end users—from IP-originated services that offer enhanced functionality.[159] Although, the FCC could have merely issued a statement rejecting AT&T's petition or a short order stating that IP-enabled calls are no different than PSTN calls for purposes of its access charge regime, it went to great lengths to distinguish AT&T's service from other types of IP-enabled services. This is because the FCC's current policy is that "IP telephony [is] generally exempt from access charges . . ."[160] As the FCC repeatedly has stated, although "ISP traffic is properly classified as interstate," under the ESP exemption, it is subject to reciprocal compensation rather than access charges.[161]

The FCC has ruled in two instances that certain calls carried over IP-based networks do not qualify for the access charge exemption. Those rulings are applicable under limited circumstances. In one case, the calls at issue were *not* VoIP-originated; rather, they originated on the PSTN, were converted to Internet protocol, and then converted back to circuit-switched format, and terminated on the PSTN (known as IP-in-the-Middle).[162] The FCC also made clear that, absent an agreement to the contrary, when "terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs."[163] In the other order, the FCC rejected AT&T's position that inserting an advertising message into prepaid calling card prompts converted the service into an information service.[164]

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Moreover, the FCC's ESP access charge exemption is not limited to circumstances in which the exchange access service is used to connect an ISP with its own subscribers as some ILECs would argue.[165] As discussed, the FCC has expressly recognized that access charges are inapplicable when calls are originated by VoIP customers regardless of whether the calls are terminated on the ISP's own network or on the network of another provider.[166] Thus, when a VoIP service provider hands off to its LEC a call placed by one of the VoIP provider's customers, the VoIP provider is treated as the LEC's end user, and the LEC may terminate the call to another LEC over local interconnection trunks, and pay reciprocal compensation instead of access charges, regardless of where the VoIP provider's customer may be located barring contractual terms and conditions that would frustrate the exercise of this right.[167]

The pending outcome of the FCC's Intercarrier Compensation FNPRM, as influenced by the Missoula Plan, could change the FCC's prior rulings on the intercarrier compensation treatment to be extended to

IP-enabled service traffic.[168] A working group made up of industry players and members of the National Association of Regulatory Utility Commissioners (NARUC) filed a proposed intercarrier compensation plan entitled the Missoula Plan. Numerous carriers have supported the Missoula Plan, including the AT&T, BellSouth, Global Crossing, Level 3, and many rural ILECs. Several others have opposed the Missoula Plan, such as Verizon, the National Cable & Telecommunications Association, and numerous CLECs. If adopted by the FCC, the Missoula Plan could significantly modify the way in which LECs would be compensated for terminating VoIP-originated traffic and could change LECs interconnection rights with respect to rural carriers. The same group also filed a "plan" to deal with phantom traffic and establish a uniform process for the creation and exchange of call detail records.[169] The filing of the Missoula Plan and the Phantom Traffic Plan, however, has no effect on the analysis of current law and it is difficult to predict whether those plans will be adopted.

The pending outcome of the FCC's Intercarrier Compensation FNPRM, as influenced by the Missoula Plan, could change the FCC's prior rulings on the intercarrier compensation treatment to be extended to IP-enabled service traffic.

While a comprehensive solution to intercarrier compensation reform languishes, petitions have been filed seeking to address what intercarrier compensation carriers are entitled to for termination of VoIP traffic. ILECs and CLECs have brought challenges before state commissions, the FCC, or the courts. The majority of the court challenges have been referred to the FCC for resolution. For example, Grande Communications, a CLEC that provides "termination services" for VoIP service providers, has asked the FCC to rule that it may rely on the VoIP customer's self-certification that the traffic being sent to Grande originates in IP format at the calling party's premises and that terminating LECs receiving such traffic over local interconnection trunks are required to bill it as reciprocal compensation traffic for intercarrier compensation purposes.[170] The certification is necessary because neither the location of the caller nor NPA-NXX is relevant for termination of VoIP service calls. Nonetheless, according to Grande, based solely on the fact that the customer of the VoIP service provider has a non-local calling party number (CPN),[171] several ILECs have begun assessing access charges against Grande for the "certified traffic" and have threatened to block the calls if Grande does not pay.

The FCC also has opened a proceeding to review issues related to access charge "stimulation" or traffic pumping. The increasing use of chat lines, conference calling, and similar services—often free to end users in exchange for listening to advertisements or providing other non-monetary consideration—can generate a significant amount of traffic between LECs and IXCs, most of which would be subject to access charges. Some rural LECs have realized that this increased demand can lead to significant increases in revenue, especially when they use the tariff process to raise their access rates. These LECs enter into revenue-sharing arrangements to attract providers of conferencing services or other one-way call services delivered via IXCs and then share the access charge revenue due from the IXC to terminate the call to LEC where the customer resides. The FCC is now seeking comment on how to address these types of situations and ensure that access rates remain just and reasonable.[172] In a related action, the FCC found that a rural ILEC in Iowa violated the Act as a result of its increased access charges.[173] Some states are also looking at these issues with respect to intrastate access charge,[174] and court actions have been filed.[175]

Attempts to block customer calls probably will not be tolerated by regulators. The FCC has disfavored self-help policies[176] and took action against one ILEC for allegedly blocking VoIP traffic.[177] The state commissions also would most likely not respond favorably to an ILEC that blocked traffic. The non-uniform, artificial access charge constructs of the past have outlived their social purpose and FCC action to implement a uniform intercarrier compensation regime as envisioned by the Act is long overdue.[178] FCC action on the Intercarrier Compensation FNPRM that is consistent with Congressional directives will best ensure the public interest is protected and all customer calls are completed.

Conclusion

As of June 2008, there appears to be little promise that the directives of Congress and the President to promote the expansion of advanced communications services to all Americans will be furthered by the FCC in relation to its regulatory treatment of VoIP services. There is opportunity to do so through many of the pending proceedings, but there are few signs that there is a willingness to exercise the power and authority extended to the FCC in a manner envisioned by the plain language of the Act. The regulatory classification of VoIP services remains unresolved, with no indication it will be finally addressed in any near future. The

extent of FCC preemption of state regulation of VoIP services remains unsettled, largely through lack of clear direction from the FCC. In the meantime, consumers likely will suffer in the near term from the lack of, or hindered deployment of, advanced telecommunications and broadband services, especially in more rural communities. The FCC's actions will determine whether history will regard this period in the development of IP-enabled services as the Dark Ages or as an Age of Enlightenment.

Notes

1. *See* 47 U.S.C. § 9.3 (defining interconnected VoIP service as a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires IP-compatible customer premises equipment; and (4) permits users to receive calls from and terminate calls to the PSTN).
2. IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶ 24 (2005) (*VoIP E911 Order*).
3. *Id.* at n.78.
4. *Id.* ¶ 4.
5. *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, however, that it expected 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).
6. Defined in 47 C.F.R. § 20.3.
7. Defined in 47 C.F.R. § 20.3.
8. VoIP E911 Order ¶ 37.
9. *Id.* ¶ 40.
10. *Id.* ¶¶ 48-50.
11. VoIP E911 Order ¶ 51.
12. *Id.* ¶ 19.
13. *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.).
14. *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.).
15. *Id.* ¶ 56.
16. *Id.* ¶ 57.
17. *Id.* ¶ 61.
18. *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).
19. Nuvio Corporation filed a petition for review of the *E911 VoIP Order* with the 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.
20. 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 arguing that they would be irreparably harmed because they will be forced to disconnect existing customers if the FCC enforces the 120-day deadline for compliance with E911 requirements. 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. *See* Emergency Motion for Partial Stay, Nuvio Corp. v. FCC, Case No. 05-1248 (D.C. Cir. filed Nov. 1, 2005). On November 15, 2005, the court denied the parties' motion for partial stay. *See Per Curiam* Order, Nuvio Corp. v. FCC, Case No. 05-1248 (D.C. Cir. filed Nov. 15, 2005).
21. "Wireline," *Communications Daily*, Nov. 16, 2005.
22. Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006).
23. 911 Modernization and Public Safety Act of 2007, H.R. 3403, 110th Cong. (2007). *See* "Comm Daily Notebook," *Communications Daily*, Oct. 11, 2007; Tim Gray, "U.S. House Passes E911 Bill," *TMCnet.com*, Nov. 14, 2007, *http://internetcommunications.tmcnet.com/topics/broadband-mobile/articles/14581-us-house-passes-e911-bill.htm*.
24. H.R. 3403, 110th Cong. (2007).
25. Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket 04-295, First Report and Order and Further NPRM, 20 FCC Rcd 14989 (Sept. 23, 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 (2004) (*CALEA Broadband NPRM*).
26. CALEA Broadband Order ¶ 46.
27. *Id.*
28. *Id.* ¶ 47.
29. *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.

30. *See* CALEA Broadband NPRM ¶ 37.
31. *See* CALEA Broadband Order ¶¶ 11-14.
32. 47 U.S.C. § 1001(8)(B)(ii).
33. CALEA Broadband NPRM ¶ 43.
34. 47 U.S.C. § 1001(8)(B)(ii).
35. 47 U.S.C. § 1001(8)(B)(ii).
36. CALEA Broadband Order ¶¶ 15-23.
37. Am. Council on Educ. v. FCC, 451 F.3d 226 (D.C. Cir. 2006).
38. *Id*. at 234.
39. Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295, Second Report and Order an Memorandum Opinion and Order, 21 FCC Rcd. 5360 (2006) (*CALEA Second Order*).
40. CALEA Second Order ¶ 3.
41. CALEA Second Order ¶ 26.
42. CALEA Second Order ¶ 70. The order clarified the conditions under which a provider could seek financial relief through a CALEA § 109(b)(1) petition. CALEA Second Order ¶¶ 38-56. The FCC declined to institute an end user surcharge to fund CALEA costs. CALEA Second Order ¶ 73.
43. CALEA Second Order ¶ 18.
44. CALEA Second Order ¶ 22.
45. CALEA Second Order ¶¶ 59-60, 76.
46 Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006) (VoIP USF Order).
47. VoIP USF Order ¶ 35.
48. VoIP USF Order ¶ 52. In the order, the FCC determined that interconnected VoIP service providers are providing telecommunications services for purposes of USF when they complete communications to and from the PSTN. VoIP USF Order ¶ 41.
49. The order warns that "[u]nder this alternative, however, . . . an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation." VoIP USF Order ¶ 56.
50. VoIP USF Order ¶ 52.
51. VoIP USF Order ¶ 7. The order required interconnected VoIP service providers to submit any traffic study to the FCC for review and approval prior to using the results of the study for USF revenue reporting purposes, *id*., while wireless carriers were required only to submit their traffic studies concurrent to the report in which they were used, *id*. ¶ 32. On review, the D.C. District vacated the pre-approval requirement as failing to apportion USF obligations on a fair and equitable basis. Vonage Holdings Corp. v. FCC, 489 F.3d 1232, 1244 (2007).
52. VoIP USF Order ¶ 60.
53. VoIP USF Order ¶ 60.
54. Providers whose projected annual revenues would produce a USF contribution of less than $10,000 are not required to submit quarterly Form 499Q filings. 47 C.F.R. § 54.708. All telecommunications providers, including all interconnected VoIP service providers, are required to file the annual Form 499A. 47 C.F.R. § 54.711.
55. VoIP USF Order ¶ 61.
56. VoIP USF Order ¶ 62.
57. VoIP USF Order ¶ 69.
58. Vonage Holdings Corporation filed a petition for review of the VoIP USF Order with the Court of Appeals for the District of Columbia on July 18, 2006. *See* Petition for Review, Vonage Holdings Corporation v. FCC, Case No. 06-1276 (D.C. Cir. filed July 18, 2006). The court subsequently consolidated Vonage's petition with the petition filed by the Computer & Communications Industry Association.
59. Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).
60. *Id*. at 1240-1241.
61. *Id*. at 1241-1242.
62. *Id*. at 1243-1244.
63. *Id*.
64. *Id*. at 1244.
65. 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).
66. Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501 (1998) (*Report to Congress*) ¶ 91, n.189.
67. 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).
68. Consumer Information Bureau Seeks Additional Comment on the Provision of Improved Telecommunications Relay Service, Public Notice, 16 FCC Rcd 13100 (2001).

69. *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.
70. James Gifford, "Is Your VoIP Secure?," *Computer Telephony*, Sept. 1, 1999, at 99.
71. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶¶ 148-149 (2005) (Wireline Broadband Order).
72. *Id*. ¶ 149.
73. CPNI Order ¶ 55. The FCC emphasized that the newly applied CPNI obligations "apply to all VoIP communications made using an interconnected VoIP service, even those that do not involve the [public switched telephone network] PSTN." CPNI Order at 30, n.170.
74. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, ¶ 54 (2007).
75. 47 U.S.C. § 255(c).
76. 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*).
77. *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 § 255 to telecommunications services.
78. 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).
79. 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).
80. VoIP E911 Order ¶ 63.
81. *Id*.
82. *See generally* IP-Enabled Services, WC Docket No. 04-36, Report and Order, 22 FCC Rcd. 11275 (2007) (*VoIP Disability Access Order*).
83. VoIP Disability Access Order ¶ 30.
84. 47 C.F.R. § 64.604(c)(5)(iii)(B).
85. VoIP Disability Access Order ¶ 43. Most interconnected VoIP service providers were required to provide revenue data for only the fourth quarter of 2006 in their 2007 Form 499-A submissions. Federal Communications Commission, Telecommunications Reporting Worksheet, FCC Form 499-A (2007), at 32, *http://www.fcc.gov/Forms/Form499-A/499a.pdf.*
86. VoIP Disability Access Order ¶ 27. The term "readily achievable" (incorporating the definition from the Americans with Disabilities Act) means "easily accomplishable and able to be carried out without much difficulty or expense." VoIP Disability Access Order ¶ 2.
87. VoIP Disability Access Order ¶ 29.
88. VoIP Disability Access Order ¶ 31.
89. VoIP Disability Access Order ¶ 33. *See also* 47 C.F.R. ¶ 64.603.
90. 47 C.F.R. ¶ 64.601(14).
91. 47 C.F.R. ¶ 64.603.
92. VoIP Disability Access Order ¶ 42. *See also* 47 C.F.R. ¶ 64.603.
93. VoIP Disability Access Order ¶ 43.
94. *Motion for Stay or Waiver of the Voice on the Net (VON) Coalition*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Motion for Stay or Waiver (filed Sept. 14, 2007). The United States Telecom Association and the Hamilton Telephone Company requested waivers of the 711 requirement only. United States Telecom Association Petition for Waiver of Certain Regulations Concerning Provision of 711 Dialing, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Petition for Waiver (filed Sept. 21, 2007) (requesting a two-year waiver); Hamilton Telephone Company d/b/a Hamilton Telecommunications, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Petition for Waiver (filed Sept. 21, 2007).
95. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Order and Public Notice Seeking Comment, 22 FCC Rcd. 18319 (2007).
96. *Id*. ¶ 2.
97. *Id*. ¶ 16.
98. Assessment of Regulatory Fees for Fiscal Year 2007, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712, ¶ 11 (2007) (*Regulatory Fee Order*).
99. *Id*. ¶ 18.
100. *Id*. Attachment B.
101. *Id*. Attachment D.
102. *Id*. ¶ 20.
103. *Id*. ¶ 13.

104. Telephone Number Requirements for IP-Enabled Services Providers, WC Docket No. 07-243, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, FCC 07-188 (rel. Nov. 8, 2007) (*LNP Order & NPRM*).
105. *Id.* ¶ 29.
106. *Id.* ¶ 40.
107. The use of the term "numbering partners" recognizes that interconnected VoIP service providers "generally obtain [North American Numbering Plan] NANP telephone numbers for their customers by partnering with a local exchange carrier (LEC) through a commercial arrangement rather than obtaining them directly from the numbering administrator, which provides numbers only to entities that are licensed or certificated as carriers under the [Communications] Act." *LNP Order & NPRM* ¶ 12. The order reaffirms that, absent an FCC waiver, only carriers are eligible to receive numbers directly from the numbering administrator. *Id.* ¶ 20.
108. *Id.* ¶ 17. The FCC asserts that its "plenary numbering authority" under 47 U.S.C. § 251(e)(1) and the FCC's ancillary jurisdiction under Title I of the Communications Act provides the FCC with sufficient authority to extend LNP requirements to interconnected VoIP service providers, *Id.* ¶¶ 22, 24-28. Numbering partners are LECs, which are subject to FCC LNP rules under 47 U.S.C. § 251(b)(2). *Id.* ¶ 23.
109. *Id.* n.64.
110. *Id.* ¶ 32.
111. *Id.* ¶ 33. This rule supersedes any existing contractual provisions to the contrary. *Id.*
112. *Id.* ¶¶ 34-36.
113. *Id.* ¶ 38. VoIP service providers "certifying that they are unable to divide their traffic and resulting end-user revenue among the seven LNPA regions precisely will be allowed to divide their end-user revenue among these regions based on the percentage of subscribers in each region." *Id.* n.125.
114. *Id.* ¶ 39.
115. *Id.* ¶ 40.
116. VoIP E911 Order ¶ 57.
117. *Id.* ¶ 61.
118. Wireless E911 Location Accuracy Requirements, PS Docket No. 07-114, Notice of Proposed Rulemaking, 22 FCC Rcd. 10609, ¶ 18 (2007).
119. LNP Order & NPRM ¶ 53.
120. Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, Notice of Proposed Rulemaking, 22 FCC Rcd. 7760, ¶ 22 (2007).
121. 47 C.F.R. §§ 64.2400-01.
122. 47 C.F.R. § 64.2401.
123. Truth-in-Billing and Billing Format, 14 FCC Rcd 7492, ¶¶ 13-14 (1999).
124. *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).
125. 47 C.F.R. § 64.2400(c).
126. Truth-in-Billing and Billing Format, CC Docket No. 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 6448, ¶¶ 49-53 (2005).
127. Wireline Broadband Order ¶¶ 152-153.
128. 47 U.S.C. § 157nt.
129. A New Generation of American Innovation, at 11 (April 2004), available at *http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf* ("This country needs a national goal for…the spread of broadband technology. We ought to have…universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier."); *see also* President George W. Bush, Remarks to American Association of Community Colleges Annual Convention (Apr. 26, 2004), available at *http://www.whitehouse.gov/news/releases/2004/04/20040426-6.html* (stating that "[b]roadband is going to spread because it's going to make sense for private sector companies to spread it so long as the regulatory burden is reduced—in other words, so long as policy at the government level encourages people to invest, not discourages investment").
130. *See* Pleading Cycle Established for Comments on Time Warner Cable's Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Public Notice, 21 FCC Rcd. 2276 (2006).
131. Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Petition for Declaratory Ruling (filed March 1, 2006).
132. *See* Pleading Cycle Established for Comments on Time Warner Cable's Petition for Preemption Regarding the South Carolina Public Service Commission's Denial of a Certificate of Public Convenience and Necessity, WC Docket No. 06-54, Public Notice, 21 FCC Rcd. 2280 (2006).
133. Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended, WC Docket No. 06-54, Petition for Preemption (filed Mar. 1, 2006).
134. Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain

Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd. 3513, ¶ 8 (2007) (*Time Warner Order*).

135. Time Warner Order ¶ 9.

136. Time Warner Order ¶ 9.

137. Time Warner Order ¶ 13.

138. Time Warner Order ¶ 13.

139. Time Warner Order ¶ 16 (emphasis by the FCC).

140. Time Warner Order ¶ 17.

141. Time Warner Order ¶ 1, n.2.

142. Case Nos. 05-0259, *et al.*, Cambridge Telephone Company, et al. Petitions for Declaratory Relief and/or Suspensions for Modification Relating to Certain Duties under §§ 251(b) and (c) of the Federal Telecommunications Act, Order (I.C.C. July 13, 2005); Case No. 05-0402, Sprint Communications L.P. d/b/a Sprint Communications Company L.P. Petition for Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers pursuant to Section 252 of the Telecommunications Act of 1996, Arbitration Decision (I.C.C. Nov. 8, 2005); Case No. 3:06-CV-00073-GPM-DGW, Harrisonville Telephone Company, et al. v. Illinois Commerce Commission, et al., Complaint for Declaratory and Other Relief (S.D. Ill. filed Jan. 26, 2006), Motion for Preliminary Injunction and Expedited Discovery (S.D. Ill. filed Aug. 16, 2006), Harrisonville Telephone v. Illinois Commerce Commission, 472 F. Supp. 2d 1071, 1076 (S.D. Ill 2007); Cause No. 43052-INT-01 (consolidated with 43053-INT-01 and 43055-INT-01), Sprint Communications Company L.P.'s Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Ligonier Telephone Company, Inc., Order (I.U.R.C. Sept. 6, 2006); Docket No. ARB-05-2, Sprint Communications Company L.P. v. Ace Communications Group, et al., Order Granting Motions to Dismiss (I.U.B. May 26, 2005); Docket No. D2006-8-121, CenturyTel of Montana, Inc., Complaint by IDT America, Corp. Pertaining to CenturyTel's Violation of State and Federal Regulations and Breach of Interconnection Agreement, Amended Complaint and Petition for Expedited Complaint Proceeding (Mont. P.S.C. filed Aug. 21, 2006); Application No. C-3429, Sprint Communications Company L.P., Overland Park, Kansas, Petition for Arbitration under the Telecommunications Act, of Certain Issues Associated with the Proposed Interconnection Agreement between Sprint and Southeast Nebraska Telephone Company, Falls City, Findings and Conclusions (Neb. P.S.C. Sept. 13, 2005).

143. 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, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 34 (2001)(*ISP Remand 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 § 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).

144. 47 U.S.C. § 152; *Compare* 47 U.S.C. § 251(b)(5) *with Intercarrier Compensation NPRM* ¶ 69.

145. S*ee* 47 U.S.C. 215(g).

146. 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).

147. 47 U.S.C. § 252.

148. *See* Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001) (*2001 ICC NPRM*).

149. Developing a Unified Intercarrier Compensation Regime, CC Docket 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005) (*Intercarrier Compensation FNPRM*).

150. Intercarrier Compensation FNPRM ¶¶ 2, 12.

151. 47 C.F.R. § 69.5(b).

152. 2001 ICC NPRM ¶ 10 (2001); *ISP Order*; *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983). An "information service" is defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

153. Federal-State Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶ 91 (1998).

154. *See, e.g.*, 2001 ICC NPRM; Intercarrier Compensation FNPRM; IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (IP-Enabled NPRM).

155. 2001 ICC NPRM ¶ 133; *see also id*. ¶¶ 6, 12 (acknowledging the various exceptions to which both the reciprocal compensation and access regimes are subject, including that access charges generally are not applicable to long-distance calls handled by ISPs because of the ESP exemption).

156. IP-Enabled NPRM ¶¶ 61-62.

157. Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, Order, 19 FCC Rcd. 7457 ¶ 9 (2004) (*AT&T IP-in-the-Middle Order*) (noting that the FCC had "mentioned the application of access charges to VoIP" in the *2001 ICC NPRM*, "stating that "[IP] telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay") (*citing 2001 ICC NPRM* ¶ 133).

158. IP-Enabled NPRM ¶ 30; Intercarrier Compensation FNPRM ¶ 148 (recognizing that the existing intercarrier compensation regime "does not take into account recent developments in

service offerings, including bundled local and long distance services, and voice over Internet Protocol (VoIP) services").

159. AT&T IP-in-the-Middle Order ¶ 1.

160. 2001 ICC NPRM ¶ 6.

161. ISP Remand Order ¶¶ 52-53, 55. The U.S. Court of Appeals for the D.C. Circuit subsequently overturned the Commission's conclusion in the *ISP Remand Order* that ISP traffic falls within § 251(g) of the Act (which permitted the assessment of access charges instead of reciprocal compensation for certain types of telecommunications traffic as a transitional mechanism), but it did not disturb the Commission's ruling that ISP traffic is interstate and subject to the ESP exemption. *See* WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002). The only logical result of the court's ruling is that if traffic is not subject to access charges (251(g)), then it must be subject to reciprocal compensation because *all* traffic is subject to § 251(b)(5) unless carved out by § 251(g). The court specifically determined that ISP-bound traffic did fall within this carve out.

162. *See generally* AT&T IP-in-the-Middle Order. The FCC made clear that its ruling only applied to the specific factual situation presented by AT&T and only to its specific "IP-in-the-Middle" service.

163. AT&T IP-in-the-Middle Order at n.92.

164. AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services, WC Docket No. 03-133, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005) (*AT&T Enhanced Prepaid Calling Card Order*).

165. *See, e.g.*, Intercarrier Compensation FNPRM ¶ 7 (citing Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, ¶¶ 344-48 (1997)). Contrary to these suggestions, the FCC's 1997 *Access Charge Reform Order* does not support this conclusion. Although the FCC was addressing that particular form of interconnection in the *Access Charge Reform Order*, the FCC has not restricted the ESP exemption solely to calls terminated to an ISP as discussed above.

166. *See, e.g.,* AT&T IP-in-the-Middle Order ¶ 9. In the *AT&T IP-in-the-Middle Order*, the FCC also explained that it was not clear whether its prior statement in the *IP-Enabled NPRM* that IP telephony is exempt from access charges "was intended to include phone-to-phone services *that use IP in the backbone*." *Id*. at n.67 (emphasis added). This strongly supports that the FCC understood that *IP-originated* calls were indisputably included within the exemption.

167. Under the FCC's decisions, ISP traffic and IP-enabled services are treated as interstate in nature and subject to the FCC's exclusive jurisdiction regardless of whether a particular call actually originates and terminates within a single state. *See, e.g., Vonage Order* ¶ 32. Accordingly, even absent the ESP exemption, intrastate access charges would not apply to VoIP-originated traffic.

168. *See* NARUC July 24, 2006, Ex Parte in CC Docket 01-92, Intercarrier Compensation FNPRM (Missoula Plan).

169. *See* Letter from Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Nov. 6, 2006).

170. *See* Petition for Declaratory Ruling of Grande Communications, Inc., WC Docket No. 05-283 (filed Oct. 3, 2005).

171. Grande says that it forwards the CPN to the terminating carrier.

172. Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd. 17989 (2007).

173. Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (2007).

174. *See, e.g.*, Qwest Commc'ns Corp. v. Superior Tel. Coop., Iowa Utilities Board Docket No. FCU-07-2, Order Granting Motion to Dismiss Counterclaims and Denying Request for More Specific Statement (Nov. 15, 2007).

175. *See, e.g.,* Sprint Commc'ns Corp. v. Superior Tel. Coop., No. 4:07-cv-00194 (S.D. Iowa filed May 7, 2007).

176. OCMC, Inc.; Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 14160, ¶ 13 (2005) ("a carrier may not engage in self-help"); In the Matter of Bell Atlantic-Delaware, et al., Complainants, v. Frontier Communications Services, Inc., et al., Defendants; and Ameritech Illinois, Pacific Bell, et al., Complainants, v. Frontier Communications Services, Inc., Defendants, Order on Review, 15 FCC Rcd 7475, ¶ 11 (2000) ("the Commission looks disfavorably on such self-help"); *see also* MGC Communications, Inc. v. AT&T Corp., 14 FCC Rcd 11647 (1999); In the Matter of Communique Telecommunications, Inc. d/b/a LOGICALL, Declaratory Ruling and Order, 10 FCC Rcd 10399 (1995).

177. Madison River Communications, LLC and Affiliated Companies, Order, 20 FCC Rcd 4295 (2005).

178. *See* 47 U.S.C. §§ 251(b)(5); 251(g).

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