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# **Challenges of the 21<sup>st</sup> Century: Are Regulators Seeking to Promote or Hamper the Deployment and Delivery of Sophisticated, Multi-Functional Cable-Provided VoIP Services?**

**PLI New York**

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**By Chérie R. Kiser**

# Cable-Provided VoIP Services under the Current Legal and Regulatory Framework

- **Definitions dictate regulatory status and classification of providers and services**
  - “Telecommunications” - an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers telecommunications
  - “Telecommunications Service” - offering telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used
  - “Information Services” - the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications

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# Application of the Historical Definitions Approach Remains Murky for VoIP

- **Interstate IP-Enabled**

- Broadband connection from user's location
- A need for IP-compatible CPE
- 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 (“enhanced functionality”)

- **Interconnected VoIP Service**

- Enables real-time, two-way voice communications; and
- Offering permits users generally to receive calls that originate on the PSTN and terminate calls to PSTN

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# Application of the Historical Definitions Approach Remains Murky for VoIP (cont'd)

**Broadband Internet access providers and interconnected VoIP service providers are “telecommunications carriers” under CALEA (47 USC 1001 (8)) but outside definition of telecommunications carrier under the Communications Act.**

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# FCC Issues Policy Statement on Broadband Deployment and Internet Access

- **Ancillary jurisdiction under Title I permits it to “ensure that providers of telecommunications for Internet access or IP-enabled services are operated in competitively neutral manner.”**
- **To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet**
  - [C]onsumers are entitled to access the lawful Internet content of their choice . . . .
  - [C]onsumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement . . . .
  - [C]onsumers are entitled to connect their choice of legal devices that do not harm the network . . . . [and]
  - [C]onsumers are entitled to competition among network providers, application and service providers, and content providers

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# Four Key Decisions Extend Federal Regulatory Obligations to IP-enabled Services

- Vonage Order
- E911 VoIP Order
- CALEA Broadband Order
- USF Report and Order

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## Key Decisions (cont'd)

### *November 2004 - Vonage Order*

- **FCC finds Vonage's service is interstate and preempts the Minnesota PUC's entry requirements**
  - Ruling extends to other IP-enabled services that have the same basic characteristics as Vonage's service: (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

## Key Decisions (cont'd)

### *November 2004 - Vonage Order*

- Ruling does not address information/telecom distinction
- Ruling does not address 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)
- Ruling reiterates that applying the end-to-end analysis to Internet-based services is difficult, if not impossible
- Sections 706 and 230 key components of review of policies for IP-enabled services
- **Order appealed by state regulatory commissions**

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# Key Decisions (cont'd)

## June 2005 - E911 VoIP Order

- **Interconnected VoIP service providers must provide E911 to subscribers**
  - Consumers expect interconnected VoIP services will function like a “regular telephone”
  - Does not apply to IP-based services such as IM or Internet gaming
  - Obligation to promote “safety of life and property” and facilitate “a seamless, ubiquitous and reliable end-to-end infrastructure” for public safety
  - FCC has jurisdiction under 4(i) and 251(e)(3) of Act; 911 is not purely intrastate
  - No funding obligations imposed

## Key Decisions (cont'd)

### *June 2005 - E911 VoIP Order*

- No exemption from liability similar to that experienced by common carriers
- Refrains from requiring discontinuance of existing subscribers, but requires discontinuance of marketing and accepting new customers anywhere provider is not capable of transmitting E911 calls to appropriate PSAP
- Appeal pending before U.S. Court of Appeals for DC
- Waivers pending
- Legislation

# Key Decisions (cont'd)

## *June 2005 - E911 VoIP Order*

- **Operational Requirements**

- Notification and affirmative acknowledgment
- Warning stickers or appropriate labels
- Reporting
- Must transmit 911 calls, ANI and customer registered location for each call to PSAP, designated statewide default answering point, or appropriate local emergency authority that serves caller's registered location
- Subscribers must be able to update registered location at will and in timely manner

## Key Decisions (cont'd)

### *August 2005 - CALEA Broadband Order*

- **CALEA applies to facilities based Broadband Internet access providers and providers of interconnected VoIP service**
- **“Substantial Replacement” for any part of the PSTN if:**
  1. Providing wire or electronic communication switching or transmission service;
  2. Service is a replacement for a substantial portion of local telephone service = any significant part of the functionality previously provided by the PSTN; and
  3. FCC must find “it is in public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA].”
- **Monitoring reports 2/12/07; system security policies 3/12/07; compliance 5/14/07**
- **Federal court challenge**

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# Key Decisions (cont'd)

## *June 2006 - USF Report and Order*

- **Interconnected VoIP Service Providers**
  - Enable real-time, two-way voice communications
  - Require a broadband connection from user's location
  - Require IP-compatible CPE and
  - Permit users to receive calls from and terminate calls to PSTN
- **When:**
  - Beginning 4<sup>th</sup> quarter 2006; First FCC Form 499-Q, August 1, 2006
- **Contribution Options:**
  - Interim Safe Harbor 64.9%
  - Report based on actual interstate/international end user revenues; or
  - Use FCC pre-approved traffic study
- **Pending Appeal - arbitrary and capricious**

## FCC Classifies Other Services

- **Pulver.com Order - Interstate Information Service**  
point-to-point broadband IP voice service provided only within pulver.com's network to those customers who subscribe to service
- **Cable Modem Service - Interstate Information Service**
- **Wireline Broadband Service (Internet Access) - Interstate Information Service**

## FCC Classifies Other Services (cont'd)

- **AT&T Phone-to-Phone Order - Telecommunications Service**

IP in the middle - uses ordinary CPE with no enhanced functionality, originates and terminates on PSTN, undergoes no net protocol conversion, and provides no enhanced functionality to end users due to IP technology

- **Prepaid Calling Cards Utilizing IP Technologies - Telecommunications Service**

all menu-driven calling cards and calling cards that use IP transport to deliver all or portion of the call as telecommunications services subject to Title II regulations as telecommunications carriers

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## Proceedings/Legislation to Watch

- **TWC Petitions for Declaratory Ruling and Preemption**
  - Telecommunications carriers are entitled to interconnect with ILECs, in particular RLECs, for purposes of selling telecommunications services to entities like Time Warner Cable and other VoIP service providers
  - South Carolina PSC's denial of CPCN violates § 253(a) of Act
- **Pending state cases re related issue:**
  - IL, IN, IA, MO, NE, NY, NC, OH, SC, SD, TX, WI
- **T-Mobile and Sprint/Nextel Petition Seeking Clarification of Number Portability Rules**
  - Century Tel - MT
  - NH

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## Proceedings/Legislation to Watch (cont'd)

- **State Taxation - Sales, E911, USF**
  - PA
  - NM - USF
  - NJ - sales, E911
  - KS
  - IL

## Proceedings/Legislation to Watch (cont'd)

- **E911 Further NPRM**

- Techniques for automatic identification of geographic location of VoIP service users
- Whether to extend obligation to all IP-based voice service providers regardless of broadband connection
- Application to wireless VoIP service
- Role of states and whether to address states' ability to collect all fees
- Whether to adopt any consumer privacy protections

## Proceedings/Legislation to Watch (cont'd)

- **USF NPRM**

- Refine record re:

- Interim requirements
- Safe harbor percentages
- Permanent approach to USF contributions from VoIP providers

## Proceedings/Legislation to Watch (cont'd)

- **CALEA Outstanding NPRM Issues**

- Use of industry standards as safe harbors
- Use of trusted third parties
- Implementation timelines and the extension/waiver process
- Allocation of costs for CALEA implementation
- Enforcement of CALEA

- **CALEA FNPRM**

- Are there any types of “managed” VoIP services not included in definition of interconnected VoIP that should be included?
- Should there be an exemption for small and rural broadband providers or educational or research institutions?

# Proceedings/Legislation to Watch (cont'd)

## *February 2004 - IP-Enabled NPRM*

- **FCC issues NPRM to address legal and regulatory framework for IP-based services, including VoIP services**
  - Seeks to categorize different IP-based services
    - Consumer perception
    - Interconnection with PSTN
  - Asks how each category should be classified
  - Asks what, if any, regulations should apply to each category
- **In conjunction with NPRM, FCC conducts “Solutions Summits” on public policy issues: CALEA, 911, disability access**

## Proceedings/Legislation to Watch (cont'd)

- **CPNI NPRM - what additional steps should be taken to further protect CPNI held by telecommunications carriers and whether those requirements should extend to VoIP service providers**
  - Existing rules, certification and notice
  - New rules
    - Consumer set passwords
    - Audit trails
    - Encryption
    - Limiting data retention
    - Notice to customers

# Proceedings/Legislation to Watch (cont'd)

## *Intercarrier Compensation*

- **Intercarrier compensation NPRM and FNPRM**
  - Carriers should move to a unified regime for all intercarrier compensation payments
  - Missoula Plan
- **ISP remand order**
  - 251(b) 5 and 251(g)
  - Calls to ISPs consist of multiple communications and these communications often are interstate or international so entire call jurisdictionally interstate
  - Neither the path of communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis

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