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

**PLI San Francisco
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By Chérie R. Kiser

Statutory & Regulatory Definitions Dictate Regulatory Status

- “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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Statutory & Regulatory Definitions Dictate Regulatory Status (cont'd)

- **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”)

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Statutory & Regulatory Definitions Dictate Regulatory Status (cont'd)

- **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
- **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.**

FCC Jurisdiction

- **Title I - ancillary jurisdiction**
- **Title II - common carrier regulation**
- **706 - FCC and state commissions shall encourage deployment of advanced telecommunications capability to all Americans**
- **230 - U.S. policy to promote competition and broadband deployment unfettered by federal or state regulation**

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Policy Statement on Broadband Deployment and Internet Access

- **Title I permits FCC 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, consumers are entitled to:**
 - Access the lawful Internet content of their choice
 - Run applications and use services of their choice, subject to the needs of law enforcement
 - Connect their choice of legal devices that do not harm the network [and]
 - Competition among network providers, application and service providers, and content providers

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Five Key FCC Decisions

- **Vonage Order**
- **E911 VoIP Order**
- **CALEA Broadband Order**
- **USF Report and Order**
- **Time Warner Cable MO&O**

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Key Decisions (cont'd)

June 2005 - E911 VoIP Order

- **FCC finds Vonage's service is interstate and preempts the Minnesota PUC's entry requirements**
 - Ruling does not address information/telecom classification
 - No effect on Minnesota's general laws governing entities conducting business in the state (taxation, fraud, general commercial dealings, marketing, advertising, and other business practices)
 - 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

- 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)

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. Any significant part of the functionality previously provided by the PSTN; and
 3. “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**

Key Decisions (cont'd)

June 2006 - USF Report and Order

- **Interconnected VoIP Service Providers**
 - Permissive authority under 254(d)
 - Ancillary jurisdiction under Title I
- **When:**
 - Beginning 4th 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**

Key Decisions (cont'd)

March 2007 - Time Warner Cable MO&O

- Wholesale telecommunications carriers are entitled to interconnection and exchange of traffic with ILECs when providing services to other providers, including VoIP service providers under 251(a) and 251(b)
- LECs must port telephone numbers under 251
- States commission decisions denying such interconnection are inconsistent with Act, FCC precedent, and frustrate the development of competition and broadband deployment
- Refrains from classifying VoIP service

FCC Classifies Other Services

- **Pulver.com Order - Interstate Information Service**
- **Cable Modem Service - Interstate Information Service**
- **Wireline Broadband Service (Internet Access) - Interstate Information Service**
- **AT&T Phone-to-Phone Order - Telecommunications Service**
- **Prepaid Calling Cards Utilizing IP Technologies - Telecommunications Service**

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FCC Proceedings to Watch

- **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

FCC Proceedings to Watch (cont'd)

- **USF NPRM**

- Refine record re:

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

FCC Proceedings 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?

FCC Proceedings 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**

FCC Proceedings 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

FCC Proceedings 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

State Action

- **Taxation/Surcharges**

- E911

- Pending - AK, AZ, AR, CO, ID, MA, MT, PA, TN, UT
- Passed - KS, NJ, VA, WV

- USF

- Pending - KS, VT, VA
- Passed - NM, NE

- Sales

- Pending -
- Passed - IL, KY, MN, PA, OH, WI

State Action (cont'd)

- **Exemption from Regulation**
 - Pending - AL, LA, MD, MO
 - Passed - FL, GA, OH
- **Regulation of VoIP**
 - Pending - UT
 - Passed - MO (legislation pending to undo)
- **Access to Emergency Services**
 - Pending - AK, NY
 - Passed - IL

State Action (cont'd)

- **VoIP is not End User**
 - Pending - SD
 - Passed - NE (appeal - Federal Court stayed), NC, SC
- **VoIP is End User or Traffic**
 - Pending -
 - Passed - AZ, IL (appeal pending), IN, IA (appeal pending), NY, OH, TX (appeal pending)

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