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

Chérie R. Kiser [*/]

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
202-434-7300
www.mintz.com

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[*/] Chérie R. Kiser is the Managing Partner of the Washington, D.C. office of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and Chair of the Communications and Information Technology practice group for the firm. She also serves on the firm Policy Committee and is Chair of the firm's Diversity Committee. Chérie's practice is devoted to telecommunications law and Internet-related transactions representing a wide range of clients, including cable companies, voice over Internet protocol service providers, competitive local exchange carriers, Internet service providers, wireless providers, satellite carriers, and large users of telecommunications services.

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This paper examines the views 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." Section I provides an overview of historical and recent FCC and state actions that are relevant to assessing the regulatory treatment of IP-enabled services. Section II reviews pending proceedings that may further shape the regulatory landscape for VoIP service providers. Section III analyzes the legal principles established by past rulings against recent rulings, pending proceedings and requirements that hinge on the classification of services..

## I. OVERVIEW OF FEDERAL AND STATE ACTIONS RELEVANT TO ASSESSING THE REGULATORY TREATMENT OF IP-ENABLED SERVICES

IP-enabled services have 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."[1/] Based on these classifications, "telecommunications services,"[2/] such as basic local telephone service and long distance service, have been subject to all of the trappings of telecommunications regulation. Meanwhile, information services, such as e-mail, have flourished free from regulation. Initially, IP-enabled service providers avoided regulation through providers' claims that such services more appropriately fall into the category of information services because they offer consumers so 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.[3/] The expansion of VoIP service to

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1/ 47 U.S.C. § 153(20) (defining "information service"). The definition of information services encompasses enhanced services and value added services.

2/ 47 U.S.C. §§ 153(43) (defining "telecommunications"); 153(46) (defining "telecommunications service").

3/ VoIP services available today include: multimedia conferencing, which allows multiple users to communicate with one another via voice and video while accessing data sources; high-power call centers, which allow customer service representatives to share data, instant message, and communicate in voice simultaneously in real time; unified messaging, which routes e-mails, faxes, and voicemails to a single unified mailbox; expanded call management and screening, which handles and distributes incoming voice messages and has the potential to convert them to text messages and to page the recipient; availability awareness, which allows end users to specify whether they are free for a voice conversation, for video-conferencing, for e-mail or for gaming; location scheduling, which indicates where communications should be forwarded; and simplified relocation, which permits the user to relocate to another office or city anywhere in the world without significant network reprogramming because the voice-embedded IP configuration data is tied to the end user and not the physical extension. *See, e.g., Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701 (b)(1), and Rule 69.5(b)*, Petition for Forbearance, WC Docket No. 03-266, at 11-14 (filed Dec. 23, 2003) ("Level 3 Forbearance Petition"); Elizabeth M. Gillespie, *Deal with MCI Allows only Outbound Calls at First; Test to Begin this Week*, SAN JOSE MERCURY NEWS, Dec. 13, 2005 (reporting that Microsoft and MCI will soon offer services that allow consumers to place phone calls from their personal computers and noting that Yahoo and America Online already allow instant-messaging users to receive calls and make calls using conventional phones); *Skype Pursues U.S. Consumer Mainstream Via RadioShack*, N.Y. TIMES, Nov. 21, 2005; Peter Grant,

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 the current federal and state regulatory policies shaping the future regulatory treatment of VoIP services.

## A. Defining the FCC's Jurisdiction over IP-Enabled Services

### 1. 1998 Report to Congress

In its 1998 *Report to Congress*,[4/] the FCC analyzed VoIP services. It did so from the perspective of the two distinct classifications set forth in the Communications Act of 1934, as amended,[5/] for "telecommunications service" and "information service." The FCC found that IP telephony blurred the line between telecommunications services and information services. Reviewing the services 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.[6/]

The 1998 *Report to Congress* was the first time the FCC had taken steps to distinguish between the various types of VoIP services (phone-to-phone, computer-to-computer, computer-to-phone, and vice versa) and to discuss how those services compare to traditional telecommunications services.[7/] The FCC concluded that it would be inappropriate "to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings."[8/] The FCC committed to address the regulatory status of VoIP services in upcoming proceedings with more focused records. In February 2004, the FCC adopted a notice of proposed rulemaking ("NPRM") regarding the legal and regulatory framework for IP-enabled

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*Ready for Prime Time*, WALL ST. J., Jan. 12, 2004, at R7 (noting that businesses use VoIP to set up conference calls, to allow employees to route calls to other locations including their homes or their cell phones, and to establish a single directory for voicemail and emails); *see also Verizon Kicks off Massive Overhaul Changes Commit Firm to a New Generation of Net*, BOSTON GLOBE, Jan. 8, 2004, at E1 (reporting that Verizon is launching a multibillion-dollar overhaul of its network to provide local VoIP services).

4/ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 (1998) ("*Report to Congress*").

5/ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq*. (1996)) (the "Act").

6/ *Report to Congress* ¶ 88.

7/ The FCC noted that computer-to-computer IP telephony was not a telecommunications service, primarily because vendors who sell the software and hardware needed to make IP voice calls with a computer were merely selling customer premises equipment, not transmission capacity. *See Report to Congress* ¶ 77. Likewise, the FCC determined that Internet service providers ("ISPs") were not "providing" or "offering" telecommunications services because ISPs were providing a service that typically included storage, retrieval, and manipulation of data, and generally had no way of knowing whether their customers were using Internet access services for transmission capacity to make computer-to-computer voice calls. *See id.* ¶ 87.

8/ *Report to Congress* ¶ 90.

services, including VoIP, which is discussed below.[9/] While that proceeding continues to be pending, the FCC has issued a series of other decisions that directly affect the regulatory obligations of certain VoIP services providers and other decisions that likely will be relevant to the future classification of IP-enabled services.

### 2. FCC *Policy Statement* on Broadband Deployment and Internet Access

The FCC issued a *Policy Statement* in September 2005 that offered insight to the Commission's "approach to the Internet and broadband that is consistent with . . . Congressional directives." 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:

> 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.[10/]

As discussed below, recent actions by rural LECs appear to be directly inconsistent with the FCC's stated policy goals.[11/]

### 3. FCC Renders Four Important Decisions that Extend Federal Regulatory Obligations to IP-enabled Services

There have been four key decisions since the *1998 Report to Congress* that have directly affected the regulatory obligations of IP-enabled service providers, including specifically interconnected VoIP and broadband Internet access service providers. These include the *Vonage Order*,[12/] the *E911 VoIP Order*,[13/] the *CALEA Broadband Order*,[14/] and the *USF Report*

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9/ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004) ("*IP-Enabled Services NPRM*").

10/ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, 20 FCC Rcd. 14986 (2005) (formatting added).

11/ *See* Part II.A.8.a, *infra*.

12/ *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 (2004) ("*Vonage Order*").

*& Order*.[15/] The implications of each of these decisions for the VoIP service provider are discussed below.

### a. *Vonage Order* - IP-Enabled Services Are Interstate

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.[16/]

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.[17/] 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.[18/] 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.[19/]

The FCC also rested its decision to preempt the Minnesota PUC's requirements on its statutory mandate to promote the policies and goals of Sections 230 and 706 of the Act.[20/] As discussed below, 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

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13/ *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 (2005) ("*E911 VoIP Order*").

14/ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989 (2005) ("*CALEA Broadband Order*").

15/ *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006) ("*USF Report & Order*").

16/ *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*"). The Minnesota PUC's order is discussed in more detail below. *See infra* Part II.B.1.

17/ *Vonage Order* ¶31.

18/ *Vonage Order* ¶25. *See also, 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, ¶ 16 (2004) (*pulver.com Order*).

19/ *Vonage Order* ¶¶26-29.

20/ *Vonage Order* ¶¶33-36.

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*.[21/]

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 are left to the generic *IP-Enabled Services* proceeding, which is discussed below. 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 section 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.

Several state commissions and the National Association of State Utility Consumer Advocates ("NASUCA") have appealed the FCC's *Vonage Order*.[22/] Numerous private entities,

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21/ *Vonage Order* ¶32.

22/ Minn. Pub. Util. Comm'n v. FCC, No. 05-1069 (8th Cir. filed Jan. 6, 2005) (consolidating Pub. Util. Comm'n of Ohio v. FCC, No. 05-3114 (8th Cir. filed Aug. 3, 2005); People of the State of N.Y. v. FCC, No. 05-3118 (8th Cir. filed Aug. 3, 2005); and Nat'l Assoc. of State Util. Consumer Advocates v. FCC, No. 05-112 (8th Cir. filed Jan 11, 2005)). All of these cases were originally consolidated in the Ninth Circuit and were transferred to the Eighth Circuit on August 12, 2005. *See* Minn. Pub. Util. Comm'n v. FCC, No. 05-1069, Docket (8th Cir. filed Jan. 6, 2005).

including Vonage, AT&T Corp, Time Warner, Inc., SBC Communications and Verizon filed motions to intervene on behalf of the Federal Communications Commission.[23/]

### b. E911 Requirements for "Interconnected VoIP Service Providers"

On June 3, 2005, the FCC released an order requiring "interconnected VoIP service providers" to offer enhanced 911 ("E911") services to their subscribers.[24/] Interconnected VoIP services are defined as those that "(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to" the public switched telephone network ("PSTN"). The *E911 VoIP Order* regulatory obligations do not apply to providers of other IP-based services, such as instant messaging or Internet gaming because customers of those services cannot place calls to and receive calls from the PSTN.[25/]

The FCC's decision was based on its findings that consumers expect that VoIP services interconnected with the PSTN will function like a "regular telephone" service; especially if a VoIP service subscriber is able to receive calls from the PSTN and is able to place calls to the PSTN. Although the FCC acknowledged its commitment to allow VoIP services to evolve without undue regulation, it stressed its obligation to promote "safety of life and property" and to facilitate "a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.[26/]

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.[27/] The calls must be routed using ANI,[28/] and if necessary, pseudo-ANI[29/] via the dedicated Wireline E911 Network, and the customer Registered Location must be available from

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23/ The following entities have been granted motions to intervene on behalf of the FCC: Vonage Holdings Corp.; AT&T Corp.; 8x8 Inc.; The Voice on Net Coalition, Inc.; pulver.com; BellSouth Corp., Qwest Communications International, Inc., AT&T Inc. (formerly SBC Communications, Inc.) Verizon; Time Warner, Inc.; Time Warner Cable, Inc.; America Online, Inc.; Level 3 Communications LLC; the High Tech Broadband Coalition; Charter Communications, Inc.; and Pacific Lightnet, Inc. *See* Minn. Pub. Util. Comm'n v. FCC, No. 05-1069, Docket (8th Cir. filed Jan. 6, 2005).

24/ *E911 VoIP Order* ¶ 24.

25/ *Id.* at n. 78.

26/ *Id.* ¶ 4.

27/ *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 911Compliance Letters*, Public Notice, DA 05-2945 (rel. Nov. 7, 2005).

28/ Defined in 47 C.F.R. § 20.3.

29/ Defined in 47 C.F.R. § 20.3.

or through the ALI database.[30/] The FCC also stated that incumbent local exchange carriers ("ILECs"), as common carriers, are subject to Sections 201 and 202 of the Act and it indicated that it will closely monitor these efforts and take any further actions necessary if interconnected VoIP service providers are not getting the necessary access to the 911 tandems of the ILECs.[31/]

In addition, interconnected VoIP service providers must obtain, prior to the initiation of service, the physical location at which the service will first be utilized (Registered Location) and provide end users one or more methods to update information regarding the user's physical location. All interconnected VoIP providers were also required to 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 provide subscribers with a sticker for the VoIP service equipment warning of the E911 limitations of their service. Interconnected VoIP providers must obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood the advisory regarding the E911 capabilities of the service. Interconnected VoIP service providers were required to submit compliance certifications to the FCC.[32/] 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.[33/]

The FCC reaffirmed its previous findings that it has statutory authority under Sections 1, 4(i), and 251(e)(3) of the Act to determine which entities should be subject to the FCC's 911 and

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30/ *E911 VoIP Order* ¶ 37.

31/ *Id.* ¶ 40.

32/ *Id.* ¶¶ 48-50. Providers were required by the Order to provide the notice and stickers and obtain acknowledgement from 100% of their subscribers by July 29, 2005, E911 VoIP Order ¶ 48, but on July 26, 2005, the FCC Enforcement Bureau issued a public notice extended the deadline to August 30, 2005. *Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, Public Notice, DA 05-2085 (rel. July 26, 2005). The deadline was later further extended to September 28, 2005. *Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, Public Notice, DA 05-2358 (rel. Aug. 26, 2005). Another notice, issued on September 27, 2005, announced that the FCC would forbear from enforcement indefinitely against providers who had attained notification acknowledgement from at least 90% of their subscribers. An additional extension through October 31, 2005, was granted for providers who had not yet attained the 90% standard. *Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, Public Notice, DA 05-2530 (rel. Sept. 27, 2005). Finally, on October 31, 2005 the Enforcement Bureau, announcing its finding of "evidence of providers' substantial efforts to comply with the Commission's rules, as well as significant progress in obtaining acknowledgements from all of their customers," extended indefinitely the deadline for attaining 100% subscriber notification acknowledgement. Providers that had not yet obtained at least 90% acknowledgement were required to file an additional compliance report by November 28, 2005. *See Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, Public Notice, DA 05-2874 (rel. Oct. 31, 2005); *See also Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice over Internet Protocol 911 Compliance Letters*, Public Notice, DA 05-2945 (rel. Nov. 7, 2005).

33/ *E911 VoIP Order* ¶ 51.

E911 rules.[34/] While the FCC acknowledged that there are generally intrastate components to interconnected VoIP service and E911 service, the FCC rejected any argument that 911/E911 services are purely intrastate; thereby establishing its jurisdiction over the matter. The FCC declined to adopt rules regarding the funding of 911 services by interconnected VoIP providers.[35/] It also declined to exempt providers of interconnected VoIP service from liability under state laws related to E911 services.[36/] The Commission also issued an NPRM seeking comment on additional steps it should take to ensure that VoIP services provide reliable and ubiquitous 911 services.[37/]

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.[38/] Some providers publicly questioned the FCC's authority to regulate advertising.[39/] FCC Chairman Kevin J. Martin responded that providers that requested waivers from the Order are not absolved from the FCC's announcement on marketing restrictions.[40/] At least one provider, Vonage, indicated that it intended to continue its marketing efforts even if found noncompliant because it had filed for a waiver.[41/]

Petitions for review of the *E911 VoIP Order* have been filed with the FCC and with the United States Court of Appeals for the District of Columbia.[42/] The parties generally claim that the FCC's decision was "arbitrary and capricious" and that the decision falls outside of the Commission's statutory jurisdiction. Furthermore, some petitioners stated that it was functionally impossible to implement the FCC's E911 requirements by the deadline and asked for temporary stays of the order from both the FCC and the federal courts.[43/] Based on

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34/ *Id.* ¶ 19.

35/ *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.)

36/ *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.)

37/ *See* Part II.A.3, *infra*.

38/ *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).

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

40/ *Martin Adamant on VoIP Provider E-911 Compliance*, COMMUNICATIONS DAILY, Dec. 15, 2005.

41/ *Id.*

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

43/ 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

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 emergency stay.[44/] The D.C. Circuit denied Nuvio's appeal on December 15, 2006, finding that the Commission adequately considered the technical and economic feasibility of the deadline, inquiries made necessary by the ban against arbitrary and capricious decision making, and the public safety objectives the Commission is required to achieve.[45/]

### c. *CALEA Broadband Order* - Broadband Internet Access and Interconnected VoIP Service Providers are "Telecommunications Carriers" under CALEA

On August 5, 2005, the FCC adopted an order concluding that Communications Assistance for Law Enforcement Act ("CALEA") applies to "facilities-based broadband Internet access providers and providers of interconnected [VoIP] service."[46/] Providers of these types of services were given eighteen months to come into compliance with CALEA provisions.[47/] Rather than issuing orders responding to all of the issues raised in the *CALEA Broadband NPRM*, the *CALEA Broadband Order* was purposefully limited to establishing that CALEA applied to these specific services.[48/] The FCC explained its belief "that addressing applicability issues now is the best approach to commencing productive discussions between law enforcement agencies and industry" and that "[b]y identifying the providers that are covered today, we seek to ensure that the appropriate industry representatives will be party to those discussions."[49/]

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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 3, 2005, RNK, Inc. ("RNK") filed for a limited waiver with respect to the November 28, 2005 deadline with the FCC. It stated that it needed an extension in order to satisfy all of the FCC's requirements. Specifically it requests a six-month extension to cover its subscriber base in parts of New Jersey and Florida; as well as a one year extension to cover the remained of its subscriber base. *See IP Enabled Services, E911 Requirement for IP-Enabled Service Providers,* Request of RNK, Inc. for a Limited Waiver, WC Docket No. 04-36 and No. 05-196. (filed Nov. 3, 2005).

44/ *Wireline*, COMMUNICATIONS DAILY, Nov. 16, 2005.

45/ Nuvio Corp. v. FCC, Case No. 05-1248 (D.C. Cir. Dec. 15, 2006).

46/ The text of the *Order* was issued on September 23, 2005. *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 (Aug. 9, 2004) ("*CALEA Broadband NPRM* "). Interconnected VoIP services are those "that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN." *CALEA Broadband Order* ¶ 39 (citing *E911 VoIP Order* ¶¶ 36-53).

47/ *CALEA Broadband Order* ¶ 46.

48/ *Id*.

49/ *Id*. ¶ 47.

The FCC declared in the *CALEA Broadband Order* that providers of interconnected VoIP services and Broadband Internet access services are "telecommunications carriers" under CALEA, and therefore covered by CALEA provisions, even though they remain outside of the definition of "telecommunications carrier" under the Communications Act.[50/] The Commission 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 public switched telephone network ("PSTN").[51/] 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:[52/] (1) the entity must be providing "wire or electronic communication switching or transmission service,"[53/] 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;"[54/] (2) the service must be "a replacement for a substantial portion of the local telephone service,"[55/] which the FCC defines as satisfied if a service replaces "any significant part" of the functionality previously provided by the PSTN; and (3) the Commission must find that "it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA]."[56/]

The Commission similarly interpreted the definition of "information service" under CALEA to be different from the definition of the term under the Communications Act and determined that broadband Internet access and interconnected VoIP services were not excluded information services under CALEA.[57/]

Almost immediately, the *Order* was challenged in federal court as being arbitrary, capricious, and contrary to law. Two cases filed in the District of Columbia Circuit were consolidated.[58/] Petitioners included Comptel, Sun Microsystems, Pulver.com, the American Library Association, the American Council on Education ("ACE"), the Center for Democracy and Technology ("CDT") and the Electronic Frontier Foundation ("EFF"). An ACE spokesperson expressed concern about the estimated $7 billion costs of implementation for the nation's colleges and universities, saying the ACE "hope[s] to convince the FCC that colleges and universities can provide the same access through alternative approaches."[59/] The EFF raised

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50/ *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.

51/ *See CALEA Broadband NPRM* ¶ 37.

52/ *See CALEA Broadband Order* ¶¶11-14.

53/ 47 U.S.C. § 1001(8)(B)(ii).

54/ *CALEA Broadband NPRM* ¶ 43.

55/ 47 U.S.C. § 1001(8)(B)(ii).

56/ 47 U.S.C. § 1001(8)(B)(ii).

57/ *CALEA Broadband Order* ¶¶ 15-23.

58/ Am. Council on Educ. v. FCC, No. 05-1404 (D.C. Cir. filed Oct. 24, 2005) (consolidating Comptel v. FCC, No. 05-1408 (D.C. Cir. filed Oct. 25, 2005)).

59/ Elliot Smilowitz, *Groups Battle FCC's Wiretap Act Extension*, UPI, Oct. 30, 2005, http://www.upi.com/Hi-Tech/view.php?StoryID=20051028-025706-9246r.

security concerns: "Many of the technologies currently used to create wiretap-friendly computer networks make the people on those networks more pregnable to attackers who want to steal their data or personal information."[60/] The central concern, however, appeared to be the impact the ruling could have on innovation on the Internet. A CDT spokesperson expressed concern that "extending a law written specifically for the public telephone network to these emerging technologies will stifle the sort of innovation that has been a hallmark of the Internet revolution."[61/]

In a ruling issued June 9, 2006, the D.C. Circuit upheld the FCC's application of CALEA to VoIP and broadband services.[62/] 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."[63/]

On May 12, 2006, the FCC released a follow-up order giving VoIP service and broadband providers additional direction on the Commission's expectations for CALEA implementation.[64/] 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.[65/] 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 CALEA requirements are met.[66/] Service providers are responsible for the capital costs of CALEA implementation and may not pass those costs on to law enforcement agencies.[67/]

Noting that providers can attain CALEA compliance by use of equipment that implements an industry CALEA standard, the Commission 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.[68/] The FCC said

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60/ *Id.*

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

62/ Am. Council on Educ. V. FCC, 451 F.3d 226 (D.C. Cir. 2006).

63/ *Id.* at 234.

64/ *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*").

65/ *CALEA Second Order*¶ 3.

66/ *CALEA Second Order*¶ 26.

67/ *CALEA Second Order*¶ 70. The Order clarified the conditions under which a provider could seek financial relief through a CALEA Section 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.

68/ *CALEA Second Order*¶ 18.

it would continue to monitor this standards-development process, but that it would be premature for the Commission to insert itself into that process at this time.[69/]

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.[70/] The deadline for submission of monitoring reports was established as February 12, 2007,[71/] while system security policies are required to be submitted by March 12, 2007.[72/]

### d. FCC Imposes USF Contribution Obligations on Interconnected VoIP Service Providers

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.[73/] The Commission 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.[74/] Interconnected VoIP service providers must report and contribute to the USF on all their interstate and international end-user telecommunications revenues.[75/] Providers may do so by: (a) reporting actual interstate telecommunications revenues;[76/] (b) applying to their total telecommunications revenues the 64.9% interstate "safe harbor" percentage established in the *Order*; or (c) relying on a traffic study to establish an alternative percentage to apply to their total telecommunications revenues.[77/] An interconnected VoIP service provider proposing to use a traffic study to determine an appropriate percentage of revenues to allocate to interstate revenues must submit its proposed study to the Commission for approval.[78/]

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69/ *CALEA Second Order*¶ 22.

70/ *CALEA Second Order*¶¶ 59-60, 76.

71/ *OMB Approves CALEA Compliance Monitoring Report for Providers of Facilities-Based Broadband Internet Access and Interconnected VoIP Service; Reports are Due February 12, 2007*, ET Docket No. 04-295, Public Notice, DA 06-2513 (rel. Dec. 14, 2006).

72/ *OMB Approves CALEA-Mandated System Security Filing Requirement for Providers of Facilities-Based Broadband Internet Access and Interconnected VoIP Service*, ET Docket No. 04-295, Public Notice, DA 06-2512 (rel. Dec. 14, 2006).

73/ *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*").

74/ *VoIP USF Order* ¶ 35.

75/ *VoIP USF Order* ¶ 52. In the *Order*, the Commission 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.

76/ 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.

77/ *VoIP USF Order* ¶ 52.

78/ *VoIP USF Order* ¶ 57.

Interconnected VoIP service providers are 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.[79/] The first annual Form 499A filing for interconnected VoIP service providers will be on April 1, 2007.[80/] All interconnected VoIP service providers, even those with revenues too small to require USF contribution,[81/] were required to register with the Commission and receive an FCC Registration Number ("FRN").[82/] 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.[83/]

To further refine the record concerning the interim requirements established in the *Order* while the Commission continued to examine more fundamental USF contribution methodology reform, the Commission 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.[84/]

### 4. FCC Is Willing to Classify Other Services

#### a. *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.[85/] In 2003, pulver.com filed a petition for declaratory ruling requesting the FCC to rule that its Free World Dialup service is neither telecommunications nor a telecommunications service within the Act's definitions.[86/] Free World Dialup facilitates point-to-point broadband Internet protocol voice communications and is only provided within pulver.com's network to those customers who subscribe to the service. pulver.com argued that its service does not fit within the statutory definitions of "telecommunications," "telecommunications service," or "information service" because Free World Dialup does not offer subscribers transmission services or telecommunications for a fee. The FCC rejected Free World Dialup's position that it did not offer an information service.

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79/ *VoIP USF Order* ¶ 60.

80/ *VoIP USF Order* ¶ 60.

81/ 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.

82/ *VoIP USF Order* ¶ 61.

83/ *VoIP USF Order* ¶ 62.

84/ *VoIP USF Order* ¶ 69.

85/ *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*").

86/ *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).

Instead, the FCC concluded that the service fell squarely within the definition of an information service.[87/] Had the FCC found otherwise; Free World Dialup arguably would have been beyond the FCC's jurisdictional reach. The *pulver.com Order* also emphasizes the FCC's long-standing policy of keeping consumer Internet services free from burdensome regulation at both the federal and state levels,[88/] which will be discussed further below.[89/]

### b. *Cable Modem Ruling* - It's an Information Service

The FCC's 2002 *Cable Modem Ruling*[90/] is important to the classification of VoIP services provided via a cable modem. The FCC determined that cable modem service was properly classified as an interstate information service subject to Title I of the Act, not a cable service subject to Title VI of the Act, and that there is no separate offering of telecommunications service by cable modem providers.[91/] 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."[92/]

The FCC found that cable modem service as then offered by cable operators was an integrated offering -- the telecommunications component was not separable from the data processing or information service capabilities of the service.[93/] Cable operators providing cable modem service over their own facilities were not offering telecommunications service to end users; rather they were using telecommunications to provide end users with cable modem service.[94/] Several groups appealed the FCC's finding that cable modem service was an interstate information service.[95/]

The court determined that it was bound by its prior decision and was required to find that cable modem service was both an information service and a telecommunications service.[96/] The court did not address the substantive aspects of the classification issue, but ruled based on a legal requirement that it could not make a finding that was inconsistent with its prior ruling. The FCC

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87/ *pulver.com Order* ¶ ¶ 11, 15.

88/ *pulver.com Order* ¶ 21.

89/ *See* Part II.A, *infra*.

90/ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Ruling*").

91/ *Id.* ¶ 7.

92/ *Id.* ¶ 31.

93/ *Id.* ¶ 39.

94/ *Id.* ¶ 41.

95/ 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).

96/ Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).

and several cable operators asked the full panel of the Ninth Circuit to rehear the case,[97/] which was denied by the court.[98/] 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.[99/] On June 27, 2005, the Supreme Court issued its opinion ruling that the FCC's finding that broadband cable modem services are exempt from mandatory common carrier regulation is a lawful construction of the Communications Act.[100/] The Supreme Court stated that the Ninth Circuit should have applied the *Chevron* framework to its analysis of the FCC's interpretation of "telecommunications service."[101/] Thus, it found the FCC's interpretation of the word "offering" within the Act's "telecommunications service" definition was entitled to deference. The Court found that an "offering" could be, as the FCC had determined, the offer of a finished Internet service product.[102/] The Supreme Court also held that the transmission component of a cable modem service is "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." Accordingly the Court upheld the Commission's decision that Internet Service Providers offer Internet access as an integrated service.[103/]

### c. *Wireline Broadband Order* - It's Information Service

The FCC initiated the *Wireline Broadband Order* proceeding to determine "the appropriate legal and policy framework for wireline broadband Internet access service…."[104/] This decision primarily provided relief to incumbent LECs and provided parity in treatment among wireline broadband Internet access service providers and cable modem service providers. The FCC affirmed its tentative conclusion "that wireline broadband Internet access service

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97/ 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).

98/ 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).

99/ 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).

100/ NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005).

101/ *Brand X Internet Servs.*, 545 U.S. at 840 (citing Chevron USA Inc. v. NRDC, 467 U.S. 837, 843-844 (1984)).

102/ *Brand X Internet Servs.*, 545 U.S. at 843 .

103/ *Brand X Internet Servs.*, 545 U.S. at 851 .

104/ *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*"). The Commission defined wireline broadband Internet access service as "a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities." *Id.* ¶ 9. It defined "Internet access service" as a "service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups." *Id*. Wireline broadband Internet access service was compared to cable modem service and defined as a "functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission. *Id.*.

provided over a provider's own facilities is an information service." The classification was based on the FCC's finding that Internet access offers "a single, integrated service" to end users and it "inextricably combines the offering of powerful computer capabilities with telecommunications." The FCC also stated that it will not classify services based on the owner of the transmission facilities. It reiterated that its decision was based on the "end product" delivered to the user. The FCC noted that in classifying wireline broadband Internet access services and cable modem services as "information services" it can move towards "crafting an analytical framework that is consistent… across multiple platforms that support competing services."[105/]

The FCC eliminated access obligations for wireline broadband Internet access providers for four overarching reasons. First, it found that broadband Internet access services are offered by at least two platform providers in every market and emerging platforms are continuously expanding into markets. Second, current regulations constrain technological advances and deter broadband infrastructure investment. Third, regulations limited the ability of providers to efficiently respond to the technological advances in the marketplace. Fourth, the "marketplace should create incentives for facilities-based wireline broadband providers to make broadband transmission available on a wholesale basis."[106/] The FCC also eliminated the long-standing *Computer Inquiry* requirements;[107/] finding that they are no longer appropriate because the

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105/ *Id.* ¶ 17.

106/ *Id.* ¶ 19.

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

broadband marketplace "is markedly different from the narrowband marketplace" that existed when the regulations were adopted.[108/] Citing the rapid evolutionary nature of the broadband technology market, the FCC concluded that the costs of the *Computer Inquiry* regulations outweighed the benefits and no longer achieved the desired regulatory objectives.[109/] The FCC also stated that it is not appropriate to make findings about dominance or non-dominance with respect to the retail market for broadband Internet access because of the characteristics of the marketplace.[110/]

The Commission affirmed that facilities-based carriers providing wireline broadband Internet access services are immediately relieved of "subsidiary, CEI, and ONA obligations."[111/] Furthermore, subject to a one-year transition period for existing services, wireline broadband Internet access service providers are no longer required to separate and offer transmission components of wireline broadband Internet access services as a stand-alone telecommunications service under Title II.[112/] The FCC determined that the wireline broadband Internet access service providers may offer transmission either on a non-common carrier or a common carrier basis.[113/] It noted that in order to comply with statutory requirements, wireline broadband Internet access providers may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and non-common carrier basis. But, entities may provide one *type* of "broadband Internet access transmission on a common carrier basis and *another type of such transmission* on a non-common carrier basis."[114/]

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 are negotiated.[115/] The FCC also found, for regulatory

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108/ Although the Commission 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 Commission stated that there is "vigorous" competition between platform providers and increasing competition at the retail level. Among broadband customers, the Commission found that "approximately 60.3 percent received cable modem service, while approximately 37.2 percent received DSL service and other broadband services provided by incumbent LECs and 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.

109/ *See 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.").

110/ *Id.* ¶ 85.

111/ *Id.* ¶ 41.

112/ *Id.* ¶ 86. The FCC stated that it is not eliminating the carriers' ability to offer wireline broadband transmission on a Title II basis.

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

114/ *Id.* ¶ 95.

115/ *Id.* ¶ 104.

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.[116/]

In regards to LEC obligations under Section 251, the Commission determined that "competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled… [s]o long as a competitive LEC is offering an 'eligible' telecommunications service." It reiterated that "nothing in this Order changes a requesting telecommunications carrier's UNE rights under section 251 and our implementing rules."[117/] The FCC also required wireline broadband Internet access service providers to continue to contribute to the Universal Service Fund on then-current levels of reported revenue for their transmission component for a period of 270 days (ending August 13, 2006)[118/]and that all providers are subject to CALEA requirements.[119/]

FCC Chairman Kevin J. Martin stated 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."[120/] 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."[121/]

#### d. *AT&T Phone-to-Phone Order* - It's a Telecommunication Service

On April 21, 2004, the FCC released an order finding that the phone-to-phone IP telephony service offered by AT&T was a telecommunications service upon which interstate

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116/ The FCC rejected arguments that its decision concerning classification requires additional approval by the Network Reliability and Interoperability Council. *Id*. ¶ 119.

117/ *Id.* ¶ 108.

118/ *Id*. ¶ 113. The FCC noted that the universal service obligation would be maintained for a 270-day period or until it adopted new contribution rules in the *Universal Service Contribution Methodology* proceeding, whichever occurred first. The 270-day period ended on August 13, 2006, without a new order in the *Universal Service Contribution Methodology* proceeding, effectively ending (at least temporarily) required wireline broadband contributions to the USF. The FCC's urgency in adopting the *VoIP USF Order* to be effective for contributions with the fourth quarter of 2006, *see* Part I.A.3.d., *supra*, was widely thought to be, in part, an attempt to replace revenues lost to the USF as a result of the *Wireline Broadband Order*. *See, e.g.*, *VoIP USF Order*, Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, at 2 ("I think the jury may still be out on whether today's action actually puts enough additional funds into the universal service fund as DSL's non-participation takes out."); Howard Buskirk, *FCC Imposes USF Obligations on VoIP, with More Sweeping Reform Contemplated*, COMMUNICATIONS DAILY, June 22, 2006, at 1 ("Commission officials aren't saying how the change will alter USF revenue flow or whether that flow will stanch losses from an Aug. [2005] FCC order reclassifying broadband Internet access services as an information service.").

119/ *Wireline Broadband Order* ¶ 114.

120/ *Id.*, Statement of Chairman Kevin J. Martin.

121/ *Id.*

access charges may be assessed.[122/] In 2002, AT&T filed a petition for declaratory ruling asking the FCC to find that its phone-to-phone IP services were exempt from access charges.[123/] AT&T argued that incumbent LECs' efforts to impose access charges on this type of traffic violates Congress's goal to preserve the vibrant and competitive free market that exists for the Internet and the FCC's policy established in the *Report to Congress* of exempting all VoIP services from access charges pending the future adoption of nondiscriminatory regulations.

The FCC found that AT&T's service is properly classified as a telecommunications service, and thus, is subject to access charges under the FCC's current rules. The FCC emphasized that its decision was limited to the type of service described by AT&T in its petition. Specifically, the decision is limited to an interexchange service that: 1) uses ordinary customer premises equipment with no enhanced functionality; 2) originates and terminates on the PSTN; and 3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.[124/] 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."[125/] The FCC also noted that the purpose of its decision was to provide clarity to the industry pending the outcome of the FCC's comprehensive *IP-Enabled Services NPRM* and the *Intercarrier Compensation* proceeding, both of which are discussed below.

### B. Prepaid Calling Cards Utilizing IP Technologies - It's a Telecommunication Service

On June 30, 2006 the FCC released a *Declaratory Ruling and Report and Order* classifying certain prepaid calling cards utilizing Internet Protocol and menu-driven prepaid calling card services as telecommunications services. As such, providers of these calling card services are subject to, among other things, Universal Service Fund contribution requirements and payment of access charges.[126/]

The FCC deemed all menu-driven calling cards and calling cards that utilize 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 where the customer can make a call or access information such as sports, weather, entertainment, and

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122/ *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*").

123/ *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).

124/ *AT&T IP-in-the-Middle Order* ¶ 1.

125/ *AT&T IP-in-the-Middle Order* ¶¶ 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.").

126/ *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, 21 FCC Rcd. 7290 (2006) ("*Prepaid Calling Card Order*").

other services.[127/] The FCC cited to the Supreme Court's ruling in *Brand X* to support classifying menu-driven services as telecommunications services. The Court in *Brand X* 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 information services classification.[128/]

Following its rationale in the *AT&T IP-in-the-Middle Order*,[129/] the FCC also held that any prepaid interexchange 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.[130/]

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

### A. FCC Proceedings

#### 1. Cable Modem NPRM

In the NPRM portion of the *Cable Modem Ruling*, the FCC asked for comment on what factors would indicate that a cable operator is offering a stand-alone telecommunications service, what regulations should apply to that service, and whether it would be appropriate to forbear from common carrier regulation where a cable operator was offering a stand-alone telecommunications service to ISPs or subscribers.[131/] 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.[132/]

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

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127/ *Prepaid Calling Card Order* ¶ 5.

128/ *Prepaid Calling Card Order* ¶ 7.

129/ *See, generally, AT&T IP-in-the-Middle Order*.

130/ *Prepaid Calling Card Order* ¶¶ 18-19.

131/ *Cable Modem Ruling* ¶ 93.

132/ *Id.* ¶ 95.

regulations under its information service regime.[133/] 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."[134/] 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.[135/] In contrast, the state and local governments argued that the FCC should not preempt state and local laws, including laws regulating cable modem service, the public rights-of-way, customer proprietary network information, and truth-in-billing.[136/]

The comment cycle for the Cable Modem NPRM closed on July 16, 2002.[137/] As of December 2006 the FCC had taken no further action in this proceeding.

### 2. *IP-Enabled Services NPRM*

In 2003 and 2004, the FCC held VoIP Forums and Solution Summits to gather information concerning advancements, innovations, and regulatory issues related to VoIP services.[138/] During one Forum, several commissioners intimated that the FCC would likely continue its "hands-off" approach to regulating VoIP services.[139/] The membership of the

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133/ *Id.* ¶¶ 96-108.

134/ *Id.* ¶ 99.

135/ *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).

136/ *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.

137/ *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).

138/ *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).

139/ 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

Commission has changed since these comments were made, however. There is a new Chairman and two new Commissioners. It is difficult to predict if the "hands-off" approach will continue, although the FCC's recent *Policy Statement* did declare that the Commission's intended approach was to be consistent with Congressional directives, which clearly require the promotion of continued development of the Internet, to preserve the vibrant and competitive market for the Internet, to encourage the development of technologies that maximize user control over information received, and to encourage deployment of advanced telecommunications capability to all Americans.[140/]

In February 2004, the FCC adopted a generic NPRM seeking comment on the legal and regulatory framework for IP-enabled services, including VoIP services.[141/] While the NPRM asked many questions regarding the 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 services to which they were compared in the 1998 *Report to Congress*.[142/] Accordingly, the FCC asked commenters to categorize and classify different types of IP-enabled services based on whether the service is: 1) functionally equivalent to traditional telephony; 2) substitutable for traditional telephony; 3) interconnected with the PSTN and uses North American Numbering Plan numbers; 4) a peer-to-peer service; and 5) a private carriage or common carriage service.[143/] The FCC also 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,[144/] or whether forbearance may be appropriate for some types of services.[145/]

Comments on the *IP-Enabled Services NPRM* were filed in May and July of 2004. With the exception of the states, some consumer groups, and one competitive LEC, nearly every commenter argued that IP-enabled services are interstate services based on either the principles

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exciting developments in telephony in decades, and promises a new era of competition, new efficiencies, lower prices, and innovative services.").

140/ *See* 47. U.S.C §§ 230(b), 706(a).

141/ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004) ("*IP-Enabled Services NPRM*").

142/ *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.

143/ *IP-Enabled Services NPRM* ¶¶ 35-37.

144/ 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.

145/ *Id.* ¶¶ 46-48.

set forth in the FCC's *pulver.com Order*, the mixed-use theory, or the inseparability doctrine.[146/] The parties asserted that state authority over IP-enabled services must be expressly preempted in order to preserve a national policy for the deregulation of the Internet and Internet-based services.[147/] The commenters also argued that allowing states to individually regulate VoIP services would create an unmanageable, unworkable regulatory regime that will thwart continued deployment of IP-enabled services. In addition, there was widespread agreement that the FCC should not impose regulations that have the potential to curtail the deployment and investment in new and innovative IP-enabled services.[148/]

In contrast, there were substantial differences between the parties on the appropriate regulatory framework for IP-enabled services with some parties supporting a "layers" model[149/] and others supporting a functional equivalence approach.[150/] Others used the proceeding to emphasize the need for access to the incumbent LECs' network and proposed that the FCC impose requirements on incumbent LECs with market power, including the duty to provide nondiscriminatory access to loops or other bottleneck facilities.[151/] It has been two and a half years since comments were filed. The record is stale. The FCC appears to have chosen to take the piecemeal approach to regulating IP-enabled services as reflected by the decisions outlined above in Section I and in some of the Commission's other pending proceedings.[152/]

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

In the *E911 VoIP Order*, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on additional steps it should take to ensure that providers of VoIP services offer reliable and ubiquitous 911 services. The FCC asked what it could do to help facilitate the development of techniques for automatically identifying the geographic location of VoIP users.[153/] It also inquired about whether it should extend its E911 rules to other VoIP services,

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146/ *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).

147/ *See 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).

148/ *See 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).

149/ *See 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).

150/ *See 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).

151/ *See 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).

152/ 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. *See also, e.g.*, *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, 21 FCC Rcd. 1782, ¶ 28 (2006) (seeking comment on whether consumer proprietary network information protections should be extended to VoIP service providers).

153/ *E911 VoIP Order* ¶ 57.

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.[154/] 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.

#### 4. Broadband Consumer Protections NPRM

The FCC issued a Notice of Proposed Rulemaking seeking comment on consumer protection issues that may arise as the industry shifts to providing broadband services. These include: whether the FCC should extend privacy requirements "similar to the Act's CPNI requirements" to broadband Internet access service providers;[155/] whether the Commission should impose current anti-slamming requirements on providers of broadband Internet access service; whether the truth-in-billing requirements should be applied to broadband Internet access service providers; whether it should impose network outage reporting requirements; and whether Section 254(g) policies concerning rural and urban rate parity should be applied to wireline broadband Internet access providers.[156] The FCC concluded by requesting comments concerning federal-state involvement and how joint efforts should be coordinated.[157/] Comments have been filed.

#### 5. Consumer Protection Issues

The following provides an overview of the status of the FCC's review of VoIP services in relation to various consumer protection related issues.

##### a. Privacy

Under Section 222 of the Communications Act, telecommunications carriers are obligated to protect the privacy of the customer proprietary network information ("CPNI") of their subscribers.[158/] In its 1998 *Report to Congress*, the FCC acknowledged that VoIP service

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154/ *Id.* ¶ 61.

155/ *Wireline Broadband Order* ¶¶ 148-49.

156 *Id.* ¶¶ 150-156.

157/ *Id.* ¶ 158.

158/ 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).

might be subject to the FCC's CPNI requirements because it so closely resembles a telecommunications service.[159/] In another rulemaking examining the use of IP-based telecommunications relay services ("IP Relay"),[160/] 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.[161/] 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.[162/] These consumer advocates have therefore urged VoIP service providers to integrate encryption technologies into their service to protect the privacy of IP-enabled calls.[163/]

In the recent *Wireline Broadband Consumer Protections NPRM* issued in conjunction with the *Wireline Broadband Order*, the FCC asked for comment on consumer privacy needs and whether consumer information will be used for marketing purposes by broadband Internet access service providers. The FCC also inquired whether it should extend privacy requirements, similar to the Act's CPNI requirements, to broadband Internet Access service providers.[164/] In particular, it requested comment concerning whether it should adopt rules under its Title I authority. Moreover, it requested information about what type of CPNI broadband Internet access providers are collecting. It reiterated that it has long recognized privacy issues in regards to computer and Internet use and noted that it adopted some CPNI-related requirements in conjunction with its *Computer Inquiry* obligations.[165/]

In addition, the FCC's June 2005 *E911 Further Notice of Proposed Rulemaking* inquired about the possible privacy implications related to the requirement that interconnected VoIP service providers transmit a customer's Register Location to the local PSAP in emergency situations.[166/] The obligation requires the providers to keep lists of register locations and make it available to public safety personnel as needed. The FCC asked whether it should adopt privacy requirements that wireline and wireless carriers are already subject to in the context of interconnected VoIP service. It also inquired about its authority to adopt and implement the potential obligations.[167/]

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159/ *Report to Congress* ¶ 91, n.189.

160/ 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).

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

162/ *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.

163/ James Gifford, *Is Your VoIP Secure*?, COMPUTER TELEPHONY, Sept. 1, 1999, at 99.

164/ *See Wireline Broadband Order* ¶¶ 148-149.

165/ *Id.* ¶ 149.

166/ *E911 Further Notice of Proposed Rulemaking (E911 VoIP Order)* ¶ 62.

167/ *Id.*

### b. Access by Individuals with Disabilities

Section 255 of the Communications Act requires providers of telecommunications services to ensure that their services are accessible and usable by individuals with disabilities.[168/] While the Act limits this obligation to telecommunications service providers, the FCC has broadly interpreted this provision to include "all entities that make telecommunications services available,"[169/] and has used its ancillary jurisdiction to extend Section 255 to providers of voicemail and interactive menu services, which are considered to be information services.[170/]

The FCC in 2002 issued a Further Notice of Inquiry seeking comment on the application of Section 255 to VoIP services.[171/] 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.[172/] Chairman Powell stated that the FCC would continue to focus on accommodating special needs, especially in areas the market would not address effectively.[173/] The FCC favors voluntary industry action in this regard over government regulation, and recognized the Voice on the Net ("VON") Coalition's voluntary commitment to ensure that VoIP services are accessible to individuals with disabilities and that access needs are taken into account in the development of new products and services.[174/]

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168/ 47 U.S.C. § 255(c).

169/ *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*").

170/ *Id.* ¶ 93. Notably, however, then Commissioner Powell issued a separate statement, expressing his "grave concerns" over the FCC's use of ancillary jurisdiction to reach these services given Congress's apparent intent to limit Section 255 to telecommunications services.

171/ 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).

172/ *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).

173/ FCC Chairman Michael Powell, Remarks Before the Federal Communications Bar Ass'n, *available at* http://www.fcc.gov/Speeches/Powell/2001/spmkp105.html (Jun. 21, 2001).

174/ *Section 255 Order and Further NOI* ¶ 176; *see also* Letter from Bruce D. Jacobs, Counsel to the VON Coalition, to Magalie R. Salas, Secretary, Federal Communications Commission, WT Docket No. 96-198 (filed July 7, 1999). The VON Coalition, a trade association with member companies involved in the development of voice services using data networks, including the Internet, includes service providers such as Delta Three, IDT, ITXC, and USA Global LINK, and their suppliers, including Cisco, Intel, Microsoft, Netspeak, and Vocaltec.

There is no uniform standard for the assistive technologies ("ATs") used by those with hearing disabilities, and therefore, ATs may not be compatible with the new technologies being deployed. As a result, the industry, along with the FCC's Technology Advisory Council, continues to look at these issues and at possible solutions, such as creating "patches and adaptors" to allow new technologies to work with old AT or migrating persons with disabilities to new AT that may be more compatible with VoIP technology.[175/] In addition, the FCC held a "Solutions Summit" on disability access issues in May 2004.[176/] The Summit focused on the particular challenges and opportunities created for persons with disabilities. Consumer organizations, VoIP and information service providers, disability access advocates, and equipment manufacturers participated in the Summit.

In the June 2005 *E911 VoIP Orde*r the FCC issued an NPRM that addressed, among other matters, whether persons with disabilities can use interconnected VoIP services and other VoIP services to directly call a PSAP via a TTY "in light of the requirement in Title II of the Americans with Disabilities Act (ADA) that PSAPs be directly accessible by TTYs."[177/] It also discussed the *NOI* addressed above and asked commenters to "refresh the record" concerning the application of the disability accessibility provisions enunciated in Sections 251(a)(2) and 255 to IP telephony services.[178/] 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. Further, it inquired about its authority to implement such regulations.

### c. Truth-in-Billing

Under the FCC's rules, telecommunications common carriers have certain consumer protection obligations, including providing truthful, non-misleading telephone bills to their subscribers.[179/] 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.[180/] 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.[181/] 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.[182/]

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175/ John Spofford, *Voice-Over-IP Deployment*, COMMUNICATIONS DAILY, Sept. 19, 2002, at 6.

176/ *FCC Internet Policy Working Group To Hold Second "Solutions Summit" on Friday, May 7*, News Release (rel. Mar. 11, 2004).

177/ *E911 VoIP Order* ¶ 63.

178/ *Id.*

179/ 47 C.F.R. §§ 64.2400-01.

180/ 47 C.F.R. § 64.2401.

181/ *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, ¶¶ 13-14 (1999).

182/ *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.

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."[183] 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.[184] The Commission did inquire in its *Broadband Consumer Protection NPRM* whether truth-in-billing should apply to broadband Internet access service providers,.[185] In soliciting comments, the FCC noted that it had received complaints about the billing practices of broadband Internet access service providers -- in particular, complaints concerning double-billing and unexplained charges.[186]

### d. Access to Numbers (local number portability)

Verizon, Qwest, and BellSouth (the "BOCs") submitted a White Paper in 2002 to the North American Numbering Council regarding the implications of VoIP on the FCC's number allocation policies, claiming VoIP service providers threatened to exhaust the pool of telephone numbers.[187] The companies urged the FCC to consider how numbers get distributed to VoIP service providers. The provision of foreign exchange services (*i.e.*, customers in California having telephone numbers with New York area codes) was the primary concern raised in the paper. In response, AT&T submitted a paper questioning whether VoIP numbering issues were "much ado about nothing" and recommended against any changes in the current guidelines.[188] In other contexts, the FCC has noted that changing the current rating and use of foreign exchange services "raises billing and technical issues that have no concrete, workable solutions."[189]

In their White Paper, the BOCs also asked whether the number assignment rules should apply to VoIP service providers. These rules currently do not apply to VoIP service providers because VoIP service providers do not have an independent right to obtain numbers. Arguably, if the numbering rules are to be applied to VoIP service providers, they should also be given

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P.U.C. July 12, 2001) (establishing rules to implement billing safeguards for non-communications related products and services in telephone bills).

183/ 47 C.F.R. § 64.2400(c).

184/ *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).

185/ *Wireline Broadband Order* ¶¶ 152-153.

186/ *Wireline Broadband Order* ¶ 153.

187/ BellSouth, Qwest and Verizon, *VoIP Numbering Issues* (Nov. 12, 2002) (White Paper presented to the North American Numbering Council at the Nov. 19-20, 2002 Meeting), *available at* http://www.nanc-chair.org/docs/Nov/Nov02_VoIP_White_Paper.doc.

188/ AT&T, *VoIP Numbering Issues - Much Ado About Nothing?* (Jan. 22, 2003) (White Paper presented to the North American Numbering Council at the Jan. 22, 2003 Meeting), *available at* http://www.nanc-chair.org/docs/documents.html.

189/ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶ 301 (2002).

direct access to numbers. This issue has become more important in light of SBC IP Communications' request to obtain number resources directly from the numbering administrator. On June 17, 2004, the FCC granted SBC IP's request for Special Temporary Authority to obtain numbering resources directly from the Pooling Administrator for use in a limited, non-commercial trial of VoIP services.[190/] The FCC determined that allowing SBC IP to receive numbers directly would permit SBC IP to interconnect with the PSTN on a trunk-side basis at a centralized switching location, which would allow SBC IP to more efficiently use its softswitch and gateways.

On July 7, 2004, SBC IP filed a petition seeking permanent authority to access numbering resources directly from the North American Numbering Plan Administrator ("NANPA") and/or the Pooling Administrator ("PA") without obtaining the necessary carrier certification. The FCC asked for comments on SBC IP's request. Many commenters argued that SBC IP's waiver request cannot be resolved in isolation and the FCC should address the issues in an integrated fashion to provide market certainty to all VoIP service providers. Others urged the FCC to remain cautious when considering SBC IP's request given SBC IP's privileged status as a BOC affiliate.

In February 2005, the FCC granted SBC IP permission to directly obtain numbering resources from the NANPA or PA for use in deploying VoIP services to residential and business customers.[191/] The FCC found that granting SBC IP's waiver request would expedite the implementation of IP-enabled services and enable SBC IP to deploy innovative new services. SBC IP's right to obtain numbers directly is conditioned on its compliance with the FCC's number utilization rules and compliance filing requirements and will remain in place until the FCC adopts final numbering rules for IP-enabled services.[192/]

The FCC also asked the North American Numbering Council ("NANC") to review whether the FCC's current numbering rules should be modified to allow IP-enabled service providers to directly access numbering resources. On August 3, 2005, the NANC provided its report to the FCC, recommending that VoIP service providers be able to acquire numbering resources directly from the NANPA, so long as the VoIP service providers meet certain conditions.[193/] The report recommended that VoIP service providers, to be eligible to receive numbers from NANPA, must offer services on a commercial basis to residential or business customers and "must demonstrate facilities readiness" to allow calls from the PSTN to be completed to those numbers.[194/] NANC also recommended that VoIP service providers receiving numbers be required to comply with rules an regulations applying to other entities receiving numbers, including compliance with numbering resource optimization guidelines, local number

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190/ *Administration of the North American Numbering Plan*, CC Docket No. 99-200, Order, 19 FCC Rcd 10708, ¶ 1 (2004).

191/ *Administration of the North American Numbering Plan*, CC Docket No. 99-200, Order, 20 FCC Rcd. 2957, ¶ 1 (2005) ("*SBC IP Numbering Order*").

192/ *Id*. ¶

193/ VOIP SERVICE PROVIDERS' ACCESS REQUIREMENTS FOR NANP RESOURCE ASSIGNMENTS: NANC REPORT AND RECOMMENDATION, at 13-14 (July 19, 2005), *available at* http://www.fcc.gov/wcb/tapd/Nanc/nancfuture.html.

194/ *Id*. at 13.

portability requirements, and financial contribution to number administration, number pooling, and local number portability cost obligations.[195/] The FCC has not acted on the NANC recommendation.

The FCC indicated in the *SBC IP Numbering Order* that it would grant similar relief to other parties who sought it.[196/] Subsequently, the Commission opened pleading cycles for petitions from two companies seeking similar rights,[197/] and received petitions from at least three other companies.[198/] To date, no orders have been issued by the FCC with regard to any of these petitions for numbering rights similar to those granted to SBC IP.

### 6. *Intercarrier Compensation NPRM*

"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.[199/] As a general rule, FCC rules govern access charges for interstate long distance calls; state rules govern intrastate access charges.[200/] 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.[201/] The FCC, however, has primary jurisdiction over reciprocal compensation required by Section 251(b)(5) of the Act, which governs *all* telecommunications traffic.[202/] The state commissions also have a role with

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195/ *Id*. at 14.

196/ *SBC IP Numbering Order* ¶ 11.

197/ *Pleading Cycle Established for Comments on Petition for Limited Waiver Filed by Country Code 1 ENUM LLC*, CC Docket No. 99-200, Public Notice, 21 FCC Rcd. 3918 (2006); *Wireline Competition Bureau Seeks Comment on Qwest Communications Corporation Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, Docket No. 99-200, Public Notice, 20 FCC Rcd. 8765 (2005).

198/ *CoreComm-Voyager, Inc. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, CC Docket No. 99-200, Petition for Limited Waiver (filed Apr. 22, 2005); *Vonage Holdings Corp. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, CC Docket No. 99-200, Petition for Limited Waiver (filed Mar. 4, 2005); *Dialpad Communications, Inc. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, CC Docket No. 99-200, Petition for Limited Waiver (filed Mar. 1, 2005).

199/ 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 Section 251(g) for its determinations), *petition for reh'g and reh'g en banc denied* (Sept. 24, 2002), *cert. denied sub nom.*, 123 S. Ct. 1927 (2003).

200/ 47 U.S.C. § 152; *Compare* 47 U.S.C. § 251(b)(5) *with Intercarrier Compensation NPRM* ¶ 69.

201/ *See* 47 U.S.C. 215(g).

202/ 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).

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.[203/]

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.[204/] After nearly four years of inaction, the FCC issued the *Intercarrier Compensation NPRM* in March 2005 seeking to refresh the record on the adoption of a unified regime.[205/] 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.[206/] The *Intercarrier Compensation NPRM* 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.[207/] 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 exempted 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."[208/]

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'."[209/] While the Commission did initiate the

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203/ 47 U.S.C. § 252.

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

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

206/ *Intercarrier Compensation NPRM* ¶¶ 2, 12.

207/ 47 C.F.R. § 69.5(b).

208/ *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).

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

intended relevant proposed rulemakings, they remain pending.[210] In the *2001 ICC NPRM*, the Commission stated IP-enabled traffic "is exempt from the access charges that traditional long-distance carriers must pay."[211] In 2004, the FCC sought comment in its *IP-Enabled NPRM* about whether VoIP-originated calls should continue to be exempt from access charges.[212] Later that same year, when it found that IP-in-the-middle calls may be subject to access charges, the Commission again stressed that the access charge exemption is the rule for IP-originated calls.[213] Thus, the Commission'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.[214]

The Commission's more recent *AT&T IP-in-the-Middle Order* is consistent with its prior rulings. If the Commission'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 Commission to issue this order. In its decision, the Commission separated the type of service described by AT&T – *i.e.*, one that uses ordinary customer premises equipment ("CPE"), originates and terminates on the public switched telephone network ("PSTN"), and undergoes no net protocol conversion and provides no enhanced functionality to end users - from IP-originated services that offer enhanced functionality.[215] Although, the Commission 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 the Commission's 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 Commission's current policy is that "IP telephony [is] generally exempt from access charges . . ."[216] As the Commission 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.[217]

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

211/ *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).

212/ *IP-Enabled NPRM* ¶¶ 61-62.

213/ *AT&T IP-in-the-Middle Order* ¶ 9 (noting that the Commission 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).

214/ *IP-Enabled NPRM* ¶ 30; *2005 ICC 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").

215/ *AT&T IP-in-the-Middle Order* ¶ 1.

216/ *2001 ICC NPRM* ¶ 6.

217/ *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 section 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

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").[218/] 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."[219/] 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.[220/]

Moreover, the Commission'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.[221/] As discussed above, 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.[222/] 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.[223/]

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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.

218/ *See generally AT&T IP-in-the-Middle Order*. The Commission 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.

219/ *AT&T IP-in-the-Middle Order* at n.92.

220/ *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*").

221/ *See, e.g., 2005 ICC 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 Commission's 1997 *Access Charge Reform Order* does not support this conclusion. Although the Commission was addressing that particular form of interconnection in the *Access Charge Reform Order*, the Commission has not restricted the ESP exemption solely to calls terminated to an ISP as discussed above.

222/ *See, e.g., AT&T IP-in-the-Middle Order* ¶ 9. In the *AT&T IP-in-the-Middle Order*, the Commission 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 Commission understood that *IP-originated* calls were indisputably included within the exemption.

223/ 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.

The pending outcome of the FCC's *2005 ICC FNPRM*, as influenced by the recently filed Missoula Plan, could change the FCC's prior rulings on the intercarrier compensation treatment to be extended to IP-enabled service traffic.[224/] 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 filing of the Missoula Plan, however, has no effect on the analysis of current law and it is difficult to predict whether the Plan will be adopted.

While 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.[225/] 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"),[226/] 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.[227/]

Attempts to block customer calls probably will not be tolerated by regulators. The FCC has disfavored self-help policies,[228/] and took action against one ILEC for allegedly blocking VoIP traffic.[229/] The state commissions also would most likely not respond favorably to an ILEC

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224/ *See* NARUC July 24, 2006, *Ex Parte* in CC Docket 01-92, *2005 ICC FNPRM* ("*Missoula Plan").*

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

226/ Grande says that it forwards the CPN to the terminating carrier.

227/ If Insight offers termination service to other ISPs or VoIP service providers, it should ensure that all of its VoIP customers certify in writing that their traffic is originated in IP format.

228/ *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).

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

that blocked traffic. The non-uniform, artificial access charge constructs of the past have outlived their social purpose and Commission action to implement a uniform intercarrier compensation regime as envisioned by the Act is long overdue.[230/] FCC action on the *ICC FNPRM* that is consistent with Congressional directives will best ensure the public interest is protected and all customer calls are completed.

### 7. Universal Service Proceedings

In another 2002 proceeding addressing the methodology for assessing and recovering universal service contributions, the FCC noted that the "accelerating development of new technologies like 'voice over Internet' increases the strain on regulatory distinctions such as interstate/intrastate and telecommunications/non-telecommunications, and may reduce the overall amount of assessable revenues reported under the current system."[231/] As discussed above, the FCC has applied USF contribution obligations to interconnected VoIP service providers[232/] and eliminated the USF contribution obligations for wireline broadband service providers,[233/] the larger task is to resolve the outstanding issues concerning the appropriate methodology for recovery, size of the fund, eligible services and eligible recipients of fund resources.[234/] As Chairman Martin aptly stated while speaking at a telecommunications conference, the current "interstate revenue-based method" is outdated.[235/] He indicated his support for a universal support contribution system based on telephone numbers, arguing that the mechanism would be "competitively and technology neutral."

### 8. Petitions for Declaratory Ruling, Preemption, and Forbearance

#### a. Time Warner Cable Petitions for Declaratory Ruling and Preemption

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"[236/] be fully implemented by 2007, with "broadband technology to every corner of our country by the year 2007."[237/] As we approach 2007, state actions are

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

231/ *Federal-State Joint Board on Universal Service 1998 Biennial Regulatory Review Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, 17 FCC Rcd 3752, ¶ 13 (2002) ("*Universal Service NPRM*").

232/ *See* Part II.A.3.d, *supra*.

233/ *See* Part II.A.4.c, *supra*.

234/ *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, 16 FCC Rcd. 9892 (2001).

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

236/ 47 U.S.C. § 157nt.

237/ *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

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.

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 Sections 251 and 252 of the Communications Act of 1934, as amended ("Act"). In addition, the following reviews several state and court proceedings addressing many of the same issues Time Warner Cable has raised before the FCC.

***Petition for Declaratory Ruling.***[238/] 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.[239/] 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 the result of 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 Section 251 of the Act and FCC precedent unequivocally authorize telecommunications carriers to obtain interconnection to

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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").

238/ *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).

239/ *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).

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 procompetitive policies.

***Petition for Preemption***.[240/] 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).[241/] 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 have 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 has 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. Time Warner Cable seeks preemption because the denial of a CPCN violates Section 253(a) of the Act.

***Illinois***

In July 2005, the Illinois Commerce Commission ("ICC") rejected arguments by several RLECs that Sprint was not a "telecommunications carrier" under the Act because Sprint was not serving end user customers (Sprint was supporting the VoIP services to be provided by MCC Telephony, which is the Mediacom entity providing VoIP services).[242/] The ICC found that Sprint was a telecommunications carrier and was entitled to interconnect with the RLECs pursuant to Sections 251(a) and 251(b) of the Act.

Subsequently, Sprint filed a petition for arbitration against the RLECs. One group of RLECs filed a motion to dismiss arguing that the ICC did not have jurisdiction over the services because they were VoIP services (another group of RLECs filed a motion to dismiss arguing that Sprint was not a telecommunications carrier, and thus, did not have rights under Sections 251 and 252, but those RLECs later reached an interconnection agreement with Sprint). The ICC

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240/ *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).

241/ *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 March 1, 2006).

242/ 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).

ruled that the issues raised by the RLECs had been resolved in its July 2005 decision, and determined that the RLECs were required to interconnect with Sprint.[243/]

The RLECs appealed both ICC decisions to federal district court in January 2006, and more recently asked for the issuance of a preliminary injunction.[244/] The RLECs contend that Sprint is not acting as a telecommunications carrier in connection with its provision of services to MCC Telephony. A hearing on the preliminary injunction is set for mid-December 2006, and the RLECs have asked for discovery on the contract between Sprint and MCC Telephony. Sprint has opposed this request or the alternative asked for a protective order to govern the RLECs' review of the contract given the sensitive financial information contained in the contract and the fact that the RLECs are competitors to Sprint and MCC Telephony. The federal district court judge currently is reviewing Sprint's request.

***Indiana***

Sprint provides underlying telecommunications services to MCC Telephony in Indiana. In November 2005, Sprint requested interconnection from several RLECs, and later filed a petition for arbitration with the Indiana Utility Regulatory Commission ("IURC"). One of the issues in the petition for arbitration was whether the definition of "end user" in the interconnection agreement should include MCC Telephony's end users or only Sprint's retail customers. The RLECs also filed a motion to dismiss arguing that Sprint was not a telecommunications carrier. On September 6, 2006, the IURC issued an order denying the motion to dismiss and finding that Sprint was offering service to MCC Telephony consistent with common carrier and telecommunications provider definitions.[245/] The IURC also confirmed that Section 252 arbitration is available for Section 251(a) interconnection issues.

***Iowa***

In late 2004, Sprint requested interconnection from Iowa Telecom and other RLECs, and later filed a petition for arbitration with the Iowa Utilities Board ("Board"). Iowa Telecom filed a motion to dismiss alleging that Sprint was not a telecommunications carrier because Sprint was only providing service to MCC Telephony. The Board granted Iowa Telecom's motion to dismiss,[246/] and Sprint appealed the Board ruling to federal district court.[247/] While the appeal was

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[243/] 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).

[244/] 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).

[245/] 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).

[246/] 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).

pending, the Board reconsidered its previous ruling and found that Sprint is a telecommunication carrier and is entitled to interconnection, and consequently reopened the prior arbitration proceedings.[248/] In March 2006, the Board issued its arbitration order and directed the parties to file an agreement,[249/] which was filed in April 2006. Iowa Telecom and several other RLECs have appealed the Board's March 2006 arbitration order to the United States District Court for the Southern District of Iowa.[250/] Briefing will be complete in mid-January 2007.

On the day the interconnection agreement filed in April 2006 was deemed approved under the Board's rules, Iowa Telecom sent a letter to Sprint to terminate the interconnection agreement. Although the Sprint-Iowa Telecom interconnection agreement was effective, Iowa Telecom refused to process Sprint's orders for interconnection facilities or to exchange traffic with Sprint. As a result, MCC Telephony could not market its services in Iowa Telecom territory. Consequently, in July 2006, Sprint and MCC Telephony filed a complaint with the Board alleging that Iowa Telecom refused to interconnect with Sprint, which prevented MCC Telephony from providing VoIP services.[251/] Sprint and MCC Telephony claimed that Iowa Telecom was violating the Board-approved interconnection agreement, the order approving the agreement, and Iowa interconnection and discrimination regulations, and requested a preliminary injunction and emergency relief. Although the Board rejected Sprint's request for a preliminary injunction and emergency relief,[252/] on November 9, 2006, the Board issued an order in Sprint's favor.[253/] Specifically, the Board found that Iowa Telecom is required to exchange traffic with Sprint for customers of MCC Telephony, port telephone numbers to Sprint for customers of MCC Telephony, and accept all orders for interconnection facilities from Sprint in accordance with the interconnection agreement.

***Montana***

IDT Telecom provides underlying telecommunications services to Bresnan (a cable VoIP service provider) in Montana, including number portability capabilities. IDT submitted several

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247/ Case No. 4:05-CV-00354, *Sprint Communications Company L.P. v. Iowa Utilities Board*, Complaint (S.D. Iowa filed June 23, 2005).

248/ Docket No. ARB-05-2, *Sprint Communications Company L.P. v. Ace Communications Group, et al.*, Order on Rehearing (I.U.B. Nov. 28, 2005).

249/ Docket No. ARB-05-2, *Sprint Communications Company L.P. v. Ace Communications Group, et al.*, Arbitration Order (I.U.B. Mar. 24, 2006).

250/ *Iowa Telecommunications Services, Inc. d/a/b Iowa Telecom, et al. v. Iowa Utilities Board, et al.*, Complaint (S.D. Iowa filed June 23, 2006).

251/ Docket No. FCU-06-49 (ARB-05-2), *Sprint Communications Company L. P. and MCC Telephony of Iowa, LLC v. Iowa Telecommunications Services d/b/a Iowa Telecom*, Motion to Enforce Arbitration Agreement or in the Alternative Complaint (I.U.B. filed July 24, 2006).

252/ Docket No. FCU-06-49 (ARB-05-2), *Sprint Communications Company L. P. and MCC Telephony of Iowa, LLC v. Iowa Telecommunications Services d/b/a Iowa Telecom*, Order Denying Preliminary Injunction (I.U.B. Sept. 5, 2006).

253/ Docket No. FCU-06-49 (ARB-05-2), *Sprint Communications Company L. P. and MCC Telephony of Iowa, LLC v. Iowa Telecommunications Services d/b/a Iowa Telecom*, Final Decision and Order and Order Allocating Costs (I.U.B. Nov. 9, 2006).

requests to port the telephone numbers of consumers that elected to switch from a RLEC in Montana to Bresnan. Although properly documented and made consistent with the requirements of the interconnection agreement between IDT and the RLEC, all of IDT's number portability requests were rejected by the RLEC. After numerous inquiries as to why the port requests were not being completed, the RLEC informed IDT that it had rejected IDT's requests on the sole ground that the RLEC believed that the port requests were not related to IDT's end users. IDT filed a complaint against the RLEC with the Montana PSC arguing that the RLECs' refusal to port numbers was a violation of the FCC's rules, the interconnection agreement between IDT and the RLEC, and Montana law.[254/] IDT and the RLEC reached a negotiated resolution without the PSC issuing an order on the complaint.

***Nebraska***

In December 2004, Sprint requested interconnection from the Southeast Nebraska Telephone Company ("SENTCO"), and later filed a petition for arbitration with the Nebraska PSC in May 2005. One of the issues to be arbitrated was whether the definition of "end user" should include end users of a service provider for whom Sprint provides interconnection and other telecommunications services. SENTCO argued that Sprint could not use the interconnection agreement for the benefit of Time Warner Cable or any other third party. On September 13, 2005, the Nebraska PSC issued an order finding that Sprint had not demonstrated that it was a telecommunications carrier when it acts under its private contract with Time Warner, and thus could not request interconnection or reciprocal compensation arrangements from SENTCO.[255/] Sprint appealed the Nebraska PSC's decision to the United States District Court for the District of Nebraska.[256/] In May 2006, the court granted SENTCO's motion to stay the proceeding pending release of a decision by the FCC in response to the petitions filed by Time Warner Cable.

***New York***

In February 2005, Sprint filed a petition for arbitration against twelve RLECs. In response, the RLECs claimed that Sprint was not a telecommunications carrier because it was not an ultimate provider of end user services, and thus the RLECs' Section 251(a) and Section 251(b) duties were not triggered. The New York PSC disagreed, and found that Sprint met the definition of telecommunications carrier and is entitled to interconnect with the RLECs.[257/] Most of the RLECs appealed the New York PSC's decision to federal district court.[258/]

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254/ 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).

255/ 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).

256/ Case No. 05-CV-3260, *Sprint Communications Company L.P. v. Nebraska Public Service Commission, et al.*, Complaint for Declaratory and Injunctive Relief (D. Neb. filed Oct. 11, 2005).

257/ Cases 05-C-0170, 05-C-0183, *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with*

On October 27, 2006, the United States District Court for the Western District of New York issued a decision upholding the New York PSC's findings.[259/] The court rejected the RLECs' arguments and found that Sprint was acting as a common carrier, which the court found synonymous with telecommunications carrier. The court recognized that Sprint could be a common carrier by holding itself out to provide wholesale telecommunications services to other carriers, but found the record inadequate to make that finding in this particular instance. Instead, the court found that Sprint was not merely providing wholesale services that Time Warner Cable used to serve end users, but that "Sprint and Time Warner are together providing local exchange service to end users." The court concluded that: "here there is no single company providing competitive local exchange service, but rather, there are two companies, each providing a portion of the exchange service . . . Sprint, acting on behalf of itself and Time Warner, is entitled to request the services listed under 251(b)."

***North Carolina***

In March 2006, Time Warner Cable Information Services (North Carolina), LLC ("TWCIS(NC)") filed a petition for arbitration with the North Carolina Rural Electrification Authority ("REA") against three RLECs. In addition to the petitions for arbitration, TWCIS(NC) filed petitions to terminate the RLECs' rural exemptions to the extent the REA determined that TWCIS(NC)'s interconnection request implicated the exemption. The RLECs filed motions to dismiss the arbitration and termination petitions arguing that TWCIS(NC) was not a telecommunications carrier and thus did not have a right to request interconnection, file for arbitration, or petition to have the rural exemption terminated. In July 2006, the REA issued an order granting the motions to dismiss. The REA found that TWCIS(NC) was not a telecommunications carrier and did not have rights to seek interconnection under Section 251 or pursue arbitration under Section 252.[260/] Given that ruling, the REA determined it was not required to reach the issue of termination of the rural exemption.

***Ohio***

In May 2006, Sprint requested interconnection from Chillicothe, a RLEC operating in Ohio. The Public Utilities Commission of Ohio ("PUCO") previously had denied Chillicothe's request to continue its rural exemption although Chillicothe has appealed that decision to the

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*Independent Companies, et al.*, Order Resolving Arbitration Issues (N.Y.P.S.C. May 24, 2005), Order Denying Rehearing (N.Y.P.S.C. Aug. 24, 2005).

258/ Case 05-CV-6502, *Berkshire Telephone Corp., et al. v. Sprint Communications Company L.P.*, Complaint (W.D.N.Y. filed Sept. 26, 2005).

259/ *Berkshire Telephone Corp., et al. v. Sprint Communications Company L.P.*, 2006 U.S. Dist. LEXIS 78924 (W.D.N.Y. Oct. 30, 2006).

260/ Docket Nos. TMC-1, Sub 1, TMC-3, Sub 1, TMC-5, Sub 1, *Petition of Time Warner Cable Information Services (North Carolina), LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish Interconnection Agreements with Atlantic, Randolph, and Star Telephone Membership Corporations, et al.*, Order Consolidating and Dismissing Proceedings (N.C.R.E.A. July 19, 2006).

Supreme Court of Ohio.[261/] On October 13, 2006, Sprint filed a petition for arbitration against Chillicothe, in which two of the issues are whether the definition of "end user" should permit Sprint's provision of wholesale service and whether the definition of local telecommunications traffic should include voice calls utilizing VoIP technology.[262/] In response, Chillicothe argued that Sprint was acting as a "front" for Time Warner Cable, and that permitting this to take place would subject Chillicothe to a severe economic and competitive disadvantage.[263/] Hearings and briefs are scheduled for early 2007, with a decision by the PUCO expected in March 2007.

Extension of 251(f) Protections. Sprint sent requests to negotiate interconnection agreements to several RLECs in Ohio. In turn, those RLECs filed with the PUCO to seek relief pursuant to Section 251(f) from their interconnection obligations. Sprint argued that its request for interconnection did not implicate Section 251(c) or the rural exemption. In an order issued November 21, 2006, the PUCO initially found that Sprint's request for interconnection did implicate Section 251(c) and therefore the RLECs' request regarding the rural exemption was appropriate.[264/] The PUCO also determined that the total economic impact of Sprint's interconnection on behalf of Time Warner Cable would cause an undue burden on the RLECs and thus necessitated retention of the rural exemption for two years for some of the RLECs and indefinitely for the remaining RLEC. The RLECs with the two-year extensions are required to report to the PUCO semi-annually on the steps they are taking to prepare for the potential introduction of competition in their service territories.

Previous PUCO Decision. In late 2004, MCI (who was providing underlying telecommunications services to Time Warner Cable) requested interconnection from several RLECs operating in Ohio. The RLECs filed a petition with the PUCO seeking relief as rural carriers under Section 251(f) of the Act. As part of that proceeding, the RLECs argued that MCI was not a telecommunications carrier (and thus did not have interconnection rights) because MCI was only providing service to Time Warner Cable, not to the public. In a January 2005 order and a subsequent rehearing order in April 2005, the PUCO determined that telecommunications carriers offering services to VoIP service providers were entitled to interconnection and other rights under Sections 251 and 252 because those telecommunications carriers were "acting in a role no different than other telecommunications carriers whose network could interconnect with

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261/ Case No. 05-1298-TP-UNC, *Application and Petition Filed by the Chillicothe Telephone Company in Accordance with Section II.A.2.b. of the Local Service Guidelines*, Finding and Order (P.U.C.O. Mar. 20, 2006), Order on Rehearing (P.U.C.O. July 12, 2006); Case No. 06-1697, *The Chillicothe Telephone Company, Appellant v. The Public Utilities Commission of Ohio, Appellee*, Notice of Appeal (Ohio filed Sept. 11, 2006).

262/ Case No. 06-1257-TP-ARB, *Sprint Communications Company L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Chillicothe Telephone Company*, Petition of Sprint Communications Company L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 (P.U.C.O. filed Oct. 13, 2006).

263/ Case No. 06-1257-TP-ARB, *Sprint Communications Company L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Chillicothe Telephone Company*, The Chillicothe Telephone Company's Response to Sprint Communications Company L.P.'s Petition for Arbitration (P.U.C.O. filed Nov. 7, 2006).

264/ Case No. 06-884-TP-UNC, *et al.*, *Application and Petition in Accordance with Section II.A.2.b. of the Local Service Guidelines Filed by Buckland Telephone Company, Minford Telephone Company, The Glandorf Telephone Company, Inc. and Sycamore Telephone Company*, Finding and Order (P.U.C.O. Nov. 21, 2006).

[ILECs] so that traffic is terminated to and from each network and across networks."[265/] The PUCO also denied the RLECs' requests for protection from their interconnection obligations under Section 251(f) of the Act.

***South Carolina***

Davidson Cable is a cable and Internet service provider that is in the process of upgrading its system to offer telephone services. On November 2, 2006, Davidson Cable filed a letter with the South Carolina PSC alleging that Hargray Communications, a RLEC serving Davidson Cable's territory, is "protecting" its telephone numbers and not allowing customers to retain their telephone number when they attempt to switch to Davidson Cable's services.[266/] Davidson Cable also pointed out that, at the same time as Hargray is refusing to allow its customers to port their telephone numbers, Hargray is offering video services over its phone lines to compete with Davidson Cable's incumbent cable customers. The South Carolina PSC has ordered Hargray to respond to the letter by December 14, 2006.[267/]

Time Warner Cable. Even after filing its petitions with the FCC regarding the previous actions of the South Carolina PSC (which are described above), Time Warner Cable has continued to argue before the South Carolina PSC that it is entitled to interconnect with the RLECs. In December 2005, Time Warner Cable filed complaints against five RLECs in South Carolina claiming that the RLECs were in violation of the Act by failing to negotiate interconnection agreements with TWCIS(SC).[268/] The RLECs denied any allegations of wrongdoing, filed a motion to dismiss or in the alternative a motion asking the South Carolina PSC to hold the complaint proceeding in abeyance pending the outcome of the FCC's proceedings. In response, TWCIS(SC) filed a motion for summary judgment asking the PSC to find that the RLECs were required to negotiate with TWCIS(SC) in accordance with previous rulings issued by the PSC. On September 13, 2006, the South Carolina PSC issued an order in which it denied TWCIS(SC)'s motion for summary judgment, denied the RLECs' motion to dismiss, and granted the RLECs' motion to hold the proceeding in abeyance for 120 days or until

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265/ Case Nos. 04-1494-TP-UNC, *et al., Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines Filed by: The Champaign Telephone Co., Telephone Services Co., the Germantown Independent Telephone Co., and Doylestown Telephone Co.*, Finding and Order (P.U.C.O. Jan. 26, 2005), *reh'g denied in pertinent part*, Order on Rehearing (P.U.C.O. Apr. 13, 2005).

266/ Docket No. 2006-343-C, *Davidson Cable TV of SC, Inc., Complaint/Petitioner v. Hargray Telephone Company, Inc., Defendant/Respondent*, Letter from William Harvey, General Manager, Davison Cable TV of SC, Inc., to Public Service Commission of South Carolina (S.C.P.S.C. filed Nov. 2, 2006).

267/ Docket No. 2006-343-C, *Davidson Cable TV of SC, Inc. Complaint/Petitioner v. Hargray Telephone Company, Inc. Defendant/Respondent*, Notice (S.C.P.S.C. Nov. 13, 2006).

268/ Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C, *Time Warner Cable Information Services (South Carolina), LLC, Complainant/ Petitioner, vs. St. Stephen Telephone Company, Defendant/Respondent, et al.*, Complaint (S.C.P.S.C. filed Dec. 28, 2005).

the FCC rules on Time Warner Cable's pending petitions.[269/] TWCIS(SC) asked the South Carolina PSC to reconsider its ruling, but the request was denied.[270/]

***South Dakota***

Sprint is supporting MCC Telephony's voice product in South Dakota. On October 16, 2006, Sprint filed a petition for arbitration against an RLEC, which raised the issue of whether the interconnection agreement between Sprint and the RLEC should be limited to the provision of service to Sprint's retail end users only rather than wholesale customers, such as MCC Telephony.[271/] In response to Sprint's petition, the RLEC argued that Sprint had no standing to request interconnection for purposes of complying with its private contractual obligations with MCC Telephony and that it is improper for Sprint to request interconnection with the RLEC for the end user customers of MCC Telephony.[272/] The South Dakota Public Utilities Commission ("PUC") will conduct hearings and issue a decision in the coming months.

***Texas***

In September 2005, Sprint filed petitions for arbitration against several Consolidated Communications entities. In light of the decision issued by the Texas PUC in the *Brazos* proceeding finding that Brazos' rural exemption must be terminated prior to the filing of an arbitration petition[273/] and the federal court's ruling upholding that decision (which has been appealed by Sprint),[274/] in March 2006, Sprint filed a petition seeking to terminate Consolidated Communications' rural exemption. In reply, Consolidated argued that Sprint had no standing to request termination of the exemption because Sprint did not serve end user, retail customers and

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269/ Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C, *Time Warner Cable Information Services (South Carolina), LLC, Complainant/ Petitioner, vs. St. Stephen Telephone Company, Defendant/Respondent, et al.*, Order 2006-215 (S.C.P.S.C. Sept. 13, 2006).

270/ Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C, *Time Warner Cable Information Services (South Carolina), LLC, Complainant/ Petitioner, vs. St. Stephen Telephone Company, Defendant/Respondent, et al.*, Order 2006-615 (S.C.P.S.C. Nov. 6, 2006).

271/ Docket No. TC06-175, *Sprint Communications Company L.P.'s Petition for Consolidated 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 Interstate Telecommunications Coop.*, Petition for Arbitration and Request for Consolidation of Sprint Communications Company L.P. (S.D.P.U.C. filed Oct. 16, 2006).

272/ Docket No. TC06-175, *Sprint Communications Company L.P.'s Petition for Consolidated 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 Interstate Telecommunications Coop.*, Response of Interstate Telecommunications Cooperative, Inc. to the Petition for Arbitration and Request for Consolidation of Sprint Communications Company, L.P. (S.D.P.U.C. filed Nov. 13, 2006).

273/ PUC Docket No. 31038, *Petition of Sprint Communications Company L.P. for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection Terms with Brazos Telecommunications Inc.*, Order No. 1 Granting Motion to Dismiss (Tx. P.U.C. June 14, 2005); Order Denying Sprint's Appeal of Order No. 1 (Tx. P.U.C. Dec. 2, 2005).

274/ Case No. A-05-CA-065-SS, *Sprint Communications Company L.P. vs. The Public Utility Commission of Texas, et al.*, Order (W.D. Tx. Aug. 14, 2006), *appeal filed*, Notice of Appeal (W.D. Tx. filed Sept. 11, 2006).

because the FCC had preempted the Texas PUC's jurisdiction over VoIP traffic. The Texas PUC granted Sprint's request, and ordered Consolidated to enter into arbitration with Sprint to reach an interconnection agreement.[275/] On October 12, 2006, Consolidated appealed the Texas PUC's termination of its rural exemption to United States District Court for the Western District of Texas.[276/] The appeal is pending.

After the Texas PUC's order terminating Consolidated's rural exemption, Sprint then filed an amended petition for arbitration on September 11, 2006, which included the issue of whether the definition of "end user" should include Sprint's provision of wholesale services. On November 22, 2006, the Texas PUC issued a proposed arbitration award approving Sprint's proposed definition of "end user, finding there was no requirement for Sprint to name its wholesale customers in the agreement, determining that the traffic exchanged between the parties should be treated in the same manner as any other voice traffic, and finding that service provided by Sprint under wholesale arrangements is not transit traffic.[277/] A final arbitration award is due to be issued December 19, 2006.

***Wisconsin***

On June 30, 2006, Time Warner Cable Information Services (Wisconsin), LLC, Sprint Communications Company L.P., and MCC Telephony of the Midwest filed separate requests to expand their certification to provide telecommunications services to include geographic areas served by RLECs.[278/] Several RLECs sought to intervene in the cases arguing that Wisconsin statutes limited the number of providers that may be certified in certain rural areas and that the PSC was required to make certain public interest findings prior to grant of the expanded certificates.[279/] The Wisconsin PSC granted the requests to intervene and determined that the following issues will be reviewed in the proceedings: (1) what conditions may be imposed on the expanded certifications; (2) what services are provided that are subject to certification; (3) what geographical areas are proposed to be served; and (4) how do the Wisconsin statutes and Section

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275/ PUC Docket No. 32582, *Petition of Sprint Communications Company L.P. to Terminate Rural Exemption as to Consolidated Communications of Fort Bend Company and Consolidated Communications of Texas Company*, Order (Tx. P.U.C. Aug. 14, 2006).

276/ Case No. 06-CV-825, *Consolidated Communications of Fort Bend Company and Consolidated Communications of Texas Company v. The Public Utility Commission of Texas, et al.*, Complaint for Declaratory and Other Relief (W.D. Tx. filed Oct. 12, 2006).

277/ PUC Docket No. 31577, *Petition of Sprint Communications Company, L.P. for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection Terms with Consolidation Communications of Fort Bend Company and Consolidated Communications Company of Texas*, Arbitration Award (Tx. P.U.C. Nov. 22, 2006).

278/ *See, e.g.*, Docket No. 5911-NC-101, *Application of Time Warner Cable Information Services (Wisconsin), LLC to Expand Certification as an Alternative Telecommunications Utility*, Application (Wis. P.S.C. filed June 30, 2006).

279/ *See, e.g.*, Docket No. 5911-NC-101, *Application of Time Warner Cable Information Services (Wisconsin), LLC to Expand Certification as an Alternative Telecommunications Utility*, Petition for Public Interest Determinations and Hearing (Wis. P.S.C. filed Aug. 4, 2006).

253 of the Act affect the expanded certifications.[280/] After the submission of evidence, hearings are scheduled for late January 2007.

### b. SBC Petition for Forbearance Decision - Remand

In February 2004, SBC filed a petition for declaratory ruling asking the FCC to declare that its IP platform service is an interstate information service.[281/] SBC argued that the FCC should use its ancillary authority to tailor specific regulatory requirements for the IP platform service, but should not impose the full panoply of common carrier regulation on the service. In addition, SBC filed a petition for forbearance from the application of traditional common carrier regulation to its IP platform service.[282/]

On May 5, 2005, the FCC denied SBC's request for forbearance because, in part, it was unclear whether the regulation at issue actually applied to SBC's services.[283/] The FCC found that Section 10 of the Act supports the interpretation of "barring grants of forbearance from obligations that may or may not otherwise apply."[284/] It stated that an "interpretation permitting petitions seeking such relief would regularly require us to prejudge important issues pending in broad rulemakings and otherwise distort the Commission's deliberative process." [285/] Moreover, the FCC declared that granting forbearance petitions from regulations that may in fact apply to the service would "create serious administrability [sic] concerns and would threaten the Commission's ability to determine its own priorities and set its own agenda."[286/]

The FCC also found SBC's petition was not "sufficiently specific" to determine if its request satisfied the requirements of Section 10 of the Act. In particular the FCC found that SBC did not state with precision which "facilities and services its request for forbearance is meant to include" and failed to address from which provisions of Title II it wished to be exempt[287/] The FCC emphasized its reticence concerning the issuance of "rushed, and potentially poor" decisions that may have significant regulatory implications.

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280/ Docket Nos. 6055-NC-103, 5911-NC-101, 3484-NC-101, *Application of Sprint Communications Company L.P. to Expand Certification as an Alternative Telecommunications Utility, et al.*, Prehearing Conference Memorandum (Wis. P.S.C. Oct. 18, 2006).

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

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

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

284/ *Id.* ¶ 12.

285/ *Id.* ¶ 9.

286/ *Id.* ¶ 10.

287/ *Id.* ¶¶ 14-16.

SBC appealed the FCC's decision to the District of Columbia Circuit Court of Appeals and, in June 2006, the court rejected the Commission's rationale for denying the forbearance petition, remanding the case to the FCC "for further explanation and consideration."[288/]

### B. State Regulation of IP-Enabled Services

State action has decreased since the issuance of *Vonage Order*. Those states that have considered the question of how -- or whether -- they should regulate VoIP services have found few differences between IP-based voice services and traditional circuit-switched voice services.[289/] Pending a definitive ruling from the FCC on the classification of VoIP services, states appear to be poised to jockey for jurisdiction.

#### 1. Minnesota

In August 2003, the Minnesota Public Utilities Commission ("PUC") ruled that the VoIP service provided by Vonage constituted a "telephone service" under Minnesota law and ordered Vonage to comply with state law by seeking a Certificate of Public Convenience and Necessity ("CPCN"), filing a 911 plan, and submitting tariffs.[290/] The PUC closely examined the service provided by Vonage and concluded that "Vonage is offering two-way communication that is functionally no different than any other telephone service."[291/] In addition, the PUC found that it could exercise jurisdiction over Vonage as a company providing telephone service within Minnesota because there is no "federal law that preempts state law with respect to telephone services provided using VoIP technology."[292/]

Vonage appealed the decision to a Minnesota federal district court and sought a preliminary injunction to stop implementation of the Minnesota PUC's order pending review by the court. On October 16, 2003, the Minnesota court granted Vonage a permanent injunction.[293/] The court concluded that Vonage is an information service provider and that information services such as those provided by Vonage must not be regulated by state law. The court found that state regulation would effectively decimate Congress's mandate that the Internet remain

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288/ AT&T v. FCC, 452 F.3d 830, 832 (D.C. Cir. 2006). Note that by the time of the appeal, SBC had changed its name to AT&T.

289/ *See, e.g.*, Docket No. 00-00309, *Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with Bellsouth Telecommunications, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Interim Order of Arbitration Award, at 23 (Tenn. R.U.C. Apr. 3, 2002) (finding that calls using IP technologies should be treated the same as circuit-switched traffic and be subject to the FCC's rules for intercarrier compensation, regardless of whether the call is data or voice), *upheld by* Final Order of Arbitration Award (Tenn. R.U.C. Apr. 24, 2002).

290/ Docket No. P-6214/C-03-108, *Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance (Minn. P.U.C. Sept. 11, 2003).

291/ *Id.* at 8.

292/ *Id.*

293/ Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 994 (D. Minn. 2003).

unfettered by regulation. The Minnesota PUC asked the court to reconsider its decision.[294/] The court denied this request in January 2004, finding that the PUC did not provide an adequate basis for reconsidering the decision.[295/]

The Minnesota PUC appealed the federal court's decision to the United States Court of Appeals for the Eighth Circuit stating that it "respectfully disagrees" with the district court's finding that because Vonage uses the Internet, it provides an information service.[296/] In April 2004, the FCC filed an amicus brief urging the court to refrain from ruling until the FCC completes its pending proceedings in which the FCC plans to address "Vonage's regulatory status in particular and the regulatory status of Internet telephony services more generally."[297/] The FCC noted that there is a public interest in ensuring that courts have the benefit of the FCC's considered views regarding federal and state authority over IP services.[298/]

In addition, as discussed above, Vonage filed a Petition for Declaratory Ruling with the FCC seeking to have the Minnesota PUC's decision preempted,[299/] which was granted by the FCC. Although the FCC granted Vonage's preemption petition prior to oral argument, the Eighth Circuit refused to delay oral arguments. Shortly after oral arguments, the Eighth Circuit issued a decision affirming the federal district court's imposition of an injunction on the Minnesota PUC's attempt to regulate Vonage.[300/] The Eighth Circuit found that the FCC's recently issued *Vonage Order* (discussed above) was binding on the court, and therefore, affirmed the federal district court "on the basis of the FCC Order." The Eighth Circuit noted, however, that if a party prevails on a challenge of the FCC's *Vonage Order*, the Minnesota PUC remains free to challenge the injunction at that time. As discussed above, several parties have challenged the FCC's *Vonage Order*.

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294/ Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, Civil No. 03-5287, Motion for Amended Findings of Fact, Conclusions of Law, and Judgment, or in the Alternative, a New Trial including the Taking of Additional Testimony (MJD/JGL) (Minn. D. Ct. filed Oct. 30, 2003).

295/ Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, Civil No. 03-5287, Memorandum and Order (Minn. D. Ct. Jan. 14, 2004).

296/ Minnesota Pub. Utils. Comm'n. v. Vonage Holdings Corp., No. 04-1434, Notice of Appeal (8th Cir. filed Feb. 13, 2004); *see also Minnesota PUC Appeals VoIP Ruling*, TR DAILY, Feb. 15, 2004.

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

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

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

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

### 2. California

In February 2004, the California PUC instituted a proceeding to investigate the status of VoIP.[301/] The PUC's preliminary analysis suggested that the functional nature of the service, rather than the technology used to deploy the service, would determine whether the service qualifies as a public utility service under California law. As a result, the PUC tentatively concluded that VoIP services interconnected with the PSTN qualified as public utility telecommunications services. The PUC sought comment on that conclusion and looked at the impact of VoIP on universal service programs, access charges, public safety, consumer protection (customer privacy, notice for discontinuance of service, cramming and slamming), and numbering resources. On June 15, 2006, however, the PUC closed the proceeding, finding that it "need not establish a regulatory framework for Voice over Internet Protocol telephony (VoIP) to resolve any of the issues raised in this investigation at this time."[302/]

The California PUC had initiated a rulemaking proceeding in December 2002 to amend its service quality standards, seeking comment on applying its service quality rules "to any intrastate telecommunications service, including any services using Internet Protocol (IP) telephony."[303/] The PUC stated, "Anticipating this emerging technology, we intend for the rules we adopt in this proceeding to apply to similar services regardless of the technology used to provide the service. We seek comment on whether the measures and standards proposed for telecommunications services using traditional technologies are adequate and appropriate for application to services that use IP telephony. We seek comment on whether additional measures are needed for telecommunications services offered over an IP platform."[304/] No order has been issued in that proceeding.

The California PUC also found in 2002 that, despite the FCC's determination that Digital Subscriber Line service ("DSL") is interstate in nature, the California PUC has concurrent jurisdiction with the FCC over DSL transport service and thus can exercise jurisdiction over certain aspects of the service.[305/] The California PUC reasoned that DSL transport involved both interstate and intrastate applications, and that there was no "clear and manifest" congressional intent to preempt all state authority over those services. This finding is directly at odds with the FCC recent *Wireline Broadband Order*. Specifically, the California PUC relied on Section 414

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301/ Investigation No. 04-02-007, *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Order Instituting Investigation (Cal. P.U.C. adopted Feb. 11, 2004).

302/ Investigation No. 04-02-007, *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Opinion Closing Proceeding (Cal. P.U.C. adopted June 15, 2006).

303/ Rulemaking No. 02-12-004, *Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B.R.*, Order Instituting Rulemaking(Cal. P.U.C. Dec. 5, 2002).

304/ *Id.*

305/ Case No. 01-07-207, *California ISP Association, Inc., Complainant v. Pacific Bell Telephone Company; SBC Advanced Solutions, Inc., Defendants*, Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion to Dismiss (Cal. P.U.C. Mar. 28, 2002) ("*California DSL Decision*").

of the Act,[306/] which, in its view, permits states to exercise "their traditional police powers to safeguard consumer health, safety and welfare and to enforce their own laws with regard to interstate services provided to California customers, particularly where the state laws address misrepresentations to consumer and other marketing practices."[307/] Moreover, because the California PUC found that the FCC's end-to-end analysis had "been questioned" by the courts, it chose not to rely on such an analysis, which would have supported the complete preemption of the California PUC's jurisdiction over DSL transport.[308/] While the California PUC's decision did not address VoIP service, it does illustrate how a state might seek to invoke concurrent jurisdiction even where the FCC determines a service to be interstate in nature.

### 3. New York

In late 2003, the New York Public Service Commission ("PSC") asked for comment on a complaint filed by Frontier against Vonage.[309/] Frontier claimed that Vonage was in violation of the New York Public Service Law by offering telephone service in the state of New York without authorization from the PSC. Frontier also argued that Vonage's service threatens public safety and consumer welfare because Vonage does not offer reliable access to 911 emergency services.

In May 2004, the New York PSC determined that Vonage is a telephone corporation as defined by the New York Public Service Law and, therefore, must obtain a CPCN.[310/] The PSC emphasized that it intended only to apply minimal regulations to Vonage to ensure that it did not interfere with the rapid, widespread deployment of new technologies. At the same time, however, the PSC stated that it must ensure that its core public interest concerns, including public safety and network reliability, are met. Thus, the PSC determined that Vonage should be subject to, at most, the same limited regulatory regime that is applied to comparable competitive carriers in New York.

As it did in response to a similar decision from the Minnesota PUC, Vonage appealed the New York PSC's decision to a federal district court in New York. In July 2004, the federal district court issued a preliminary injunction of the PSC's decision.[311/] The court's order states that during the pendency of the injunction, Vonage will make "reasonable good faith efforts" to participate in PSC industry-wide workshops pertaining to 911 and service reliability of VoIP providers, and shall provide the PSC with a contact person in the event of network outages. The

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306/ 47 U.S.C. § 414 ("Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this Act are in addition to such remedies.").

307/ *California DSL Decision* at 8-9.

308/ *Id.* at 9-10.

309/ Case 03-C-1285, *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provisions of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Notice Requesting Comments (N.Y.P.S.C. Oct. 9, 2003).

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

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

injunction does not preclude the PSC from receiving complaints from Vonage customers, referring those complaints to Vonage, and offering to provide non-binding mediation. The order also states that Vonage's voluntary cooperation does not subject Vonage to any New York laws, regulations, or rules applicable to telephone corporations. Vonage asked the federal district court to impose a permanent injunction in light of the FCC's *Vonage Order*.[312/] In December 2005 the United States District Court for the Southern District of New York denied Vonage's request for a permanent injunction against the PSC, citing the FCC's pending rulemaking proceeding concerning the obligations of VoIP providers. The court held that Vonage would not suffer any irreparable harm from the requirements established in the 2004 preliminary injunction with regard to mandatory participation in policy talks to establish certain core principles for the advancement of IP-based service offerings for 911.[313/]

### 4. Florida

The Florida Public Service Commission has made conflicting statements on the regulation of VoIP services. In one instance, in the context of an interconnection arbitration, the Florida PSC determined that the definition of switched access traffic should include IP-based services, and included VoIP services within the definition of services subject to access charges.[314/] On the other hand, in a generic proceeding to review its compensation rules for all services, the PSC deferred a definitive ruling on VoIP services stating that "a broad sweeping decision on this particular issue would be premature at this time."[315/]

Similarly, the PSC refused to review a petition for declaratory ruling by CNM Networks, Inc. that phone-to-phone VoIP was not telecommunications under Florida law.[316/] The Florida PSC found that the issue was pending review before the FCC and it would defer to the outcome of that proceeding. The PSC did, however, direct the staff to "conduct a[n] undocketed workshop to explore the issue of phone-to-phone IP telephony," which was held in January 2003.[317/]

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312/ *Id*., Motion for Permanent Injunction (S.D.N.Y. filed Dec. 20, 2004).

313/ Vonage Holdings Corp. v. New York State P. S. C.., 2005 WL 3440708 (S.D. N.Y. 2005).

314/ Docket No. 991854-TP, *Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc*., Final Order on Arbitration, Order No. PSC-00-1519-FOF-TP (Fla. P.S.C. Aug. 22, 2000) (including phone-to-phone IP telephony in the definition of switched access traffic).

315/ Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Amendatory Order, Order No. PSC-02-1248A-FOF-TP, at 34 (Fl. P.S.C. Sept. 12, 2002).

316/ Docket 021061-TP, *Petition of CNM Networks, Inc. for Declaratory Statement that CNM's Phone-to-Phone Internet Protocol (IP) Telephony Is Not "Telecommunications" and that CNM Is Not A "Telecommunications Company" Subject to Florida Public Service Commission Jurisdiction*, Order Denying Petition for Declaratory Statement, at 3 (Fl. P.S.C. Dec. 31, 2002).

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

### 5. Colorado

In 1999, US WEST (now Qwest) filed a petition with the Colorado Public Utilities Commission regarding the application of access charges to VoIP services.[318/] The PUC never reached the merits of US WEST's arguments.[319/] Qwest then took the issue to the Colorado state courts. In response, the Colorado District Court for the City and County of Denver concluded in 2001 that VoIP service providers should be subject to switched access charges.[320/] Despite the court's decision, in a series of interconnection arbitration decisions, the PUC repeatedly found that VoIP services should not be included in the definition of switched access service and should not be subject to access charges.[321/]

More recently, the Colorado PUC officially closed its generic investigation on VoIP services.[322/] The PUC concluded that "[b]ecause of the legal uncertainty of whether a state may regulate VoIP services, as well as the host of policy issues involved with VoIP, we believe the most prudent course is to take no action with respect to VoIP pending FCC action."[323/] The Chairman of the Colorado PUC also called on VoIP service providers to seek free market solutions to intercarrier compensation and 911 service issues and urged them to negotiate service agreements "to show they are good corporate citizens and to show that traditional regulation is not necessary."[324/] The PUC also directed the staff to continue to monitor the FCC proceedings and comments made by parties related to VoIP.

### 6. Nebraska

The Nebraska PSC voted unanimously to assess a state universal service surcharge on the intrastate portion of *facilities-based* providers of VoIP services.[325/] The order went into effect on June 1, 2005. In its order, the Nebraska PSC stated that the ultimate end points of a call

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318/ Docket No. 99F-141T, *US WEST Communications, Inc. v. Qwest Communications Corporation*, US WEST Communications, Inc. Complaint for Declaratory Judgment (Colo. P.U.C. filed April 2, 1999).

319/ Docket No. 99F-141T, *US WEST Communications, Inc. v. Qwest Communications Corporation*, Order Dismissing Case and Closing Docket, Decision No. C99-1051 (Colo. P.U.C. Sept. 15, 1999).

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

321/ *See, e.g.*, Docket No. 00B-601T, *Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(B) of The Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Initial Commission Decision, Decision No. C01-312, at 30-31 (Colo. P.U.C. Mar. 16, 2001) (finding that the functionality and network use of VoIP service is different than circuit-switched technology, and therefore, should not be subject to access charges), upheld by Decision on Applications for Rehearing, Reargument, or Reconsideration, Decision No. C01-477 (Colo. P.U.C. May. 1, 2001).

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

323/ *Id.* at 1-2.

324/ *Id.* at 8. Chairman Sopkin also stressed that the policy implications of VoIP are "dramatic" and said the "nascent VoIP industry should not be subject to death-by-regulation, which could well occur by having 51 state commissions imposing idiosyncratic, inconsistent, and costly obligations." *See id.* at 3.

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

determine the jurisdictional nature of the call, despite VoIP service providers' contentions that it is difficult or impossible to determine the location of the end points of VoIP calls. In addition, the PSC noted that the FCC, in its three previously released orders relating to VoIP services, has not addressed whether the assessment of a universal service surcharge on VoIP service is appropriate. The PSC noted that a VoIP service provider can establish separate prices for the information service and the telecommunications service components of a bundled service offering, and may use such prices in reporting service revenue subject to the universal service surcharge. This recent action contradicts the Nebraska PSC previous finding in 1999 that "IP telephony does not place the same burdens upon the network as does traditional switched telecommunications, [and thus] the obligations of its providers should not be the same."[326/]

On April 22, 2005, Qwest Communications Corporation ("Qwest") filed a complaint in the United States Federal District Court for the District of Nebraska seeking declaratory and injunctive relief from the PSC's VoIP Order. Qwest argued that state regulation of IP-enabled offerings, including VoIP applications, is preempted by federal law. It also disputed the finding that IP-enabled offerings are "information services" and not "telecommunications services." It stated that the Order violates federal and Nebraska law permitting the PSC to require universal service contributions only from "telecommunications carriers" that provide "telecommunications services" that are "intrastate."[327/] Contemporaneously, Qwest filed a similar complaint in a Nebraska state court as a "precautionary matter." The PSC appealed the federal filing, arguing that the federal court should not hear the case until the state court rules on the matter. The federal court ruled in the PSC's favor. It found that although it should retain jurisdiction over the case, it will allow the state court to issue its findings before proceeding. Accordingly, the federal court stayed the proceedings until the resolution of Qwest's state claim.[328/]

### 7. Other States

Several other states have examined the issue of regulating VoIP services. For example, in 1999, the South Carolina Public Service Commission established a generic docket to examine the issue of VoIP services, but because it was concerned about the far-reaching implications of such a proceeding it voted to hold the matter in abeyance.[329/] More recently, the Public Utilities Commission of Ohio, the Washington Utilities and Transportation Commission, the Pennsylvania Public Utilities Commission, the Alabama Public Service Commission, the Utah

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326/ Application C-1825/PI-21, *Application of the Nebraska Public Service Commission on its Own Motion, Seeking to Conduct an Investigation Into the Effects of Internet Telephony on the Telecommunications Industry in Nebraska*, Order (Neb. P.S.C. Sept. 28, 1999).

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

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

329/ Docket No. 98-651-C, *Generic Proceeding to Review Voice Over the Internet (IP Telephony)*, Order Holding Matter in Abeyance, Order No. 1999-183 (S.C.P.S.C. Mar. 10, 1999); *see also* Docket 27385, *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc.*, Pursuant to Section 252(b) of the Telecommunications Act of 1996, Order, at 33-34 (Ala. P.S.C May 21, 2001) (concluding that VoIP should not be included in the definition of switched access traffic because the FCC had not addressed the classification of VoIP).

Public Service Commission, Missouri Public Service Commission, the North Dakota Public Service Commission, and the Michigan Public Service Commission have initiated generic proceedings to consider the regulation of VoIP service providers operating within their states and the jurisdictional issues raised by VoIP services.[330/] In addition, Florida, Illinois, and Tennessee have held workshops to investigate the status of VoIP.[331/]

Several state legislatures also have introduced or enacted bills that would regulate VoIP services in some way. For instance, New Jersey enacted legislation that requires VoIP service providers to collect 911 surcharges for each "voice grade access service line" provided to end user customers with a "service address" in New Jersey as part of the "telephone exchange services" provided to the end user.[332/] Those fees must then be remitted to the state. Both the Colorado and Kansas legislatures have introduced similar measures.[333/]

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

The level of regulatory uncertainty for the provision of VoIP services continues to be high despite the issuance of several decisions over the past year and a half. VoIP service providers still may be subject to a host of regulations, yet undefined, as indicated in the *CALEA First Order* and the *E911 VoIP Order* The following attempts to compare past rulings with recent rulings and their application to pending proceedings and requirements that are imposed based on the classification of services.

### A. Tension between Federal and State Jurisdiction

Historically, information services have been free from state regulation. Generally, once the FCC exercises its Title I authority over an "information service," any state regulations interfering with the FCC's exercise of its authority could be preempted.[334/] In its *Computer*

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330/ Case No. 03-950-TP-COI, *In the Matter of the Commission's Investigation into Voice Services Using Internet Protocol*, Entry (Pub. Utils. Comm'n Ohio. Apr. 17, 2003); Docket No. UT-030694, *Staff Investigation re: Voice over Internet Protocol (VOIP)* (Wash. Utils. Trans. Comm'n May 13, 2003); Docket No. M-00031707, *Investigation into Voice over Internet Protocol as a Jurisdictional Service*, Order (Pa. P.U.C. May 1, 2003); Docket No. 29016, *In re: Petition for Declaratory Order Regarding Classification of IP Telephony Service*, Order Establishing Declaratory Proceeding (Ala. P.S.C. Aug. 2003); Docket No. 04-999-02, *Regulation of Voice over the Internet Telephone Service (VoIP)*, Order Opening Docket (Utah P.S.C. Jan. 22, 2004); Case No. TW-2004-0324, *In the Matter of a Study of Voice over Internet Protocol*, Order Establishing Case (Mo. P.S.C. Feb. 3, 2004); Case No. PU-2967-03-666, *BEK Communications Cooperative, et al. v. Smartnet, Inc. d/b/a CallSmart*, Complaint (N.D.P.S.C. filed Nov. 25, 2003); Case No. U-14073, *Commission's Own Motion to Commence an Investigation into Voice over Internet Protocol Issues in Michigan*, Order Commencing Investigation (Mi. P.S.C. Mar. 16, 2004).

331/ *Staff Workshop: Voice over Internet Protocol* (Fla. P.S.C. Jan. 27, 2003); *Workshop: Regulatory Issues – Local Voice Services Delivered over Packet Switched Networks* (I.C.C. May 8, 2003); *VoIP – A New Day in Telecommunications* (Tenn. R.U.A. Apr. 30, 2004).

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

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

334/ 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

*Inquiry* proceedings, the FCC found that information services must remain free of state and federal regulations to promote the competitive growth of such services.[335/] The FCC reaffirmed this finding in its decision ruling that pulver.com's Free World Dialup service is an interstate information service that must remain free from unnecessary regulation,[336/] and its finding that Vonage (and services like Vonage's) are interstate in nature.[337/]

As a result, the FCC has preempted the imposition of certain state regulatory requirements on information service providers that would have resulted in the application of inconsistent regulatory requirements at the state and federal levels. The Ninth Circuit upheld the FCC's narrowly-tailored preemption because the FCC was able to demonstrate that it would preempt only those state regulations that would negate the FCC's regulatory goals or otherwise frustrate the FCC's purposes.[338/]

Given the FCC's previous preemption of state regulations governing information services and its most recent findings in the *Wireline Broadband Order, pulver.com Order* and *Vonage Order*, state commissions' ability to impose burdensome regulations on VoIP services 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."[339/] 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.[340/] 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."[341/] A single, national broadband policy for VoIP services appears to be at the forefront of efforts to craft regulations and legislation.

The need for a national broadband policy that limits the role of the states is further supported by the FCC's recent findings in its *pulver.com Order* and *Vonage Order*. In both of those decisions the FCC determined that the end-to-end analysis was inapplicable because the concept of "end points" has no relevance.[342/] For example, pulver.com simply provides

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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.

335/ *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).

336/ *pulver.com Order* ¶ 17.

337/ *Vonage Order* ¶ 14.

338/ California v. FCC, 39 F.3d at 932-33.

339/ *Wireline*, COMMUNICATIONS DAILY, Dec. 10, 2003, at 9.

340/ *Id.*

341/ *Wireline Broadband Order*, Statement of Kevin Martin.

342/ *pulver.com Order* ¶ 21; *Vonage Order* ¶ 25.

information on its server that its members can access. Each member must find its own means (*i.e.*, an ISP) to get to the server. In addition, Free World Dialup is portable in nature without fixed geographic origination or termination points. Thus, the FCC's *pulver.com Order* presents a detailed analysis of when the end-to-end analysis is inappropriate or "unhelpful." Similarly, in the *Vonage Order*, the FCC determined that Vonage's service can be taken anywhere, and that this "total lack of dependence on *any* geographically defined location" renders application of the end-to-end analysis nearly impossible.[343/] The FCC's reticence towards allowing states to regulate IP-enabled services was reiterated in the *Broadband Wireline Order*. The Commission emphasized that it is 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."[344/] As discussed below, the FCC's recent statement in its *VoIP USF Order* regarding the reporting of actual interstate usage by interconnected VoIP service providers could subject those providers to state regulation[345/] may suggest that the FCC is backing away from its statutory mandates in sections 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.[346/]

### B. Functionality vs. Facilities

Both the FCC and some states have indicated that they make regulatory classifications based on the functionality provided to end users rather than the facilities used to provide those services. The FCC's overarching principle in several of the proceedings discussed above is "to develop an analytical framework that is consistent, to the extent possible, across multiple platforms."[347/] 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."[348/] 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."[349/]

In the *Wireline Broadband Order*, the FCC adhered to the "function over facilities" principle, and concluded that the Act and its prior rulings suggest that the FCC should take a functional approach to regulation that focuses on the nature of the service provided to consumers, rather than an approach that focuses on the technical attributes of the underlying architecture used to provide the services.[350/] Likewise, in the *Cable Modem Ruling*, the FCC

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343/ *Vonage Order* ¶¶ 24-25 (emphasis in original).

344/ *Wireline Broadband NPRM* ¶ 45.

345/ *VoIP USF Order* ¶ 56.

346/ *See. e.g.*, *Vonage Order* ¶ 2; *pulver.com Order* ¶ 16; *IP-Enabled Services NPRM* ¶ 39.

347/ *Wireline Broadband NPRM* ¶ 6; *Cable Modem Ruling* ¶ 85, n.315.

348/ *Report to Congress* ¶ 98.

349/ 47 U.S.C. § 153(46).

350/ *Wireline Broadband Order* ¶ 17; *Wireline Broadband NPRM* ¶ 7, n.10.

concluded that the classification of cable modem service turns on the nature of the functions that the end user is offered.[351/] In the *AT&T Phone-to-Phone Order*, former FCC Chairman Powell noted that AT&T's IP service was a telecommunications service because it does not "offer consumers any variation in experience or capability" and consumers "are in no discernable way receiving the transforming benefits of an IP-enabled service."[352/]

Thus, it is generally irrelevant what technology a provider utilizes to provide telecommunications services. For example, carriers using 39 GHz, microwave, or data packet switched technologies to provide voice and data communications have all been subject to the FCC's common carrier (*i.e.*, Title II) regulations.[353/] 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.[354/]

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 "an Internet application just like unregulated e-mail and file sharing" that can follow its users everywhere, over any network.[355/] As former FCC Chairman Powell stated, "Stop thinking of voice as just the telephone. It's just an application running on an IP network."[356/] VoIP applications of tomorrow will combine voice and data in new and innovative ways, going far beyond the functionality offered by POTS. In light of the present and evolving functional differences between VoIP services and POTS, regulators must resist the temptation to focus on individual trees and ignore the forest. The regulation of VoIP products as telecommunications services simply because a single element of the enhanced offering looks like telecommunications service would be inappropriate and stifling to nascent VoIP products.

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351/ *Cable Modem Ruling* ¶ 38.

352/ *AT&T Phone-to-Phone Order*, Statement of Chairman Michael K. Powell.

353/ *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).

354/ *Report to Congress* ¶¶ 39, 58, 60.

355/ Herb Kirchoff, *VoIP Advocates Urge States to Keep Hands Off*, COMMUNICATIONS DAILY, Sept. 9, 2003.

356/ 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.

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

The FCC has three statutory tools that would permit it to refrain from imposing any traditional telecommunications regulation on VoIP even if it reaches a conclusion that these services are not information services. First, the FCC could utilize its Section 10 forbearance authority to forbear from applying telecommunications regulation to VoIP services.[357/] Under the 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.[358/] The FCC has acknowledged that its forbearance obligation is a key component of the Act's "pro-competitive, de-regulatory national policy framework" designed to ensure that all telecommunications markets are open to competition and to make advanced telecommunications and information technologies and services available to all Americans.[359/] For these reasons, the FCC has asked in its *IP-Enabled Services NPRM* whether it should forbear from applying certain regulations to particular categories of IP-enabled services.[360/] Notably, in the 1998 *Report to Congress*, the FCC stated it would have "to consider carefully" whether to forbear.[361/]

Second, Section 706 of the Act imposes on the FCC an affirmative obligation to encourage the deployment of advanced services.[362/] While Section 706 does not constitute an independent grant of authority to the FCC, the FCC may use the authority granted to it in other provisions of the Act (including forbearance authority under Section 10) to encourage the deployment of advanced services.[363/] The FCC has interpreted Section 706 as a directive to the FCC to use the forbearance authority granted elsewhere in the Act to further Congress's objective of opening all telecommunications markets to competition, including the market for

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357/ 47 U.S.C. § 160. As noted above, Level 3 has asked the FCC to forbear from the application of access charges to some IP services. *See supra* Section I.B.

358/ 47 U.S.C. § 160(a); *see also* Cellular Telecoms. & Internet Ass'n v. FCC, 330 F.3d 502, 504-05 (D.C. Cir. 2003).

359/ *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).

360/ *IP-Enabled Services NPRM* ¶ 48.

361/ *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.").

362/ 47 U.S.C. § 157nt.

363/ *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).

advanced services.[364/] In its recent *Vonage Order*, the FCC found that promotion of a national policy framework for advanced services required it to "preclud[e] multiple disparate attempts to impose economic regulations on [Vonage's service] that would thwart its development and potentially result in it exiting the market."[365/]

Third, FCC decision-makers also must consider Section 230 of the Act, which expressly states that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[366/] In the *Vonage Order*, the FCC determined that preemption of the Minnesota PUC's entry regulations was required under Section 230 because the language of that section "embraces [Vonage's] service."[367/] 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."[368/]

### D. Taxation of VoIP Services

The tax implications for VoIP service depend heavily on how the service is classified by federal and state regulators. State and federal law generally exempts Internet access services from taxation, but telecommunications services remain subject to certain fees and taxes.

#### 1. Federal Taxation

Most federal taxes and fees that apply to telecommunications services may not be applicable to VoIP services because VoIP services have not been defined by the FCC to be a telecommunications service.[369/] The FCC has not, however, definitively decided that VoIP services are not telecommunications services, so a further ruling by the FCC, at some future time, defining VoIP as a telecommunications service would render VoIP services obligated for federal taxes and fees that apply to telecommunications services. As it has done with the *VoIP USF Order*,[370/] the FCC may also apply specific taxes and fees to VoIP services without ruling on whether VoIP is a telecommunications service.

While the Internal Revenue Service ("IRS") continues to collect the local telephone service portion of the Federal Excise Tax ("FET"), application of the local telephone service portion of FET to VoIP services would be inconsistent with Congress's intent to tax purely local service because the FCC has ruled that the intrastate portion of VoIP services cannot be

364/ *Advanced Services Order* ¶¶ 69-77.

365/ *Vonage Order* ¶ 36.

366/ 47 U.S.C. § 230(b)(2).

367/ *Vonage Order* ¶ 34.

368/ *Vonage Order* ¶ 35.

369/ *Vonage Order* ¶ 14.

370/ *See* Part II.A.3.d, *supra*.

distinguished from the interstate portion.[371/] In any case, IRS FET instructions exclude bundled services from application of the local telephone FET and specifically list VoIP services in this excluded category.[372/]

### 2. State Taxation

The law is less than fully settled with regard to application of state tax law to VoIP services. The FCC's *Vonage Order* preempted the ability of state regulatory authorities to apply certification, tariffing, and other telecommunications regulations to VoIP.[373/] Several state commissions are currently appealing the *Vonage Order* in federal court,[374/] raising the possibility of reversal of the ruling. In addition, on its face the FCC's preemption appears to be limited to state "entry" regulations such as "certification, tariffing or other related requirements as conditions to offering [VoIP]" that were specifically at issue in the ruling.[375/] In the *Vonage Order*, the FCC was careful to say that it "express[ed] no opinion here on the applicability to [VoIP] of [a state's] general laws governing entities conducting business within the state, such as laws concerning taxation . . . ."[376/] It is possible to read the latter holding as referring to general state business taxes like corporate income tax and property taxes, preserving an argument that state application to VoIP services of taxes specific to telecommunications and telephone service are preempted.[377/] States, however, may argue that the *Vonage* ruling means that states can apply taxes to VoIP services so long as payment of the tax is not a "condition[ ] to offering" VoIP.

At the state level, the tax classification of VoIP services turns on how the state statutes and regulations define "telecommunications" or "telephone" services with regard to specific taxes. The telecommunication and tax statutes sometimes contain different definitions for such services further complicating the analysis regarding their application. In some instances, the definitions are broad enough to encompass the functionality provided to consumers via IP-enabled services.[378/] In other cases, state tax laws are written to specifically include VoIP

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371/ *Vonage Order* ¶ 31.

372/ Internal Revenue Service, *Communications Tax*, http://www.irs.gov/publications/p510/ch04.html#d0e5400.

373/ *Vonage Order* ¶ 14.

374/ *See* note 22, *supra*.

375/ *Vonage Order* ¶ 46.

376/ *Vonage Order* ¶ 1.

377/ In the *Vonage Order*, the FCC ruled that it is impossible to separate intrastate and interstate components of VoIP services, *Vonage Order* ¶ 31, and that VoIP services are of a unique nature demanding "cohesive national treatment," *Vonage Order* ¶ 41, preempting even state regulation aimed solely at intrastate services. *But cf.*, *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, ¶ 56 (rel. June 27, 2006) ("*USF Order*") (concluding 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").

378/ Under New York tax law, for example, "telecommunications services" are defined as "telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic laser, microwave, radio wave, satellites, or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) and also include any equipment and services provided therewith. Provided,

services.[379/] If VoIP service is subject to taxation under a particular state's law, the service could be subject to gross receipts taxes, sales and use taxes, or specific taxes imposed on telecommunications services.

Some states have issued "notices" stating that VoIP services are subject to state sales and use taxes. For instance, the Pennsylvania Department of Revenue stated in a recent tax bulletin that VoIP services are subject to Pennsylvania state and local sales taxes because VoIP services fall under the statutory definition of a "telecommunications service" and are not considered "enhanced telecommunications services" under Pennsylvania law.[380/] Enhanced telecommunications services are defined as services offered over a telecommunications network, which employ computer processing applications that include one or more of the following: (1) acts on the format, content, code, protocol, or similar aspects of the purchaser's transmitted information; (2) provides the purchaser additional, different, or restructured information; or (3) involves the purchaser's interaction with stored information. Pennsylvania found that VoIP services do not fall within the enhanced telecommunications service exclusion because VoIP service uses computer processing applications solely for the management, control, or operation of a telecommunications system and not in any manner as prescribed by the definition.

The New Jersey Division of Taxation has issued a similar notice indicating its belief that VoIP services fall within the definition of "telecommunications service" in the New Jersey sales and use tax statutes.[381/] The Illinois Department of Revenue has taken the position that the state's telecommunications taxes should be collected on VoIP services.[382/]

Some states have taken the position that VoIP providers are required to contribute to their state universal service funds. For example, the New Mexico Public Regulation Commission ("NMPRC") adopted rules in November 2005 for the New Mexico State Rural Universal Service Fund ("SUSF") that defined "intrastate retail telecommunications services" required to

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the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent." NY TAX § 186-e(1)(g). *See also, e.g.*, Illinois Telecommunications Excise Tax, 35 Ill. Comp. Stat. 630/2 ("Telecommunications, in addition to the meaning ordinarily and popularly ascribed to it, includes without limitation, messages or information transmitted through the use of local, toll and wide area telephone service . . . or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities.").

379/ *See, e.g.*, Kentucky Telecommunications Tax, Ky. Rev. Stat. § 139.105; Ohio Sales Tax, Ohio Rev. Code § 5739.01(AA)(1) (declaring that taxable telecommunications services "includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added").

380/ Pennsylvania Department of Revenue, Sales Tax Bulletin 2005-02 (Jan. 28, 2005).

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

382/ *See* Illinois Department of Revenue, ST 06-0008-GIL 01/24/2006 Telecommunications Excise Tax, http://www.revenue.state.il.us/legalinformation/letter/rulings/st/2006/ ("Voice Over Internet Protocol ("VOIP") is telecommunications subject to tax within the meaning of "telecommunications" and "gross charges" pursuant to the Telecommunications Excise Tax Act . . . ; the Telecommunications Infrastructure Maintenance Fee Act . . . ; and the Simplified Municipal Telecommunications Tax Act . . . .").

contribute to the SUSF to include "services that provide telecommunications through a New Mexico telephone number using voice over internet protocol (VOIP) or comparable technologies."[383/] In defining "intrastate retail telecommunications revenue," the regulations declared that "for voice over internet protocol (VOIP) and similar services, the portion of total retail revenues attributable to intrastate retail telecommunications shall be equal to the proportion of calls originating and terminating in New Mexico to all calls originating in New Mexico."[384/]

Apparently believing that the regulations' application to VoIP services required clarification, the NMPRC initiated a new proceeding that culminated in an October 2006 *NMPRC VoIP Order*.[385/] In the *Order*, the NMPRC rejected arguments that it was preempted by the FCC from regulating VoIP service providers and therefore could not require them to contribute to the SUSF. The FCC's ruling in its *Vonage Order*, the NMPRC said, "must be read . . . as precluding state regulation of VoIP in the sense of limiting or controlling market entry, requiring the filing and approval of tariffs . . ., etc., and not as precluding state requirements that VoIP providers contribute to universal service funds."[386/] The NMPRC also analogized to the FCC's recent determination that VoIP services are required to contribute to the federal universal service fund, citing "the practical similarity of VOIP services to other types of telecommunications services, particularly wireless."[387/]

### E. Pole Attachments

Under current law, both cable operators and telecommunications carriers are subject to certain fees for utilizing pole attachments, with varying fees depending on the type of attacher.[388/] Under current law, VoIP service providers should not be subject to additional fees for the use of poles in the provision of VoIP services. The Supreme Court has determined that "the addition of a service does not change the character of the attaching entity -- the entity the attachment is 'by.' And this is what matters under the statute."[389/] For this reason, the Supreme Court determined that cable operators offering Internet access services (such as cable modem service) over such attachments were within the rates established for cable operators under the Act.[390/] Under current law, VoIP service providers also are not subject to pole attachment rates as telecommunications carriers because they are not a "telecommunications carrier" using the attachment "to provide

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383/ N.M. Admin. Code 17.11.10.7(P).

384/ N.M. Admin. Code 17.11.10.7(O).

385/ Implementation of the State Rural Universal Service Fund, Case No. 06-00026-UT, Order on Methods of Determining VoIP Providers' Contributions to State Universal Service Fund, ¶ 2 (Oct. 5, 2006) ("*NMPRC VoIP Order*").

386/ *NMPRC VoIP Order* ¶ 21.

387/ *NMPRC VoIP Order* ¶ 24.

388/ 47 U.S.C. § 224 (requiring the FCC to regulate "any attachment by a cable television system" or "pole attachment used by telecommunications carriers to provide telecommunications services").

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

390/ *Id.* at 339.

telecommunications service."[391/] As with most of these requirements, classification of the service dictates what regulation and fee obligations will apply to the service provider.

## CONCLUSION

As of December 2006, there appears to be little promise that the directives of Congress and the President will be furthered by the FCC. 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 Commission in a manner envisioned by the plain language of the Act. In the meantime, consumers likely will suffer in the near term from the lack of, or hindered deployment and development of, advanced telecommunications and broadband services, especially in more rural communities. The Commission'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.

391/ 47 U.S.C. § 224.