

# Will the FCC Ever Make the Call on VoIP Service?

JUDITH A. ENDEJAN

The Supreme Court has said that “[d]ecisionmakers sometimes dodge hard questions where easier ones are dispositive. . . .”<sup>1</sup>

The Federal Communications Commission (FCC or Commission) faces a very hard question in deciding the right regulatory classification for Voice-Over Internet Protocol (VoIP) telephone service. Therefore, it has avoided answering that question by disposing of easier, isolated VoIP issues. This article will provide an update on the FCC’s approach to VoIP, a technology which industry experts claim will replace traditional telephone service in the near future.<sup>2</sup> Such a sea change in consumer behavior has dramatic regulatory ramifications for the telecommunications industry. Thus, it is not surprising that the FCC has taken cautious steps to nibble around the corners of VoIP issues -- although it has considered VoIP classification for ten years, the Commission has yet to issue a final determination as to whether it is a telecommunications service or an information service.

## What is VoIP?

In essence, VoIP is an Internet application that uses packet switching to transmit a voice communication over a broadband Internet connection, instead of a regular phone line. VoIP technically is a technology, not a service. VoIP technology converts analog voice signals to packets, which are routed as data over an Internet protocol (IP) network without ever having to rely on traditional circuit switching. By doing so, the voice conversation does not tie up a dedicated path or channel. With traditional circuit switching, a dedicated circuit is required. In fact, circuit switching requires the circuit to remain open until the phone call is terminated. Thus, VoIP is viewed to be more efficient and cost-effective, although it has some technical drawbacks. For instance, power outages sometimes can cause VoIP services to go down.

*Judith A. Endejan is a partner in the Seattle office of Graham & Dunn PC.*

VoIP can be used in different ways. For instance, in a peer-to-peer model, a VoIP application resides on the user’s PC and allows the user to connect directly to another user’s computer.<sup>3</sup> VoIP even can be a hybrid combination of computer to phone or vice versa.

A more prevalent application is interconnected VoIP service, which is defined as a service that (1) enables real time, two-way voice communication; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) generally permits users to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.<sup>4</sup>

VoIP providers vary from traditional telephone and cable companies to IP-specific companies to hybrids that involve joint provisioning between cable and telecommunication companies.<sup>5</sup> The key common denominator is provision of the underlying required broadband connection that transmits the digitized voice packets. As more and more homes obtain broadband connectivity, and as major telecommunications companies continue to invest in ubiquitous broadband provisioning (e.g., Verizon’s FIOS project and AT&T’s Project Lightspeed), VoIP is expected to supplant traditional circuit-based voiced telephony.

## The History of VoIP Regulation

Under the Communications Act of 1934 (the Act) as amended,<sup>6</sup> the regulatory status of VoIP is not settled. The FCC first examined VoIP services in its 1998 Report to Congress, where it found that IP telephony blurred the line between telecommunications and information services. While the Commission noted that phone-to-phone VoIP service resembled a telecommunications service, the FCC refrained from making a final conclusion about VoIP, stating that it would address the regulatory status in future proceedings.<sup>7</sup> The FCC then waited six years, until February 2004,

before adopting its first Notice of Proposed Rule Making (NPRM) regarding the legal and regulatory framework for IP-enabled services, including VoIP.<sup>8</sup>

To date, the FCC has not rendered a categorical pronouncement about VoIP’s regulatory classification, but instead has chosen to address most of the discreet issues identified in the IP-Enabled Services NPRM separately over the years.<sup>9</sup> The FCC has two categories for VoIP classification available to it under the Act, neither of which fits properly. The VoIP industry favors an information services<sup>10</sup> classification which exempts VoIP from regulation unless the FCC acts pursuant to its ancillary jurisdiction under Title I of the Act.<sup>11</sup> Title I jurisdiction allows the FCC to impose regulations only where it has subject matter jurisdiction over the service to be regulated and where the assertion of jurisdiction “is reasonably ancillary to the effective performance of [its] various responsibilities.”<sup>12</sup> For example, the Commission imposed E911 rules for interconnected VoIP providers to fulfill its overarching responsibility of “promoting safety of life and property through the use of wire and radio communications.”<sup>13</sup>

All of the methods for providing the underlying broadband connections for VoIP have been classified as information services.<sup>14</sup> In the FCC’s view, the policy promoted by this classification is the encouragement of broadband deployment, which in turn promotes further development of nascent technologies that are Internet-based.<sup>15</sup>

The FCC also could find that VoIP falls within the second category, as a telecommunications service<sup>16</sup> subject to regulation under Title II of the Act, typically applicable to providers of voice service.<sup>17</sup> Title II imposes direct common carrier requirements on voice providers, such as the obligation to provide service upon demand, at rates that are just and reasonable, without unreasonable discrimination or undue preference.<sup>18</sup>

The more VoIP replaces traditional voice service, the more difficult it will

be for the Commission to refrain from Title II-type regulation because of the need to satisfy those Title II requirements specific to telephone service. At the same time, the FCC will not want to be perceived as thwarting innovation and broadband deployment in the Internet age. Hence the regulatory conundrum: Is VoIP an information service or a telecommunications service?

In 2004 the FCC ruled that a point-to-point broadband Internet protocol service within a closed network was an interstate information service.<sup>19</sup> However, in that same year, the FCC refused to classify an interconnected VoIP service offered by Vonage as either a telecommunications or information service. The *Vonage Order* was nonetheless significant because in it the FCC determined that VoIP service should be regulated at the federal level.<sup>20</sup> The *Vonage Order* clearly signaled to state public utility commissions that the FCC was going to preempt local jurisdiction over IP-enabled services such as VoIP. In that particular decision, Minnesota state regulation was preempted because, the Order stated, it was impossible or impracticable to separate the intrastate components of Vonage's VoIP service from its interstate components.<sup>21</sup> In addition, preemption allows for the development of a uniform federal policy for VoIP.

In a subsequent decision, the FCC withdrew a bit from its initial signal of pervasive preemption of state regulation when it ordered VoIP providers to contribute to the federal Universal Service Fund (USF), which is a funding stream used to subsidize telecommunications services in rural and high-cost areas, as well as for schools, libraries and low-income households.<sup>22</sup> In that ruling the FCC indicated that an interconnected VoIP provider with the capability of tracking the jurisdictional confines of customer calls might not fall within the preemption piece of the *Vonage Order*, and instead would be subject to state regulation. While in that decision the FCC suggested that there may be room for state regulation, it is difficult to reconcile this suggestion with the FCC's determination in the *Vonage Order* that state regulation would interfere with valid federal rules and policies.

The FCC clearly views Internet traffic as interstate in nature; however, that conclusion does not necessarily have a bearing on VoIP regulatory classification. In 2004, the FCC refused to find

that an AT&T phone-to-phone IP telephony service was removed from Title II regulation. That service converted circuit-switched long distance traffic into IP packets and then routed them across the country, converting them back into circuits for termination on the recipient's circuit-switched voice connection at an identified location.<sup>23</sup> AT&T used its Internet backbone to route these calls, which were treated in all other respects as traditional circuit-switched calls. The end-user customer did not know there was a difference in service. This case signals that the FCC is looking for more than an Internet service component before it will characterize the whole service as an information service, beyond Title II regulation, where the end-user service is provided mostly through traditional phone service components.

Yet, the FCC has imposed some Title II regulation on VoIP services even where the service is offered through IP telephony, where the end-user service is the equivalent of traditional phone service. It has done so without deciding whether the service is a telecommunications service or an information service.

For instance, the FCC has ordered all interconnected VoIP providers to ensure that their users are able to reach local emergency centers when making E911 calls.<sup>24</sup> The *E911 Order* requires these providers to obtain from their users, prior to initiation of service, the physical location at which a service would first be utilized (a registered location) and to provide methods for updating this information. The FCC also issued a further notice of proposed rulemaking seeking comments on additional steps it should take to ensure that VoIP providers fully offer E911 service. This order was challenged because of the short time period for compliance, but ultimately upheld by the United States Court of Appeals for the District of Columbia Circuit.<sup>25</sup>

As noted above, the Commission has ordered interconnected VoIP providers to make contributions to the federal USF.<sup>26</sup> The FCC reasoned that requiring interconnected VoIP providers to make USF contributions was fair because USF contributions have declined in recent years while interconnected VoIP services have experienced dramatic growth.<sup>27</sup> Thus, the Commission concluded, VoIP contributions will preserve and advance universal service. The Commission also

reasoned that USF contributions were fair because much of the appeal of VoIP service to consumers derives from the ability to place calls to and receive calls from the public switched telephone network, which is supported by universal service mechanisms. Finally, the Commission applied a competitive neutrality principle, finding that VoIP providers should contribute because they increasingly compete with analog voice service providers who also contribute to the USF.<sup>28</sup>

## Is VoIP an information service or a telecommunications service?

In 2007 the Commission extended Title II customer proprietary network information obligations to interconnected VoIP providers.<sup>29</sup> Again, the Commission found that interconnected voice service increasingly is a replacement for analog voice service:

It therefore seems reasonable for American consumers to expect that their telephone calls are private, irrespective of whether the call is made using the services of a wireline carrier, a wireless carrier, or an interconnected VoIP provider, given that these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable.

*Id.* at ¶ 56.

The Commission also extended the disability access requirements of § 255 of the Act to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide these services. In addition, this order extended the telecommunication relay services requirements to providers of interconnected VoIP services.<sup>30</sup>

Most recently, the Commission extended local number portability obligations to interconnected VoIP providers to ensure that their customers may port their NANP telephone numbers when changing telephone providers, reasoning that this should facilitate greater competition among telephony providers by allowing customers to respond to price and services changes.<sup>31</sup>

In all of its orders, the Commission has extended certain Title II obligations – which apply to telecommunications

carriers – to interconnected VoIP providers by asserting ancillary jurisdiction under Title I of the Act, which the FCC uses when it regulates information services providers.<sup>32</sup> Yet the Commission has refused to classify VoIP as an information service.

The Commission also has imposed requirements under the Communications Assistance for Law Enforcement Act (CALEA)<sup>33</sup> upon VoIP service providers, relying on the language of CALEA to find that CALEA's definition of telecommunications carrier was sufficiently broad to cover VoIP providers. Because the basis for the FCC's ruling was not the Act, the CALEA order also does not dispose of VoIP classification under the Act.<sup>34</sup>

What pattern can be discerned in these FCC orders on VoIP services? First, the FCC is giving the VoIP industry a lot of time to develop, free from many of the regulatory obligations applied to traditional telecommunications services. This approach is consistent with the Commission's previously-stated reluctance to regulate the nascent VoIP industry for fear of hindering its development.<sup>35</sup> At the same time, the Commission has found a mechanism to satisfy its statutory obligations under Title II with respect to consumer protections and public health and safety concerns. The FCC cleverly has imposed select Title II obligations by using Title I ancillary (and discretionary) authority without having to declare VoIP to be an information service. By taking this approach, bit by bit over time, the FCC may make the question of regulatory classification somewhat irrelevant. Perhaps the FCC is waiting for VoIP to effectively replace traditional circuit-based telephony before imposing all Title II obligations. Regardless, as of today, many unresolved questions remain for VoIP providers, such as intercarrier compensation issues, and state and federal tax issues. For the time being, the FCC's incremental approach toward VoIP regulation probably will be the norm. □

## Endnotes

1. Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002).

2. See e.g., [www.ezinearticles.com/?The-Explosion-of-VoIP-Replacing-Traditional-Phone-Service&ID=770356](http://www.ezinearticles.com/?The-Explosion-of-VoIP-Replacing-Traditional-Phone-Service&ID=770356).

3. *In Re IP-Enabled Services*, 19 FCC Rcd 4863, 4876 (2004) (hereinafter the IP-Enabled Services NPRM).

4. 47 C.F.R. § 9.3 (2007).

5. The FCC has endorsed this model as a

means of spurring the development of facilities-based competition and broadband deployment. *In Re Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513 (2007).

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

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

8. Endnote 3 *supra*.

9. For instance, the IP-Enabled Services NPRM sought comment on the public safety and disability access implications of IP technology and services, carrier compensation, universal service, and consumer protection.

10. 47 U.S.C. § 153(20) defines an *information service* as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .”

11. See 47 U.S.C. §§ 151-61.

12. See *In Re IP-Enabled Services*, 20 FCC Rcd 10245, 10261 (2005).

13. See *In Re IP-Enabled Services—E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10262 (2005) hereinafter E911 Order.

14. See Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd*, Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005). See also *In Re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005); *In Re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

15. The Commission must also recognize the federal policy “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.” 47 U.S.C. § 230(b)(2).

16. The Act defines *telecommunications service* as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153 (46). *Telecommunications* is defined as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

17. See also *Regulating Broadband*, 23:2 COMM. LAW. (2005).

18. See e.g., 47 U.S.C. §§ 201(b), 251(a)(1).

19. See Petition for Declaratory Ruling That Pulver.Com's Free World Dialup is Neither Telecommunications Nor A Telecommunication Service, 19 FCC Rcd 3307 (2004).

20. *In re Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004), *aff'd*, Minn. Public Utilities Comm'n. v. FCC, 483 F.3d 570 (8th Cir. 2007) (Vonage Order).

21. The service in Vonage was “nomadic” rather than fixed, meaning that Vonage users can place calls from any geographic location and can select any area code available under the North American Numbering Plan (NANP). In late November 2007, the Missouri Public Service Commission relied upon the fixed versus nomadic distinction in ordering Comcast IP Phone, LLC, to submit to state regulation. The commission found that the FCC's failure to expressly preempt state jurisdiction for fixed VoIP services meant that states could act until the FCC decides otherwise. Report and Order, Staff of the Public Service Commission of the State of Missouri v. Comcast IP Phone, LLC, Case No. TC-2007-0111 (rel. Nov. 1, 2007).

22. See Universal Service Contribution Methodology, 21 FCC Rcd 7518, 7546 (2006) (USF Order). The USF was established by 47 U.S.C. § 254.

23. AT&T sought to be exempt from access charges for this traffic, but was rebuffed by the FCC. See Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt From Access Charges, 19 FCC Rcd 7457 (2004).

24. See endnote 13 *supra*.

25. *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2007).

26. See USF Order, *aff'd in part, vacated in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).

27. *USF Order* at 7528.

28. *Id.* at 7540, 7541.

29. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6227 (2007) (CPNI Order).

30. See *In Re IP-Enabled Services Implementation of Sections 255*, 22 FCC Rcd 11275 (2007).

31. See *Re Telephone Number Requirements for IP-Enabled Service Providers*, W.C. Docket No. 07-243, C.C. Docket No. 99-200, FCC 07-188 (rel. Nov. 8, 2007).

32. Under Title I ancillary jurisdiction, the Commission also has required interconnected

VoIP providers to pay fiscal year 2007 regulatory fees. *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2007, M.D. Docket No. 07-81, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-140 ¶¶ 11-13 (rel. Aug. 6, 2007).

33. 47 U.S.C. §§ 1001-1011.

34. Communications Assistance for Law Enforcement and Broadband Access and Services, 20 FCC Rcd 14989 (2005), *a'ffid*, *Am. Council on Ed. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

35. *See* IP-Enabled Services NPRM, 19 FCC Rcd 4863, 4864 (2004).