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FCC Stakes Out VOIP Issues

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The FCC has drawn broad outlines for addressing the regulatory status of various Voice-over-Internet-Protocol ("VOIP") services, and thus for promoting the advent of VOIP. Early signals suggest that the FCC's approach will depend on how closely VOIP services resemble ordinary telephone service. The more they do, the more likely they are to be regulated the same way.

The term VOIP can refer to a technology, a set of services, or both. As a technology, VOIP means the transmission of voice and data over the Internet using the Internet protocol ("IP"), which operates differently from the formats used for traditional wireline and wireless telephone calls. As a service, use of the IP format is not only efficient and cost-effective, but allows voice transmissions to be bundled with new applications and services, transforming telephony into a more interactive multi-media or data-enhanced experience. The FCC is eager to promote the benefits of VOIP, but recognizes that VOIP's revolutionary technology and applications raise complex regulatory problems.

Two recent decisions by the FCC stake out positions at the regulatory extremes: all and none.

At the "all" end of the spectrum, the FCC ruled that AT&T cannot avoid paying access charges by carrying long-distance calls over its own network in IP format. Access charges are fees a long-distance carrier pays to the local telephone companies that originate and terminate a call. If AT&T carries a call from City A to City B, part of the money it bills for the call goes to the local telephone companies in Cities A and B, whose facilities connect each of the people on the call to AT&T's equipment. Access charges are a major source of revenue to local telephone companies.

In the case considered by the FCC, AT&T accepted a call from City A in the usual manner, and paid the usual access charges to the City A local telephone company. AT&T converted the call to IP format and transmitted the call over its own Internet backbone to City B. There, AT&T converted the call back to conventional voice format and delivered it to the City B local telephone company. But it handed off the call over an ordinary business line, as though it were a local call from within City B. That meant AT&T did not pay access charges in City B.

Wrong, said the FCC. AT&T's offering is a "telecommunications service" subject to the full panoply of regulation. Access charges apply, regardless of IP format, to a service

that (like AT&T's) meets all these tests:

the service uses ordinary telephones;
each end of the call connects through a local telephone company;
both ends of the call are in the same format; and
the use of IP protocol does not give the customers enhanced functionality.

In other words, if both ends of a VOIP call look like plain old telephone service, that is how the FCC will regulate it. AT&T's use of "IP-in-the-middle" was not enough to change the outcome.

Just a few weeks earlier, the FCC reached the opposite conclusion as applied to a very different service, pulver.com's Free World Dialup ("FWD") service. FWD is a form of "peer-to-peer" or computer-to-computer Internet telephony. Users download software that enables their personal computers to function as telephones. FWD provides no transmission service (users must subscribe to a third-party broadband service), but once on-line, FWD users are alerted when other FWD users are on-line, and the FWD software facilitates voice and data transmissions among users.

The FCC ruled that FWD is an "information service," which means FWD is not subject to the extensive regulation applicable to traditional telephone companies. The FCC also ruled that the FWD service is jurisdictionally interstate, and that bars individual states from subjecting FWD to regulations designed for telephone companies. But the FCC emphasized that its ruling was limited to the specific facts presented by pulver, including these:

pulver does not charge for its service;
pulver provides no transmission capacity;
FWD does not use traditional telephone numbers for identifying or calling subscribers;
and
FWD calls do not originate on or terminate on the traditional public telephone network.

That is, a VOIP service that looks nothing at like traditional telephone service to end users escapes all regulation.

That leaves the problem of VOIP services that have some attributes of plain old telephone service, but not all. To help find a resolution, the FCC issued a notice of proposed rulemaking inquiring more generally into the regulatory issues raised by VOIP:

Should the FCC establish categories of VOIP services, based on important distinguishing characteristics? It asks commenters to propose specific grounds on which such categorization should be pursued. For example, should regulatory distinctions depend on whether a VOIP service is a substitute for or is functionally equivalent to traditional telephony, or is interconnected with the public telephone network, and/or uses traditional telephone numbers? Should distinctions be based on "phone-to-

phone" vs. "computer-to-computer" vs. "computer-to-phone" criteria?

On jurisdictional issues, the FCC seeks comment on whether to extend the *pulver.com* ruling -- that *pulver's FWD* is an unregulated information service subject to federal jurisdiction -- to other offerings. Are some categories of VOIP more like traditional telephony that should be subject to traditional shared interstate/intrastate jurisdiction?

Seeking comment on the appropriate legal framework for various categories of VOIP services, the FCC notes the Communications Act applies substantial regulatory obligations to telecommunications services, but not to information services. It also points out that its 1998 *Stevens Report* to Congress suggested that a VOIP service could or should be classified as regulated "telecommunications" if it (1) holds itself out as providing voice telephony or facsimile transmission service; (2) requires only an ordinary telephone; (3) allows the customer to call ordinary telephone numbers; and (4) transmits customer information without net change in form or content. The NPRM asks whether these distinctions should be altered.

Lastly, notwithstanding legal categories, the NPRM asks whether particular regulatory requirements should be imposed on various VOIP services. Possible requirements include provision of 911 service, enhanced access for disabled people, compensation to other telecommunications providers for terminating calls, and contributions to and payments from universal service funds. A separate proceeding will consider whether VOIP services should be subject to CALEA, which generally requires telecommunications systems to accommodate law-enforcement wiretaps.

Both the *pulver* and AT&T decisions are subject to change by the pending rulemaking. Advocacy will be intense, given the broad impact that VOIP will likely have on traditional telecommunications economics and market structures. In the eyes of some, traditional telephone technology and regulation are already obsolete. Others fear that VOIP will undercut the economics of universal telephone service. The FCC has the difficult task of preserving the best of both the old and the new.

Comments on the NPRM are due on May 28, and reply comments on June 28.