

## **Court, FCC Put VoIP On The Hook For Pay-Ins**

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The U.S. Court of Appeals for the D.C. Circuit has upheld a 2006 FCC Order requiring interconnected Voice-over-the-Internet (VoIP) providers to contribute to the federal universal service fund (USF). While remanding back to the FCC questions regarding the details of calculating that contribution, the Court's action continues the momentum over the last few years to regulate core aspects of VoIP in a manner similar to traditional telecommunications carriers. Consistent with that momentum, on the day prior to the Court's action the FCC announced an Order under which it imposed an obligation on interconnected VoIP providers to contribute to the Telecommunications Relay Service (TRS) and comply with other carrier obligations to the disabled, and a notice of proposed rulemaking seeking comments on location accuracy and reliability requirements for VoIP (and wireless) providers.

In 2006, while the FCC had still not resolved the issue of whether VoIP should be considered a Title II "telecommunications service" or a Title I 7 information service," it concluded that it had the authority to require providers of "interconnected" VoIP (VoIP that enables real-time two-way voice service to and from the public switched telephone network) to contribute to USF, and that it was good policy to enact such a requirement. The FCC asserted authority to do so under its Title I jurisdiction to take actions ancillary to its other responsibilities. The Commission also based its authority on the provisions of Section 254(d) of the Communications Act, which authorizes the contributions not only by "telecommunications carriers," but by "providers of interstate telecommunications."

Having decided to require VoIP providers to contribute to USF, the FCC then turned to the issue of how to calculate the level of such contributions. While USF contributions are to be based only on revenues generated from interstate and international calls, determining the jurisdictional nature of VoIP calls (and wireless calls) can be very difficult, given the ability of VoIP users to call from different states or countries using the same area code and number. So, the FCC provided a "safe harbor" figure of 64.9% interstate/international traffic, for VoIP providers to use in making calculations. VoIP providers wishing to use a lower percentage of such traffic for purposes of calculations were required to submit traffic studies to the FCC for pre-approval. By contrast, wireless carriers that rely on traffic studies do not need such pre-approval. The FCC justified this different treatment by noting that wireless carriers have long relied on not having to obtain pre-approval. Lastly, the FCC suspended the so-called carrier's carrier rule, which prevents duplicative USF contributions at the wholesale and retail levels for the same call. The Commission justified this by asserting that failure to do so would "result in a net decrease in the Fund in the short term."

A VoIP provider (Vonage), and an industry trade group, challenged the FCC's attempt to impose USF contribution obligations on VoIP, and challenged the FCC's creation of the 64.9% safe harbor and suspension of the carrier's carrier rule. The Court upheld the FCC's authority to impose contribution obligations, based on the language of Section 254(d) of the Communications Act which states that the FCC may impose that obligation on a "provider" of interstate telecommunications.

In doing so, the Court was obliged to deal with the fact that the FCC has refused to rule on the broader question of whether VoIP is a telecommunications service or an information service. As part of its "dance" to avoid classifying VoIP, the FCC has made arcane findings that a telecommunications carrier "offers" telecommunications service to the public (and thus is required to contribute to USF), while an

information service provider “provides” telecommunications as part of the broader information service offering. Because the FCC has concluded that VoIP operators at least “provide” telecommunications, it concluded that VoIP falls under a portion of Section 254 that allows (but does not require) the FCC to impose USF contribution requirements on “providers” of telecommunications. The Court upheld the FCC’s action by going through an arcane analysis to find that “provide” is a broader term than “offer” and thus VoIP could be said to “provide” telecommunications even if the FCC has not yet found that it “offers” telecommunications. Having upheld the FCC’s authority under Section 254, the Court chose not to rule on whether the FCC had authority under Title I of the Act.

On related issues, the Court upheld the FCC’s 64.9% interstate safe harbor for VoIP, ruling that the FCC was reasonable in considering VoIP traffic to be closer to interstate wireline than to wireless traffic, in terms of percentages of interstate vs. local. The Court did remand back to the FCC, however, the decision to require VoIP operators to get pre-approval of traffic studies to be used to show lower percentages of interstate traffic. The Court held that on this issue, it was inequitable to treat VoIP and wireless differently.

The Court also remanded the FCC’s decision to suspend the carrier’s carrier rule for two quarters as applied to VoIP, noting that the FCC’s justification of preventing a “net decrease in the Fund” was nonsensical. If VoIP was not contributing before the FCC ruling, there could be no resulting “decrease” in contributions from applying the carrier’s carrier rule.

On the big picture level, the news here is that the momentum for applying core telecom regulations to VoIP continues. Contributing to USF is a huge part of the obligation on telecommunications carriers, and the Court has upheld this. Consistent with this momentum, the day before the Court’s ruling, the FCC took two actions towards further applying telecom regulation to VoIP. First, it announced an Order ruling that interconnected VoIP providers must comply with Section 225 requirements for providing service to the disabled. These requirements include making contributions to the TRS, and offering 711 abbreviated dialing service for access to TRS. In its other action, the FCC sought comment on its tentative conclusion that providers of interconnected VoIP that allows the subscriber to “roam” to different locations must employ automatic location technology that meets the same accuracy standards as those imposed on wireless carriers, in connection with the provision of E911 emergency service.

VoIP providers had high hopes five years ago that they could come into the market and provide voice services without any of the “legacy” regulations imposed on traditional carriers. Those hopes appear to be long gone at this point, with only the question of access charges undecided. If the FCC imposes that requirement on VoIP operators (as it appears likely to do), then VoIP operators will have to see if they can succeed in the marketplace without regulatory advantages over traditional carriers.