

FHH Telecom Law
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**Federal Appeals Court Holds
Nomadic VoIP Exempt From State Regulation**

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The U.S. Court of Appeals for the Eighth Circuit recently issued a decision upholding an FCC order preempting state telephone regulation of “nomadic” VoIP service, which is provided by Vonage and similar companies. This is at least a temporary victory for Vonage, as it means that nomadic VoIP is not subject to the burden of complying with differing telephone regulations of fifty different states. The Court’s decision does not directly apply, however, to “fixed” VoIP, which is typically provided by cable operators and facilities-based telephone companies.

The FCC and the courts have been struggling for years with the issue of the jurisdictional classification of VoIP services. Traditional telephone services are classified as “interstate” or “intrastate”, based primarily on an analysis of the origination and termination location of a call. If the area codes of both the origination and termination points of a call are in the same state, then the call is declared to be “intrastate” and is primarily subject to the telephone regulations of that state. If the area codes are from different states, then the call is declared to be “interstate” and subject primarily to FCC regulation rather than state regulation.

The problem with applying this process to VoIP is that many VoIP services are used in a nomadic mode where the subscriber has an originating area code and number, but primarily uses the number from his/her computer in various places around the country or the world. VoIP providers assert that in this situation, regardless of the location associated with the customer’s assigned area code, it is nearly impossible to tell the actual location from which such a nomadic VoIP call is originated. In contrast, “fixed” VoIP service uses the same sort of IP transmission technology, but is typically provided by a cable operator or wireline telephone company to a subscriber located at a fixed residence or business location. In that case, the origination location can be easily determined, and the jurisdictional analysis is resolved simply.

The case at issue arose in 2003 when the Minnesota Public Utilities Commission issued an order requiring Vonage to cease offering service in Minnesota until it complied with that state’s telephone regulations. Vonage filed a petition with the FCC seeking a declaratory order that Vonage’s VoIP service was not subject to state telephone regulation because the service was an “information service” rather than a “telecommunications service”. Alternatively, Vonage also sought preemption of state regulation under the theory that it was impossible to separate the interstate and intrastate components of the service, and that subjecting Vonage to state regulations interfered with federal

policies designed to minimize regulation of the Internet.

In a widely publicized and controversial 2004 order, the FCC refrained from ruling on the information vs. telecommunications service issue, but declared that VoIP services such as Vonage were jurisdictionally interstate, due to the impossibility of determining the actual origination location of such calls. In addition, though little-noticed at the time, the FCC's order also stated that the FCC "would" pre-empt state regulation of fixed VoIP services if a party subsequently sought such a ruling from the Commission. It appears that no one sought such a ruling from the FCC, though most parties continue to operate as if state regulation of fixed VoIP had been pre-empted as well.

The appeals of the FCC's 2004 order were addressed by the Eighth Circuit in its recent decision. The court first ruled that it was not arbitrary and capricious for the FCC to decline to rule on whether VoIP is an information service or a telecommunications service. The court ruled that it was logical for the FCC to *first* rule on jurisdiction. Unfortunately, this holding will likely encourage the FCC to continue (as it has for over three years already) to avoid making this important choice, thus maintaining regulatory uncertainty over an important technology and set of services.

Next, the court upheld the FCC's findings that it is impossible to separate the interstate and intrastate aspects of nomadic VoIP, and that finding VoIP to be an intrastate service would interfere with federal policy of minimal regulation of the Internet. Lastly, the court rejected an argument that the FCC improperly classified *fixed* VoIP as interstate: the court found that the FCC's language on fixed VoIP was purely predictive (*i.e.*, that the FCC "would" pre-empt state regulation of fixed VoIP *if* such a case were presented to it) and thus the appeal was not yet ripe for judicial review.

The idea that the FCC has not ruled on the jurisdictional status of fixed VoIP probably comes as a revelation to many people, and is perhaps the most important "take away" from the court's decision. Given the rapid growth of "fixed VoIP" and the impact of jurisdictional holdings on the regulation and business of VoIP, we anticipate that some party will press this issue at the FCC in the near future.