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State Barriers to VoIP Deployment

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Voice over Internet Protocol (VoIP) is the product development of the moment. VoIP offers cost and technological advantages over traditional circuit-switched voice telephone service. It also stresses existing regulatory categories past the breaking point.[1] VoIP services hold great potential to enhance consumer welfare. After a commercial introduction in 2003, they have established a toehold in the communications marketplace. Upstart providers like Skype, Vonage, and Free World Dialup compete against the "new" VoIP entrants such as AT&T CallVantage, Verizon VoiceWing, and Digital Phone Service offered by Time Warner Cable and Comcast.

The widespread migration of communications technologies toward Internet protocol (IP) infrastructure has the potential to radically undermine the current regulatory structure. VoIP presents a direct assault on traditional telecommunications policies just as clearly as it offers new pricing models, new services and additional service combinations. In the past, complex regulations governed intercarrier relationships based on geography and type of service. These intercarrier relationships, and the subsidies they supported, were heavily regulated, relatively stable and intensely debated. Yet, most VoIP providers admit limited interest in the intercarrier relationships of yesterday and no interest in the costly regulations and cross-subsidies that dominated the regulatory landscape for decades.[2]

State and federal policymakers have staked an early claim on shaping the relationship of regulation to VoIP. Legislators and regulators alike are involved in the

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[1] See May, Randolph J. "The Metaphysics of VoIP," *CNET*news.com, January 5, 2004 (hereinafter, "The Metaphysics of VoIP"); Memorandum Opinion and Order: *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45 (Feb. 12, 2004) (hereinafter "FWD Order"); *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),* WC Docket No. 03-266 (Filed Dec. 23, 2003) (hereinafter "Level 3 Petition"); and, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003) (hereinafter Vonage Petition).

[2] See, e.g., Free World Dialup Petition; Level 3 Petition; Vonage Declaratory Petition.

debate.[3] However, based on the volume of activity and likely short-term impact, regulators are the most engaged and important actors. At this time, actions by federal and state regulatory bodies can generously be described as uncoordinated. The Federal Communications Commission (FCC) is slowly charting an "unregulatory" approach through decisions in a handful of discrete VoIP petitions. The FCC also has a global Notice of Proposed Rulemaking concerning the regulatory treatment of VoIP.[4] Meanwhile, approximately half of the state utility commissions have taken up some or all of the regulatory issues presented by VoIP.[5]

This essay catalogs state regulatory activity on VoIP and offers taxonomy of the proceedings. The purpose is to survey the real and potential state regulatory impediments to VoIP deployment. By stating our purpose in this manner, we betray our bias that state impediments to VoIP deployment are harmful and unwelcome. We believe that any regulatory barrier to the proliferation of this new technology would be unfortunate, as there are clear consumer benefits to be had from VoIP's proliferation. Furthermore, since this is a new technology, we see little rationale for regulating it under the traditional common carriage regime that has historically been used for telecommunications.[6]

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[3] See, e.g. "VoIP Regulatory Freedom Act of 2004," introduced as S. 2281 and H.R. 4129.

[4] *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36 (Rel. Mar. 10, 2004) (hereinafter, "FCC NPRM").

[5] This paper presents information on regulatory action in 25 states. The parameters of "regulatory action" often expand or contract to suit the exegesis of the moment. Our parameters are limited to public actions by state agencies. In some cases, for example our description of Wisconsin, we have relied upon reputable news reports. In other cases, such as in Georgia, we declined an extended treatment because to date, activities have been limited to public officials and not extended to public agencies. As is the case in all subjective determinations, we have attempted to apply a conservative definition for "activity."

[6] We posit, generally, two-and-a-half rationales for economic regulation. The first, the "public interest" rationale dates to Professor Bonbright, who explained that regulation arose to solve the monopoly problem. *See generally, Principles of Public Utility Rates* (Columbia Press 1961). With VoIP, there is no monopoly problem, as it is a new service. The second rationale, offered by Stigler, is the capture theory of regulation, where regulation exists to benefit the group(s) that can politically control it. George Stigler, "The Theory of Economic Regulation," 2 *Bell Journal of Economics and Management Science* 3-21 (1971). Under a capture rationale, efforts at VoIP regulation could be explained as an attempt to forestall a nascent competitive threat. This rationale is belied, however, by the incumbents' relative embrace of unregulated VoIP and their own entrance into the space. *See*, e.g, *In the Matter of IP-Enabled Services*, Comments of Qwest Communications International Inc., WC Docket No. 04-36 (May 28, 2004), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516199524. The second-and-a-half rationale, related to the capture theory, holds that regulation exists as a branch of public finance; that is, as a means for taxation. Richard Posner, "Taxation by Regulation" 2 *Bell Journal of Economics* 22-50 (1971). This last rationale has great explanatory force for the impulse to regulate VoIP. If left unregulated, VoIP would present a relatively easy way to avoid the explicit and implicit subsidization inherited from the legacy regulated rate structure. This is why VoIP is called, derisively, 'regulatory arbitrage.' *See, e.g., In the Matter of IP-Enabled Services,* Comments of OPASTCO, WC Docket No. 04-36 (May 28, 2004), available at http://www.opastco.org/docs/IPServicesComments.pdf. Of course, one man's arbitrage is another's rational economic action, and net payors in the universal service scheme would have the strongest economic incentive to go "on 'Net" with VoIP and hence avoid being subsidizers. Therefore, from the perspective of the current telecommunications rate and universal service system, the impulse to regulate VoIP makes perfect sense as an attempt to maintain the "taxation

In cataloging these barriers, we do not mean to be condemnatory toward state regulatory commissions that conclude it is their duty to regulate VoIP services.[7] To the contrary, in many cases, we concur that it appears under state law to be these commissions' regulatory *duty* to regulate VoIP services. Many of the states mentioned here operate pursuant to state statutes that are service-based. Thus, the legal syllogism is: the law regulates voice communication, this service carries voice communication; thus it must be regulated. If anything, we believe that such a result makes clear the necessity for fundamental reform of state laws governing communications regulation. It is unfortunate – and harmful – for state law to compel regulation of a new service like VoIP according to a regulatory model designed for regulation of an integrated, monopoly platform.

Ultimately, we believe that the competitive pressures of new technologies and services have eroded the basis for the current regulatory classifications and most economic interventions. Likewise, we believe the "Internet" in VoIP services is inherently an interstate, and therefore federal, concern. However, until fundamental changes to the nation's telecommunications laws are adopted, VoIP regulation will remain chaotic and the states will have their prerogatives. For now, the best we can do is counsel state forbearance from VoIP regulation, where possible.

Regulatory Overview

The FCC held a workshop on VoIP in December of 2003 in advance of undertaking major activity on the issue. The informational workshop built on a Commission report that found VoIP services bear many characteristics of a "telecommunications service," but should not be viewed as a "telecommunications service" under the Telecommunication Act.[8] In February 2004, the Commission ruled that the VoIP service offered by Pulver.com Free World Dialup is an "information service" and thus free of the major economic regulation associated with

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by regulation" of the current rate structure. Pure VoIP-plays like Pulver.com's Free World Dial-Up and Skype make this ultimately unsustainable since they have already been declared unregulated. Nevertheless, as a rear-guard action, regulation of VoIP that touched the public switched telephone network (PSTN) makes sense as an attempt to maintain the cross-subsidy system of current rates.

[7] A related, and possibly legally significant, taxonomy of VoIP service providers is necessary. Pure non-PSTN-touching, non-North American numbering system VoIP providers like Skype and Free World Dial-Up, or Microsoft X-Box Live's voice capability fall into one category. An intermediate category of VoIP services uses the PSTN to originate or terminate calls. Thus, AT&T's CallVantage, Vonage's or Skype's new SkypeOut offerings can call to other numbers on the conventional telephone numbering system and can receive calls from other numbers. Finally, there is backbone protocol conversion such as was the subject of an AT&T petition for declaratory ruling [WC Docket No. 02-361], which uses Internet protocol to transport the voice signal, but uses the PSTN at both the originating and terminating points. The AT&T Petition was not the first time this backbone protocol conversion issue arose, *see, for instance*, *US West, Inc. v. Qwest Communications*, Docket 99F-141T (Colo. PUC 1999) (complaint case for non-payment of intrastate access charges with a defense of backbone protocol conversion to IP; withdrawn because of merger).

[8] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, April 10,1998 (The Stevens Report).

"telecommunications services."[9] The Commission also denied an ambitious request by AT&T for declaratory ruling on the applicability of access charges to "phone-to-phone" VoIP calls.[10]

Three other major VoIP proceedings are open at the Commission.[11] Vonage petitioned the FCC to declare its service an "information service" and hence preempt a decision of the Minnesota Public Utilities Commission requiring Vonage to comply with state laws applying to telecommunications providers.[12] Level 3 has petitioned the Commission to forbear from imposing inter- or intrastate access charges on Internet-based calls that originate or terminate on the public switched telephone network (PSTN) as well as on "incidental" PSTN-to-PSTN traffic.[13] The Commission also noticed a broad-based proposed rulemaking on VoIP.[14]

At the state level, some two-dozen states have taken formal action related to VoIP. In December 1998, the South Carolina Public Service Commission opened a VoIP docket that was soon held in abeyance. Four years later the Florida Public Service Commission held a VoIP workshop. In May 2003, Florida enacted legislation to keep VoIP free of "unnecessary regulation, regardless of the provider."

In the same month, the North Carolina Utility Commission received an application for a certificate to provide IP voice services and a staff investigation of VoIP began at the Washington Utilities and Transportation Commission. Meanwhile, the Pennsylvania Public Utility Commission issued an order on VoIP inviting comment. By July 2003, the commissions in Alabama and Minnesota were active with VoIP dockets and the regulatory floodgates had opened.

Approximately half of the states have not taken any action with regard to VoIP. The actions of other states can be grouped into four categories. In order of regulatory interest: First, certain state commissions have sought information on VoIP through workshops or formal investigations; second, some states have asserted authority over VoIP providers and, in turn, sought applications for certificates of convenience and necessity; third, in a category by itself, California has an active rulemaking docket that would subject VoIP services to the full-blown supervision of the California

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[9] FWD Order.

[10] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges,* WC Docket No. 02-361 (filed Oct. 18, 2002).

[11] A number of proceedings implicate VoIP and its legal status, principally the application of the Communications Assistance to Law Enforcement Act [47 USC § § 1001-1021]. For purposes of this paper, we sidestep these dockets and focus on those issues implicating state regulation of VoIP providers.

[12] Vonage Petition.

[13] Level 3 Petition.

[14] FCC NPRM.

Commission;[15] fourth and finally, Iowa has used its numbering allocation authority to impede VoIP deployment in the state.

State Investigations and Open Proceedings

Alabama – The rural local exchange carriers petitioned the Alabama Public Service Commission (APSC) for a declaratory ruling that VoIP providers are subject to APSC authority. In an striking example of Old Economy meets New Economy, the petition asks for VoIP providers to be classified as "transportation companies."[16] In addition, the petition seeks traditional tariff obligations for VoIP providers and to require the payment of intrastate access charges. The petition was entered July 23, 2003; the APSC established a declaratory proceeding (Docket 29016) August 29, 2003.[17] Comments and reply comments were filed by October and December 2003 and a decision is pending.

Colorado – Like many other commissions, the Colorado Public Utility Commission (CPUC) initiated a 2003 investigation of VoIP. In May, the CPUC ordered the production of documents in order to investigate VoIP services. In particular, the CPUC expressed an interest to learn more about how emergency services were furnished by VoIP providers. Moving at an unheard of regulatory speed, the CPUC closed the docket a mere six months later. After noting the FCC's assertion of jurisdiction, the CPUC found that "because 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."[18]

The Colorado Commission has also ruled that IP-based voice calls originating or terminating on the PSTN are *not* subject to intrastate switched access.[19]

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[15] See for example, Lassman, Kent and Peters, Adam, *Comments of The Progress & Freedom Foundation Before the Public Utilities Commission of the State of California*, Investigation 04-02-007 (filed Feb. 11, 2004) (hereinafter, PFF California Comments).

[16] See Alabama *Code* Section 37-2-1 (1975) as cited in the AL PSC Order, Docket 29016: "the term 'transportation company' shall include every person not engaged solely in interstate commerce or business that may now or hereafter own, operate, lease, manage or control those common carriers for hire…any telephone line."

[17] The Alabama PSC Docket 29016 is also found at http://www.psc.state.al.us/29016/29016main.html.

[18] Colorado Public Utility Commission, Docket 03M-220T (Order closing the docket, Dec. 17, 2003).

[19] *In the Matter of Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with US West Communications, Inc., pursuant to § 252(b) of the Telecommunications Act of 1996*, Initial Commission Decision, Docket No. 00B-103T, Decision No. C00-858 at 9-10 (Colo. PUC Aug. 1, 2000). The Commission engaged in rather transparent legerdemain to describe how the ICG VoIP service used the incumbent's network differently than with normal switched access, thus sidestepping the legal categorization issue and painting a different cost-causation issue to draw VoIP out of the intrastate access regime. In an utterly post-modern twist involving commenting on one's own handiwork, a co-author of this paper voted for, and had a hand in writing, that Order.

Florida – Proving that regulators are not the only public officials to make telecommunications law, the Florida legislature passed SB 654, "The Tele-Competition Innovation and Infrastructure Enhancement Act" in May 2003. The bill clarifies legislative intent for VoIP. In part, it says, "the legislature further finds that the provision of voice-over-internet protocol (VoIP) free of unnecessary regulation, regardless of the provider, is in the public interest."[20] The legislation was introduced on the heels of a Florida Public Service Commission (FL PSC) VoIP workshop in January 2003. As early as September 2000, the FL PSC published a white paper on Internet pricing that foreshadowed key VoIP policy questions.[21]

Illinois – The Illinois Commerce Commission (ICC) has hosted a pair of meetings on VoIP. An ICC workshop in January 2003 initially raised the issue. In March 2004 the telecommunications policy committee heard presentations by a handful of stakeholders but did not refer the issue to the ICC for further action. No activity is currently pending.

Indiana – In September 2003, the Indiana Utility Regulatory Commission (IURC) made a report on VoIP to the Regulatory Flexibility Committee.[22] The report found that VoIP is not competitive with traditional wireline telephone service and the IURC has not taken subsequent action.

Michigan – The Michigan Public Service Commission initiated an investigation into VoIP in March 2004.[23] More than a dozen parties filed comments in the proceeding and a decision or report is pending.

Missouri – The Missouri Public Service Commission (MoPSC) initiated a case in February 2004 to study VoIP.[24] The MoPSC acknowledged the recent opinion of the Minnesota District Court that VoIP is an information service and sought more information in anticipation of preparing comments for an FCC NPRM on VoIP. Two workshops were held and a Task Force Report was issued. The MoPSC filed comments in response to the FCC NPRM that highlighted the findings of its own investigations including the potential impact of VoIP on sales tax revenues, E-911

[20] The Florida statute can be found at http://www.flsenate.gov.

[21] Florida Public Service Commission Division of Policy Analysis & Intergovernmental Liaison (Collins, Fadiora, Groom and Smitha), *Internet Pricing: Regulatory Implications and Future Issues*, Sept. 25, 2000. The paper is found at http://www.psc.state.fl.us/general/publications/paiPDF/internetpricing.pdf.

[22] Members of the Regulatory Flexibility Committee include members of the Committee on Commerce and Economic Development in the Indiana House of Representatives and the Committee on Utility and Regulatory Affairs in the Indiana Senate. The Regulatory Flexibility Committee meets while the General Assembly is not in regular session.

[23] Case No. U-14073.

[24] Case No. TW-2004-0324.

funding in 66 Missouri counties that utilize a local line surcharge, and the widely used practice of funding regulatory activity through assessments on regulated firms.[25]

North Dakota – The North Dakota Public Service Commission received a complaint about "dial-around" services that utilize VoIP technologies.[26] The case is pending and pivots on the policy implications of access charges. Two states – Florida and Oregon – also faced "dial-around" complaints but dismissed the cases without a conclusion. However, in response to cases in Washington and New York, the respective utility commissions found that VoIP dial around services were functionally identical to widely available, traditional long distance service. The analyses of these state commissions relied heavily on the FCC's Stevens Report.

Ohio – The Public Utility Commission of Ohio (PUCO) initiated an investigation into VoIP in April 2003.[27] In December 2003, the PUCO authorized Time Warner Cable to provide local and long distance services via VoIP while it continued to study the jurisdictional questions of VoIP regulation. The PUCO also asked all VoIP providers operating in Ohio to register and to complete a questionnaire. To date, more than a dozen providers have registered with the PUCO.

Oregon – When MCI WorldCom (MCI) filed for bankruptcy in early 2004, it precipitated a joint filing by its Oregon subsidiary and Verizon Northwest (Verizon) to amend their interconnection agreement. It was necessary to "settle the books" on the exchange of various traffic between the carriers. In particular, the amendments would allow MCI to calculate a "blended rate" using a combination of data from voice and dial-up Internet traffic. Level 3 filed in the proceeding to ensure that the Oregon Public Utility Commission (OPUC) approval was "limited to the unique circumstances relating the negotiated settlement between Verizon and MCI, and does not create a precedent for any other carriers."[28] Level 3 was concerned that VoIP traffic would be defined as "telecommunications services" with attendant access charges and treated as such for the agreement. Verizon countered that the "precedential value" should be argued in some future proceeding. All parities supported the interconnection amendments. At issue was the OPUC precedent of IP-traffic in a blended telecommunications rate. In April, the commission approved the amended interconnection agreement and concluded, "that no party shall be prejudiced by our having declined to make any ruling upon their precedential value."[29] At nearly the same time, a similar situation arose in

[25] The Missouri report most pointedly gives voice to the "taxation by regulation" impetus for VoIP regulation. The report dwells not on the market failure need for VoIP regulation (because there is none), but rather the tax and revenue consequences of VoIP's escape from legacy regulatory modes.

[26] PU 2967-03-666.

[27] Case No. 03-950-TP-COI.

[28] *Comments of Level 3 Communications, Inc LLC*, p.3.

[29] The Public Utility Commission of Oregon, In the Matter of MCIMETRO ACCESS TRANSMISSION SERVICE, LLC, and GTE NORTHWEST INCORPORATED (ARB 165(1)) and In the Matter of MCI WORLDCOM COMMUNICATIONS, INC., and VERIZON NORTHWEST INC. (ARB 422(1)), Order No. 04-228.

Florida with MCI and Verizon. The Florida PSC approved a change to the interconnection agreement over the concerns of Level 3 with a staff memorandum.[30] The memorandum noted that negotiated settlements have no precedential value.

Like many state commissions, the OPUC reports to the legislature and interested parties on the state of its telecommunications marketplace. In the OPUC's January 2004 report, *The Status of Competition and Regulation in the Telecommunications Industry*, VoIP policy issues were briefly addressed. The OPUC has not opened a formal proceeding on VoIP and the report forecasts the agency's posture: "FCC decisions concerning VOIP will likely determine the role the Oregon PUC will have in the regulation of VOIP, if any. In the meantime, a number of Oregon carriers are using VOIP."[31]

Pennsylvania – In May of 2003, the Pennsylvania Public Utility Commission (PPUC) opened an investigation into VOIP as a "jurisdictional service."[32] The proceeding remains open. In April 2004, the PPUC unanimously adopted a three-page motion on VoIP. The order did not come to a conclusion on jurisdictional questions and found that regulatory restraint "is more prudent" until the technology and policy issues are better understood.

South Carolina – The South Carolina Public Service Commission (SCPSC) may have been the first state commission to open a VoIP proceeding. In December 1998, the SCPSC opened a generic proceeding to gather information. In March of the following year, the issue was held in abeyance and while the docket remains open, there has not been additional activity.

Tennessee – The Tennessee Regulatory Authority (TRA) held an informational workshop on VoIP in April 2004.[33] Subsequently, TRA Chairman Tate also filed comments at the FCC in the global VoIP NPRM. The Chairman argued for a "new mode of thinking" to address the marketplace developments brought on by VoIP.[34] Tate argued that "the only way to ensure that the proper economic signals are sent to providers of voice communications is to review the whole body of regulations for the purpose of eliminating arbitrage opportunities" and that a reevaluation of the "overall regulatory program" is necessary "so that consumer welfare is the centerpiece of regulation rather than restraining the market power of increasingly hypothetical monopolists." [35]

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[30] Florida PSC Docket No. 040047-TI.

[31] The Oregon Public Utilities Commission, *Status of Competition and Regulation in the Telecommunications Industry*, pps. 2-3, January 2004. The report is found at http://www.puc.state.or.us/telecomm/ltcs.pdf.

[32] Docket No. M-00031707.

[33] See for example, the presentation of Adam Peters at http://www.state.tn.us/tra/VOIPworkshop.htm.

[34] Deborah Taylor Tate, *Individual Comments in the Matter of IP-Enabled Services*, WC Docket No. 04-36, p. 2-3.

[35] Ibid. at p. 5 and at p.8.

Utah – The Utah Public Service Commission initiated an investigation of VoIP with a January 2004 order.[36] A technical presentation was made in March and the matter remains pending before the commission.

Vermont – The Vermont Public Service Board (VPSB) held a July 2004 workshop to investigate draft proposed rules for non-dominant telecommunications carriers. The proposed rule would require "VoIP carriers" to obtain a certificate of public good and would relieve "VOIP carriers" from rate reviews and tariffing as well as corporate organization and financial reviews.[37] Meanwhile, the Vermont Public Service Department issued a "*Vermont Telecommunications Plan, v. 4.0*" in September 2004 to replace the state's existing plan which was adopted in 2000. The plan is designed to guide regulators on issues before the VPSB. In part, the plan "favors continued forbearance in state regulation of wireless and voice over Internet Protocol (VoIP), with certain specific exceptions."

Washington – A staff investigation of VoIP was initiated at the Washington Utilities and Transportation Commission (WUTC) in May 2003. The investigation resulted from a verbal request and remains open without any documents filed. As noted above, the WUTC adopted a "functional equivalence" threshold for long distance dial around services.

Assertions of State Authority

Maine – After a 2002 cable telephony pilot program, Time Warner Cable received certification in February 2003 to provide local exchange service in Maine. The Maine Public Utilities Commission (MPUC) did not find that Time Warner Cable is a "telecommunications utility." Nonetheless, the MPUC approves the schedules, rates, terms and conditions of the VoIP service.

Minnesota – In July 2003, the Minnesota Department of Commerce filed a complaint against VoIP provider Vonage for failing to apply for a CPCN. Vonage sought and was denied temporary relief from the Minnesota Public Utility Commission (MPUC), which subsequently ordered the firm to comply with the CPCN process. However, the U.S. District Court for the District of Minnesota ruled that Vonage's VoIP service is an "information service" and therefore the MPUC had no authority under the Telecommunications Act of 1996.[38] In response to a Vonage petition for declaratory ruling, the FCC opened its own docket in February.[39] Undeterred, the MPUC sought a new trial in district court and oral arguments were heard in December of 2003.[40] In addition, the MPUC filed comments in the FCC docket while the FCC and the

[36] Docket No. 04-999-02.

[37] Memo Draft Rule Revisions, Draft Rule 7.500 and Draft Rule 7.600 at 7.505.

[38] 290 F. Supp. 2d 993.

[39] FCC Docket 03-211.

[40] Civil File No. 03-5287, *Vonage Holdings Corp. vs. The Minnesota Public Utilities Commission.*

Department of Justice have filed an amicus brief in the U.S. District Court. The FCC docket remains open while the District Court case was terminated in February 2004.

Nebraska – In June 2004, Time Warner Cable applied to the Nebraska Public Service Commission for a CPCN to provide Internet Protocol voice services.[41] A hearing on the application took place September 17, 2004 and resolution of the application is pending.

New York – The New York Public Service Commission (NYPSC) entered the VoIP waters when it requested comments on a complaint of Frontier Telephone against Vonage in October 2003. The same month, Attorney General Eliot Spitzer filed comments at the FCC in the Vonage request for declaratory ruling in the Minnesota case. Spitzer argued against the petition. In May 2004, the NYPSC established a regulatory framework for VoIP providers when it determined Vonage is a "telephone corporation" under state law. A CPCN application and attendant tariff filing followed.

North Carolina – Perhaps unique among state utility commissions, in July 2003 the North Carolina Utilities Commission (NCUC) declined a request to open an informational proceeding on VoIP policy issues. The NCUC had however recently granted a CPNC to Time Warner and included a VoIP representative in an advisory role to an ongoing study of telecommunications competition.

Texas – The Texas Public Utility Commission (TPUC) granted a certificate of authority to Time Warner Cable in August 2003. A representative of the TPUC, Mr. Ed Bosson, was a presenter at the May 2004 FCC "Solutions Summit" which focused on disability access and IP communications services.

Wisconsin – Numerous press accounts suggest that the Public Service Commission of Wisconsin (PSCW) sent letters to VoIP providers requiring them to seek PSCW approval in order to provide service.[42] According to *Government Technology* magazine, the PSCW declared the firms' bills for voice calls within the state unenforceable. The news item went on to conclude,

"Currently staff is in a fact-finding stage on the issue of VoIP," said Linda Barth, the Wisconsin PSC's public information officer, in mid-December. "It is staff's intent to continue to collect information on VoIP and to monitor FCC activities. We are not at a point in our process to make further comments about regulation of VoIP."[43]

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[41] Beginning in February 2003 with a CPNC issued by the Maine PUC and up to a June 2004 CPNC issued by the Minnesota PUC, Time Warner Cable has successfully applied for a CPCN in ten states. The remaining eight states are North Carolina, Ohio, Texas, Kansas, Missouri, California, South Carolina, and New York. CPNC petitions are pending in four states: Nebraska, Wisconsin, New Hampshire and Hawaii.

[42] See for example, *CNET News*, "Wisconsin enters VoIP fray," Sept. 15, 2003, found at http://news.com.com/2100-7352-5076852.html or *Government Technology*, "VoIP in the Crosshairs," March 2004, found at http://www.govtech.net/magazine/story.php?id=89561.

[43] Ibid. *Government Technology*.

Special Cases: California and Iowa

California – In September 2003, the California Public Utility Commission (CaPUC) notified corporate officials at Vonage, Net2Phone, Packet8, VoicePulse and SBC Communications of its interpretation of VoIP as an intrastate telecommunications service thus, necessitating formal certification from the CaPUC. The following month, CaPUC issued a report on *The Status of Telecommunications Competition in California*. The report's only mention of VoIP is in context of the then pending AT&T petition at the FCC in which the CaPUC had filed comments.[44] On VoIP, the report does not address the competitive effects of VoIP providers or the efficacy of its request for certificate applications. Rather, it concludes "The CPUC is concerned that if AT&T's VoIP calls and other similar VoIP applications are treated the same as internet traffic, it will set a dangerous precedent that will ultimately result in the demise of universal service funding."

In February 2004, the CaPUC issued an Order Instituting Investigation into "the appropriate regulatory framework" for VoIP.[45] The Order tentatively concluded "that those who provide VOIP service interconnected with the PSTN are public utilities offering a telephone service subject to our regulatory authority."[46] Comments and reply comments were filed by March and June of 2004 and a decision is pending.

Iowa – The Iowa Utilities Board (IUB) filed comments at the FCC in October 2003. A request for declaratory ruling and a significant early regulatory proceeding for VoIP were at issue.[47] The IUB staked out three basic points. First, the commission should consider "functional equivalence" and not the equipment or protocols involved in VoIP. The IUB recognized the likelihood of non-market based advantages that would result from the application of standards and regulation of telecommunications services which are not technologically neutral. Third, the IUB maintained the right and obligation of states to examine local service issues as it maintained the need for a more comprehensive review of VoIP by the FCC. These arguments have subsequently formed the basis of several state commissioners' position on VoIP.[48]

More important, the IUB has erected a barrier by denying VoIP providers access to telephone numbers. Sprint, Level 3 and KMC Telecom face a Catch-22 problem with the IUB and the North American Numbering Plan Administrator (NANPA) with respect to their dial-up Internet services. Numbering resources were denied to the petitioners because they lacked an IUB-issued certificate of public convenience and necessity

[44] The California Public Utilities Commission, *Third Report for Year 2003, Status of Telecommunications Competition*, at section 4.9.5, p. 51. Found at http://www.cpuc.ca.gov/word_pdf/REPORT/31223.doc.

[45] California Public Utilities Commission, Proceeding No. IO402007.

[46] PFF California Comments.

[47] Vonage Petition.

[48] See for example, the testimony of the Hon. Stan Wise, President of the National Association of Regulatory Utility Commissioners Before the U. S. Senate Commerce Committee, Feb. 24, 2004.

(CPCN). The IUB declined a CPCN application because the petitioners' VNXX architecture (to transport local ISP traffic) "is not an authorized local service" under its jurisdiction. That is, the petition was denied because the service was deemed interstate. The irony of the situation is that the original application and IUB ruling on ISP-bound traffic pre-dates VoIP services. Once VoIP services were viable, Level 3 went back to the IUB seeking a CPCN, as a prerequisite to obtain numbering resources, and found the IUB's posture had changed. With respect to VoIP, the IUB does not recognize sole federal jurisdiction over VoIP services that have undergone a net protocol conversion but rather view these services as local exchange services subject to IUB jurisdiction. At this time, the IUB has appealed the issue to the state Supreme Court after a district court ruling in favor of the service providers.

Telephone numbers are the *sine qua non* of the relationship between consumer and provider. Regardless of how a service provider is regulated or the level of government responsible for regulation, service can rarely commence without access to numbering resources. In an effort to resolve questions about the proper jurisdiction for regulatory control over VoIP providers, the IUB has taken a position that renders the question moot. This action is in spite of the fact that petitioners point out the availability of numbering resources in the District of Columbia and 46 other states. Nonetheless, as long as the issue remains in court, Iowa consumers do not have access to commercial VoIP services.

Conclusion

State actions on VoIP exhibit a laudable hesitancy to regulate a new service according to an old model. That said, VoIP presents unavoidable questions for state regulators to answer. Based on the various state laws, some of these answers will be salutary to VoIP deployment; others by necessity will impede VoIP's advance into the marketplace.

As we said at the outset of this paper, we believe that regulation of VoIP is unnecessary. There is no basis for economic regulation of VoIP. Even public safety regulation like 911 or E-911 may be premature, or at least in the interim can be handled by customer disclosure requirements about VoIP's limitations. We furthermore believe that VoIP can be a catalyst to dismantling the creaky cross-subsidization mechanisms for local rates and access charges. Finally, we find no purpose served by denying VoIP providers access to telephone numbers. Though there are legitimate concerns about number conservation, legal casuistry that denies VoIP the fundamental, near-universal numbering standard accomplishes no beneficial goals.

Voice over Internet Protocol is a "killer app" of the old regulatory categories. As our colleague Randy May has noted,[49] debates over whether VoIP is a "telecommunications service" or "information service" devolve rapidly into the realm of metaphysics and focus nothing on the need for regulation in the first place. State

[49] The Metaphysics of VoIP.

regulatory commissions, either through exercise of regulatory *will* or *duty*, find themselves inevitably confronted with the question of what to do with VoIP in its various permutations. More than anything, we believe that VoIP crystallizes the imperative for clarity and certainty going-forward in the age of IP-based communications. Where states can forbear from regulation and hence allow VoIP services to flourish, we urge them to do so. But the regulatory status and treatment of VoIP and all IP-based communications cannot be clear until both the Federal Communications Commission and perhaps even the Congress speak, and speak clearly.

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