

**DEVELOPMENTS IN VOIP
AND BROADBAND REGULATION**

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Developments in VoIP and Broadband Regulation

**John Nakahata,¹ Brita Strandberg & Bruce Gottlieb
Harris, Wiltshire & Grannis**

I. Introduction

2005 marked the beginning of substantive regulation of voice over Internet protocol, or VoIP, services. Initial regulation has been focused on ensuring public safety – providing assistance to law enforcement performing surveillance (CALEA) and delivery of calls to emergency services (E911) – for VoIP services that most closely resemble traditional telephony. The Federal Communications Commission has raised, but not yet addressed, a wide range of additional issues, with VoIP provider payments to the universal service fund perceived to be the most urgent. These issues, particularly universal service, along with the remaining CALEA and E911 questions, are likely to be at the center of any additional regulatory action in the short term.

Against the backdrop of the Supreme Court's *Brand X* decision, the Commission has also this year moved to deregulate provision of broadband services, issuing decisions classifying wireline broadband services as information services and ruling that ILECs are not required to offer DSL on a stand-alone basis.

Driven by various developments in communications and technology, including increasing consumer and regulatory attention to VoIP and by the challenge the Internet poses to the existing telecommunications regulatory framework, Congress has introduced several bills that could affect both

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VoIP and broadband providers. While it is too early to tell which, if any, of these bills is likely to become law, they generally evince support for regulating VoIP in areas such as public safety, consumer protection, universal service, and network interconnection.

A. Summary

In Part II, below, we outline the significant regulatory developments affecting VoIP services, beginning with the Commission's stand-alone actions addressing CALEA and net neutrality. Next, we discuss the Commission's IP-Enabled Services proceeding, including the Commission's order on E911, its classification and jurisdiction decisions, and the still-pending issues of intercarrier compensation, universal service, and disability access.

In Part III, reflecting the essential relationship between broadband access and VoIP service, we discuss developments in broadband regulation, starting with the Supreme Court's *Brand X* decision and the Commission's regulatory treatment of wireline broadband service and concluding with a discussion of the Commission's approach to standalone DSL.

Finally, Part IV describes recent legislative developments affecting VoIP, focusing on possible legislative outcomes with respect to jurisdiction, intercarrier compensation, 911, net neutrality, consumer protection, and universal service.

II. Regulatory Developments

In August of this year, the Commission took action to extend CALEA obligations to VoIP and broadband Internet access providers and articulated policy principles designed to ensure open access to the Internet. In May, in a spin-off from the larger IP-Enabled Services proceeding, the Commission

imposed E911 obligations on VoIP providers. Each of these developments is discussed below. This section next addresses remaining issues raised in the IP-Enabled Services proceeding, including: the Commission's jurisdictional decisions concerning VoIP; intercarrier compensation and universal service; and disability access.

Thus far, while sidestepping the question of how to classify interconnected VoIP services – the services now subject to CALEA and 911 obligations – the Commission in its E911 Order and broadband Internet access orders has invoked the broad, general provisions of Title I of the Communications Act as the source of its authority to adopt affirmative regulatory requirements over VoIP and broadband services, rather than Title II, which governs telecommunications services.² Although there is some precedent upholding the Commission's assertion of jurisdiction to impose detailed

² The Commission has cited the provisions of 47 U.S.C. §§ 151, 152 which, *inter alia*, state that the Communications Act “appl[ies] to all interstate and foreign communications by wire or radio” with a purpose of “mak[ing] available, so far as possible, to all the people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges,” securing “national defense,” and “promoting safety of life and property through use of wire and radio.” *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and NPRM, CC Docket No. 02-33 (¶¶ 108-110) (rel. Sept. 23, 2005) (“*Wireline Broadband Order*”); *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (¶¶ 26-29) (rel. June 3, 2005) (“*VoIP E911 Order*” or “*VoIP E911 NPRM*”). As discussed further below, the FCC’s decision mandating CALEA coverage for VoIP relied on CALEA’s separate statutory definitions, outside the Communications Act of 1934.

regulatory obligations under Title I,³ the courts have also struggled to find limits on the Commission's ability to rely on its Title I ancillary jurisdiction.⁴ As the Commission moves forward in this area, this tension between the Commission's public policy goals and possible judicial limits on Commission action will continue to inform both debate and regulatory action, and may drive legislative reform.

A. CALEA

In an Order released on September 23, 2005, the Commission extended CALEA to cover "facilities-based broadband Internet access providers" and providers of interconnected VoIP service.⁵

³ See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*") (upholding the Commission's Title I ancillary authority to regulate cable operators, including to require them to transmit programming of their own in addition to the signals independently aired by broadcasters); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding the Commission's authority under Title I to limit the ability of cable operators to transmit the signals of distant television stations in the period before Congress enacted the 1984 Cable Act, on the ground that such regulation was "reasonably ancillary to the effective performance of [the Commission's] duties").

⁴ See *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video II*") (restricting the scope of *Midwest Video I* by prohibiting the Commission from exercising its Title I jurisdiction to regulate cable operators where the specific regulations would be *ultra vires* if applied to broadcasters, because the Commission's implicit authority over cable operators must be ancillary to the Commission's express statutory authority over broadcasters); see also *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the Commission lacks Title I authority to regulate equipment when that equipment is not being used for radio or wire transmission).

⁵ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295 (rel. Sept. 23, 2005) ("*CALEA Order*").

1. Background

CALEA is the Communications Assistance for Law Enforcement Act.⁶ Passed in 1994, CALEA was meant to address technical difficulties faced by law enforcement conducting lawful surveillance of changing telecommunications technology, “such as digital or wireless transmission modes, or features and services such as call forwarding, speed dialing, and conference calling.”⁷ CALEA requires telecommunications carriers to ensure that their systems are technically capable of enabling law enforcement agencies operating with proper legal authority to intercept individual telephone calls and to obtain certain “call-identifying information.”

2. The Current Proceeding

In 2004, the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Agency (“Law Enforcement”) jointly petitioned the Commission for expedited rulemaking, seeking, among other things, a Commission decision that broadband access and “broadband telephony” are subject to CALEA.⁸ In response, the Commission initiated a proceeding to examine application of CALEA to packet-mode services.⁹

In its Notice of Proposed Rulemaking (“*CALEA NPRM*”), the Commission tentatively concluded that providers of

⁶ 47 U.S.C. §§ 1001-1021.

⁷ H.R. Rep. No. 103-827, pt. 1, at 9 (1994).

⁸ *DOJ, FBI, and DEA Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, RM-10865 (filed Mar. 10, 2004).

⁹ *Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676 (2004) (“*CALEA NPRM*”).

“managed” VoIP and facilities-based providers of broadband¹⁰ Internet access service (whether provided on a wholesale or retail basis) are subject to CALEA.¹¹ This tentative conclusion rested on determinations that the definition of telecommunications carrier in CALEA is broader than the definition of telecommunications carrier in the Communications Act, and that broadband Internet access services and managed VoIP services are substantial replacements for local telephone exchange service within the meaning of CALEA.¹² The Commission also tentatively concluded that call-identifying information in packet networks is reasonably available when the information is accessible without significantly modifying a network.¹³

In delineating covered VoIP services, the Commission in the *CALEA NPRM* essentially proposed to adopt Law Enforcement’s suggested definitions, extending CALEA’s coverage to “managed” or “mediated” VoIP services.¹⁴ These “managed” or “mediated” services are ones “that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide call set up, . . . switching, addressing or routing functions for the user.”¹⁵ Not included were peer-to-peer VoIP services, defined as “disintermediated communications that are set up and managed by the end user via its customer premises equipment or personal computer.”¹⁶

¹⁰ Broadband is defined as “services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second . . . in the last mile.” *Id.* at ¶ 35.

¹¹ *Id.* at ¶ 37.

¹² *Id.* at ¶ 1.

¹³ *Id.*

¹⁴ *Id.* at ¶ 37.

¹⁵ *Id.*

¹⁶ *Id.*

The Commission's NPRM proposed few tentative conclusions regarding the scope of broadband and VoIP providers' CALEA obligations. In the NPRM, the Commission recognized that "[p]acket technologies are fundamentally different from the circuit switched technologies that were the primary focus of the Commission's earlier decisions on CALEA."¹⁷ It thus sought comment on whether it needed to clarify the meaning of the term "call-identifying information" for broadband access and VoIP services.¹⁸ The Commission likewise invited comment on the tentative conclusion that information is not "reasonably" available to broadband access and VoIP providers if the information is only available by significantly modifying a network.¹⁹ In seeking comment on this issue, the Commission recognized that content and call-identifying information may be available from different entities involved in provision and transmission of a VoIP service, and sought comment on where CALEA obligations should rest.

3. First Report and Order and Further Notice of Proposed Rulemaking

On September 23, 2005, the Commission released its First Report and Order and Further Notice of Proposed Rulemaking addressing application of CALEA to broadband Internet access and VoIP.²⁰

The *CALEA Order* extends CALEA to broadband Internet access and interconnected VoIP, concluding that both types

¹⁷ *Id.* at ¶ 63.

¹⁸ *Id.* at ¶ 67.

¹⁹ *Id.* at ¶ 68.

²⁰ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295 & RM-10865 (rel. Sept. 23, 2005) ("*CALEA Order*").

of providers are telecommunications carriers under CALEA’s substantial replacement provision.²¹ The Commission left for another order, to be released “in the coming months,” questions of the actual capabilities covered providers will have to offer, along with other issues including “compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement.”²² By taking this approach, the Commission sought to guarantee that newly-covered providers become involved the development of standards for CALEA capabilities and compliance. Despite the absence of defined obligations, the Commission set a compliance deadline of 18 months from the effective date of the *Order*.²³

The Commission declined to use the concept of “managed” or “mediated” VoIP to define the VoIP services subject to CALEA. Instead, the Commission ruled that CALEA applied to “interconnected VoIP services” – a term first defined in the Commission’s *VoIP E911 Order*.²⁴ Interconnected VoIP services: “(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN.”²⁵ The Commission made clear that any future expansion of this definition in other contexts, such as E911, will apply to CALEA as well.²⁶ CALEA obligations extend to all interconnected VoIP that is capable of two-way interconnection with the PSTN, with the

²¹ *Id.* at ¶¶ 24-46.

²² *Id.* at ¶ 3.

²³ *Id.*

²⁴ *VoIP E911 Order* at ¶ 24.

²⁵ *CALEA Order* at ¶ 39.

²⁶ *Id.* at ¶ 39 n.108.

consequence that IP-to-IP, IP-to-PSTN, or PSTN-to-IP calls made using a covered service are also covered by CALEA.²⁷

The Further Notice of Proposed Rulemaking seeks comment on extending CALEA obligations to additional VoIP providers, specifically asking whether there are managed VoIP services not covered by the *Order* that should be covered by CALEA. In addition, the Commission requested comment on implementing CALEA's exemption provision and, in particular, the appropriateness of exempting or imposing different compliance standards on classes of providers such as small and rural providers.²⁸

B. Network Neutrality

On August 5, 2005, the Commission issued a policy statement setting forth four Commission principles directed at maintaining open access to the Internet.

1. Background

Because VoIP services are often offered separately from underlying transmission services, and in many cases compete with services offered by transmission providers, some VoIP service providers (and other Internet applications providers) and Internet policy advocates have been concerned about the possibility of actions by transmission providers to deny access to or impair performance of VoIP services. While there has been a debate raging for several years over whether rules are needed to address these concerns, these concerns have not been wholly unfounded. Earlier this year, the Commission investigated allegations that Madison River Communications had blocked ports used for VoIP applications, affecting customers' ability to use those

²⁷ *Id.* at ¶ 39.

²⁸ *Id.* at ¶¶ 48-52.

applications. As part of the resolution of the investigation, Madison River agreed that it would not block ports or otherwise prevent customers from using VoIP applications.²⁹

2. The Commission's Policy Statement

The Commission adopted the following four principles “to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet:”

Consumers are entitled to access the lawful Internet content of their choice.

Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.

Consumers are entitled to connect their choice of legal devices that do not harm the network.

Consumers are entitled to competition among network providers, application and service providers, and content providers.³⁰

As adopted by the Commission, these principles are not rules, and as Chairman Martin noted, are not enforceable.³¹ The principles, further, are “subject to reasonable network management.”³² The Commission did, however, state that it

²⁹ *Madison River Communications, LLC and Affiliated Companies*, Order, File No. EB-05-IH-0110, 20 FCC Rcd 4295 (2005).

³⁰ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement (rel. Sept. 23, 2005) (“*Internet Openness Policy Statement*”).

³¹ See, e.g., *Chairman Kevin J. Martin Comments on Commission Policy Statement*, News Release (Aug. 5, 2005).

³² *Internet Openness Policy Statement* at ¶ 4 n.15.

would “incorporate the . . . principles into its ongoing policymaking activities.”³³

C. IP-Enabled Services Proceeding

In early 2004, the FCC issued a notice of proposed rulemaking (“*IP-Enabled Services NPRM*”) to initiate a proceeding to examine the proper regulatory treatment of Internet-protocol enabled services, including VoIP.³⁴ That proceeding raised questions regarding the proper classification of various IP-enabled services, jurisdiction, and application of various types of regulation to IP-enabled services.³⁵ The Commission has addressed some, but not all, of these questions in various decisions, issuing E911 rules, exerting federal jurisdiction over VoIP in the *Vonage* decision, and classifying certain services as either telecommunications or information services. The classification of interconnected VoIP service, however, remains unresolved.

1. E911

On May 19, 2005, the Commission issued an order (“*VoIP E911 Order*”) imposing enhanced 911 (“E911”) obligations on “interconnected VoIP providers.”³⁶ The decision came in the wake of several highly-publicized incidents in which VoIP subscribers were unable to reach emergency services by dialing 911. The *VoIP E911 Order* imposed ambitious requirements on covered VoIP service providers, reflecting the Commission’s view that VoIP providers’ opportunity to

³³ *Id.* at ¶ 5.

³⁴ *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“*IP-Enabled Services NPRM*”).

³⁵ *Id.* at ¶ 6.

³⁶ *VoIP E911 Order*.

provide and profit from new services “brings with it the responsibility to ensure that public safety is protected.”³⁷

The requirements imposed by the *Order* are threefold – covered providers must provide E911 service, collect location information from customers, and notify customers of limitations in their E911 service.

VoIP service can be provided from any Internet connection, and this portability – which allows customers, for example, to use their VoIP service while traveling, or to have a phone number that does not correspond with their geographic location – makes automatic provision of a VoIP user’s location information extremely challenging. In the *VoIP E911 Order*, the Commission recognized this challenge, both by enabling VoIP providers to rely on user-reported location information for initial compliance, and by asking in the accompanying NPRM how to move to automatic location determination for VoIP services.

a. Background

“Basic” 911 refers to the capability to deliver a 911 call to the public safety answering point (“PSAP”) serving the location from which the 911 call is placed. “Enhanced” 911 (“E911”) service includes, as well, the ability to deliver the calling party’s call back number and location information to the PSAP.³⁸

³⁷ *Id.* at ¶ 56.

³⁸ *See, e.g., id.* at ¶ 8 n.18.

b. Covered Services

The new E911 obligations apply to “interconnected VoIP service” providers.³⁹ Expressly not covered are services “such as instant messaging or Internet gaming” that do not allow PSTN connections.⁴⁰ In addition, the Commission’s rules do not extend to separate services that allow connections only to or from the PSTN, even if those separate services may be combined.⁴¹

The Commission did not resolve whether interconnected VoIP service is a telecommunications service or information service within the meaning of the Communications Act.⁴²

c. E911 Obligations

The *VoIP E911 Order* sets forth three chief requirements for interconnected VoIP service providers:

E911 Service: By November 28, 2005, “interconnected VoIP service providers must transmit all 911 calls, as well as call back information and the caller’s ‘Registered Location’ for each call,” to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority.⁴³ This requirement only applies to 911 calls placed by users whose Registered Location is in a geographic area

³⁹ 47 C.F.R. § 9.5. Interconnected VoIP service is defined as a VoIP service that “(1) enables real-time, two-way communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.” *Id.* at § 9.3.

⁴⁰ *VoIP E911 Order* at ¶ 24 n.78.

⁴¹ *Id.*; *see also id.* at ¶ 58.

⁴² *Id.* at ¶ 24.

⁴³ *Id.* at ¶ 37; 47 C.F.R. § 9.5.

served by a Wireline E911 network, including a selective router. Further, if a PSAP, designated state default answering point, or appropriate local emergency authority is not capable of receiving and processing automatic numbering information (“ANI”) or location information, the VoIP service provider is not required to provide ANI or location information.

Registered Location Requirement: By November 28, 2005, interconnected VoIP service providers must obtain location information from their customers. Specifically, providers must obtain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized and provide end users with one or more methods of updating their Registered Location. At least one method of updating Registered Location information must require use only of the CPE necessary to access the interconnected VoIP service, and each method must allow an end user to update the Registered Location at will and in a timely manner.

Customer Notification: Interconnected VoIP service providers must advise each subscriber “of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service.” They must also “obtain and keep a record” of each subscriber’s acknowledgment “of having received and understood” the advisory described. Finally, interconnected VoIP service providers are required to distribute to new and existing subscribers warning stickers or other labels explaining that E911 service may be limited or not available and instruct subscribers to place the warnings or labels near the equipment used for interconnected VoIP service.

Interconnected VoIP providers initially were required to satisfy the subscriber acknowledgment requirement by July

29, 2005 – the effective date of the *VoIP E911 Order*.⁴⁴ The Enforcement Bureau subsequently extended the deadline for enforcing this requirement, and explained that it would not seek enforcement against providers that obtained acknowledgments from 90% or more of their subscribers (although providers are expected to continue to seek the remaining acknowledgments).⁴⁵

In addition, interconnected VoIP providers must submit a letter to the commission detailing their compliance with the new VoIP E911 rules no later than Nov. 28, 2005.

d. Means of Providing E911 Service

The Commission did not specify how interconnected VoIP providers must provide the required E911 service, explaining they could do so “by interconnecting indirectly through a third party such as a competitive LEC, interconnecting directly with the Wireline E911 Network, or through any other solution.”⁴⁶ The Commission noted that LECs are required to provide access to 911 databases and facilities to telecommunications carriers, but did not require LECs to extend that access to interconnected VoIP providers. The

⁴⁴ *VoIP E911 Order* at ¶ 48.

⁴⁵ *Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgment Requirement*, WC Docket Nos. 04-36 & 05-196, Public Notice (rel. Sept. 27, 2005); see also *Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgment Requirement*, WC Docket Nos. 04-36 & 05-196, Public Notice (rel. Aug. 26, 2005); *Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgment Requirement*, WC Docket Nos. 04-36 & 05-196, Public Notice (rel. July 26, 2005).

⁴⁶ *VoIP E911 Order* at ¶ 38.

Commission does require providers to interconnect to the established wireline E911 network.

e. Liability Protection

The Commission did not extend the liability protections applicable to wireless and wireline carriers with respect to provision of 911/E911 service to interconnected VoIP providers, concluding that absent Congressional action the Commission lacked authority to grant such relief.⁴⁷

f. Notice of Proposed Rulemaking

In the NPRM that accompanied its *VoIP E911 Order*, the Commission asked a series of questions about additional steps to ensure availability of ubiquitous and reliable E911 service. Chief among these was a series of questions about achieving automatic location determination for portable VoIP services, including asking whether all terminal adapters or other equipment used in the provision of interconnected VoIP services sold as of June 1, 2006 should be capable of providing location information automatically.⁴⁸

The Commission tentatively concluded that services that allow a connection either to or from the PSTN should be covered by the new E911 requirements “if a user can combine those separate offerings or can use them simultaneously or in immediate succession.”⁴⁹ The Commission also asked more generally whether other VoIP services should be subject to E911 requirements.

⁴⁷ *Id.* at ¶ 54-55.

⁴⁸ *Id.* at ¶ 57.

⁴⁹ *Id.* at ¶ 58.

The Commission asked a series of questions about performance standards for updating location information; obligations on providers in areas not served by a selective router; how use of wireless broadband connections should impact applicability of the rules, including whether wireless interconnected VoIP should be subject to CMRS rules; whether VoIP providers should be required to create redundancies in the 911 system; and the need for additional or more restrictive customer notification requirements.

2. Classification and Jurisdiction

a. Background

In 2004, the Commission issued three orders addressing the related questions of classification of VoIP as a telecommunications service or as an unregulated information service and of federal jurisdiction over VoIP.

b. The Pulver Order

The first order (“*Pulver Order*”) concerned Pulver’s Free World Dialup (“FWD”) service, which allows users with a broadband connection to conduct voice conversations with other users over the Internet without charge.⁵⁰ The Commission held that such IP-to-IP services are unregulated information services. Because Pulver does not offer transmission or assess a fee, the Commission reasoned, its service is neither telecommunications nor a telecommunications service, which must be offered “for a fee.”⁵¹ Further, the Commission explained, the service is an

⁵⁰ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (“*Pulver Order*”).

⁵¹ *Pulver Order* at ¶ 9; see also 47 U.S.C. § 153(46).

information service because it offers a capability for generating, acquiring or transforming information by offering information about other users' online presence, voicemail, and other computing capabilities.⁵² As an information service, the Commission determined, FWD is subject to exclusive federal jurisdiction.⁵³

c. The AT&T Order

The second order ("*AT&T IP Order*") concerned AT&T's practice of converting circuit-switched long-distance voice traffic into IP packets before routing them cross-country, and converting them back into circuit-switched traffic before terminating them to the recipient's circuit-switched voice connection. Noting that consumers using AT&T's service likely had no idea that they were receiving anything other than traditional long-distance telephone service, the Commission determined that an interexchange service that (1) uses ordinary customer premises equipment with no enhanced functionality; (2) originates and terminates on the PSTN; and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology is an ordinary telecommunications and is subject to the full panoply of Title II regulation.⁵⁴

The Commission made clear, however, that the scope of its ruling was limited, explaining that it applied to AT&T's "specific service."⁵⁵ The Commission also affirmed that access charges were due from interexchange carriers, and not

⁵² *Pulver Order* at ¶ 11.

⁵³ *Id.* at ¶¶ 15-25.

⁵⁴ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) ("*AT&T IP Order*").

⁵⁵ *Id.* at ¶ 24.

from “intermediate LECs that may hand off . . . traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.”⁵⁶

d. The Vonage Order

The third order (“*Vonage Order*”) concerned Vonage’s DigitalVoice service, which allows anyone with a broadband connection to call any person with an ordinary 10-digit North American Numbering Plan (NANP) telephone number.⁵⁷ Customers may receive a NANP number in virtually any U.S. area code and, for a small fee, may even receive multiple numbers for a single line.

In September 2003, acting on a complaint from the Minnesota Department of Commerce, the Minnesota Public Utilities Commission (MPUC) asserted jurisdiction over Vonage’s service. Declining to decide whether DigitalVoice is an information service or telecommunications service under federal law, the MPUC determined that the service was a “telephone service” as defined by Minnesota law. As such, the MPUC concluded, Vonage was required to seek state certification as a local service provider and to comply with state regulations, including those governing 911 service.

Vonage filed suit in federal district court challenging the MPUC’s order. The district court accepted Vonage’s position that DigitalVoice is an information service as defined by the Telecommunications Act. Concluding that the federal policy against regulating information services

⁵⁶ *Id.* at ¶ 23 n.92.

⁵⁷ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order*, 19 FCC Red 22,404 (2004) (“*Vonage Order*”).

preempted state attempts to apply common carrier regulation to such services, the court entered a permanent injunction.⁵⁸

On November 12, 2004, the FCC issued the *Vonage Order* specifically preempting Minnesota's authority to apply "traditional 'telephone company' regulations" to Vonage's service.⁵⁹ More generally, the *Order* states that the Commission is "highly []likely" to preempt similar state regulation of any services that "share similar basic characteristics" of Vonage's service.⁶⁰ As explained by the Commission, these characteristics include "a requirement for a broadband connection from the user's location; a need for IP-compatible CPE; and a service offering that includes a suite of integrated capabilities and features . . . that allows customers to manage personal communications dynamically."⁶¹ The *Order* is currently under review in the 8th Circuit, with oral argument scheduled for January 2006.

The *Vonage Order* declines to decide whether VoIP is an information or telecommunications service, but provides three grounds for preemption that apply regardless of VoIP's statutory classification. First, the *Order* finds that it is impossible as a practical matter to determine where Vonage customers are calling from because customers can send non-geographically-identifiable IP packets to Vonage's servers from any working Internet connection (*e.g.*, a home, an office, or a hotel room across the globe). Based on a line of cases establishing that the FCC has authority to preempt state

⁵⁸ Before the Eighth Circuit could review the district court's decision, the FCC issued its order reaching the same conclusion as the district court. Holding itself bound by the FCC's order, the Eighth Circuit affirmed the district court's decision without reaching the merits. *Vonage Holdings Corp. v. Minn. Pub. Utils. Com'n*, 394 F.3d 568 (8th Cir. 2004).

⁵⁹ *Vonage Order* at ¶ 1.

⁶⁰ *Id.*

⁶¹ *Id.* at ¶ 32.

regulation of services where it is impossible to distinguish between interstate and intrastate calls, the *Order* concludes that exclusive federal jurisdiction is necessary in order to avoid a patchwork of state regulations of Vonage's service.⁶² The force of this argument may diminish when VoIP providers become subject to E911 requirements that they provide automatic location information for subscribers.

Second, the *Order* finds that (1) if DigitalVoice is a telecommunications service then a patchwork of 50 potentially inconsistent state entry requirements would "stifle new and innovative services," and (2) if DigitalVoice is an information service then state regulation of any sort would be inconsistent with the FCC's "long-standing national policy of nonregulation of information services."⁶³ In either event, the *Order* finds that ordinary conflict preemption principles – which prohibit "state law[s] that stand[] as an obstacle to the accomplishment and execution of the full objectives of Congress"⁶⁴ – require displacing state regulation of Vonage's service.

Third, the *Order* finds that if Vonage were required to comply with Minnesota's regulations, it would have to make *all* its customers comply with the regulations, even though most presumably would be calling neither to nor from Minnesota. The *Order* accordingly concludes that "Minnesota's regulation would likely have the 'practical effect' of regulating beyond its borders and therefore would likely violate the Commerce Clause."⁶⁵

The *Order* does not limit states' rights to enforce laws of general applicability, such as "laws concerning taxation;

⁶² *Id.* at ¶¶ 19, 23-32.

⁶³ *Id.* at ¶¶ 20-21.

⁶⁴ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

⁶⁵ *Vonage Order* at ¶ 39.

fraud; general commercial dealings; and marketing advertising, and other business practices.”⁶⁶

3. Remaining Regulatory Issues

a. Intercarrier Compensation

One of the most critical economic issues facing the VoIP industry is the economic basis for the exchange of traffic between VoIP providers and LECs. The *IP-enabled Services NPRM* raises a number of questions about the proper forward-looking intercarrier compensation regime for IP-to-PSTN and PSTN-to-IP traffic. That *NPRM* explains that “as a policy matter” the FCC “believe[s] that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”⁶⁷ The *IP-enabled Services NPRM* further observes that “the cost of the PSTN should be borne equitably among those that use it in similar ways.”⁶⁸

In 2005, the FCC narrowly avoided deciding the related question of whether, under current law, access charges apply to IP-to-PSTN traffic. Specifically, in January 2004, Level 3 Communications, LLC (“Level 3”) filed a petition asking the FCC to forbear from applying access charges to IP traffic that is terminated on the PSTN. Instead, Level 3 argued that reciprocal compensation rates should apply to such traffic. On March 21, 2005 – just as the 15-month deadline for a decision on forbearance was set to expire – Level 3 withdrew its petition. The company explained that it reached this decision because the leadership change at the FCC occurred only three days before a ruling on the petition was due, which

⁶⁶ *Id.*

⁶⁷ *Id.* at ¶ 61.

⁶⁸ *Id.*

the company deemed an inappropriate amount of time to consider the issue. Thus, the FCC has yet to clarify the current legal obligations of interconnected VoIP service providers.

The FCC also opened an inquiry in 2005 into whether carriers that provide prepaid calling card services using IP-based transport technology are providing information services. The issue arose out of a petition filed by AT&T in 2003 seeking a declaration that intrastate access charges did not apply to calls made using its “enhanced” prepaid calling cards. These calling cards were “enhanced” (and thus qualified as interstate information services, AT&T claimed) because the caller was required to listen to a short advertisement before dialing his or her destination number. AT&T also claimed that calls between persons located in the same state qualified as jurisdictionally interstate because they involved separate interstate connections between (1) the caller and a switching platform in another state, and (2) the switching platform and the recipient.

The FCC rejected these claims in an order issued on February 23, 2005.⁶⁹ However, the FCC declined to rule on the status of two services that AT&T had begun to offer while the petition was pending – the first offered callers a menu of choices other than making a call (*e.g.*, “press 1 to learn more about specials at ABC stores”) and the second provided transport via AT&T’s Internet backbone using IP.⁷⁰ Though this second variant on the calling card service seems very

⁶⁹ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Order and Notice of Proposed Rulemaking (February 23, 2005). The Order also held that AT&T had no grounds for treating its purportedly “enhanced” cards as information services, and ordered AT&T to pay \$ 160 million in USF contributions that it had withheld on that basis. *Id.* at ¶ 30.

⁷⁰ *Id.* at ¶ 11.

similar to the service that the FCC deemed a telecommunications service in the *AT&T IP Order* discussed above, the FCC held that “[r]ather than continuing to address the appropriate regulatory regime for variations of prepaid calling cards in a piecemeal manner, . . . the public interest would be best served by considering this issue in a more comprehensive manner.”⁷¹

b. Universal Service

The *IP-Enabled Services NPRM* seeks comment on “how the regulatory classification of IP-enabled services, including VoIP, would affect the Commission’s ability to fund universal service.”⁷² This question is particularly critical because for many years the funding base for the Universal Service Fund (USF) has been shrinking (as customers have moved away from traditional circuit-switched long-distance service and towards wireless and other bundled local-and-long-distance services). The FCC currently has an open docket – *Universal Service Contribution Methodology* – to address these issues and explore options such as a numbers- or connection-based contribution methodology.⁷³ The *NPRM*

⁷¹ *Id.* at ¶ 38.

⁷² *IP-Enabled Services NPRM* at ¶ 63.

⁷³ See *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, 17 FCC Rcd 24952, 24984-24998, ¶¶ 66-100 (2002).

makes clear that reform of the USF system will occur in that broader proceeding rather than in the *IP-Enabled Services* docket.⁷⁴ Moreover, in the *Wireline Broadband Order*, discussed below,⁷⁵ the Commission maintains current USF contributions by DSL providers for 270 days or until the Commission adopts new contribution methodology rules,⁷⁶ suggesting that this is the Commission's time frame for addressing universal service contribution reform.

The *IP-enabled NPRM* also raises the separate question of whether the 1996 Act permits the FCC to use USF revenue to support IP-enabled services such as VoIP for rural and high cost areas and low-income consumers. The Commission noted that it had previously concluded that the generic universal service definition is "explicitly limited to telecommunications services," and thus sought comment as whether USF support could be extended to any VoIP services classified as an information service.⁷⁷ The Commission particularly asked how it could ensure that support for any VoIP or other IP-enabled services complied with Section 254(e)'s requirement that universal service support be used only "for the provision, maintenance, and upgrading of facilities and services for which support is intended," and Section 254(k)'s requirements that non-competitive services not subsidize services subject to competition and that services included in the definition of universal service "bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."⁷⁸

⁷⁴ *IP-Enabled Services NPRM* at ¶ 63.

⁷⁵ See *infra* Part III.B.

⁷⁶ *Wireline Broadband Order* at ¶ 113.

⁷⁷ *IP-Enabled Services NPRM*. at ¶ 65 (internal quotation marks omitted).

⁷⁸ 47 U.S.C. § 254(e), (k).

Interestingly, notwithstanding this concern raised in the *IP-enabled Services NPRM*, the FCC has elsewhere acknowledged that universal service support has nevertheless been used to build out DSL services in rural areas when DSL services are provided over the same outside plant facilities as circuit-switched voice services.⁷⁹ Moreover, the FCC, in its *Wireline Broadband Order*, both declined to require incumbent LECs to allocate a portion of their outside plant costs to non-regulated services even when the LEC chooses to offer its DSL services on a non-common carrier basis (*i.e.*, not as a “telecommunications service”), and found that this decision did not violate Section 254(k).⁸⁰ This decision, along with the Commission’s decision to allow carriers to elect to continue to provide wireline broadband transmission on a common carrier basis, ensures that federal high cost universal service support will continue to be used to support ILEC broadband deployments (but likely not broadband deployments by other broadband providers), even as the Commission continues to ponder whether universal service can be provided to a VoIP service provider that provides service over such broadband facilities.

c. Disability Access

The *IP-enabled Services NPRM* also seeks comment on how the FCC should “apply the disability accessibility requirements set forth in sections 255 and 251(a)(2) to any providers of VoIP or other IP-enabled services.”⁸¹ As noted above, the Commission has also raised similar questions in the *VoIP E911 Order’s* NPRM, which asks for comments on

⁷⁹ *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, GN Docket 04-54, at 32, 42 (Sept. 9, 2004).

⁸⁰ *Wireline Broadband Order*, at ¶¶ 128-144. The FCC did not address Section 254(e), 47 U.S.C. § 254(e).

⁸¹ *IP-Enabled Services NPRM* at ¶ 58.

how “persons with disabilities can use interconnected VoIP service and other VoIP services to directly call a PSAP via a TTY.”⁸²

III. Broadband Regulation and VoIP

A. Background

An end user must have a working broadband connection in order to use an applications-layer VoIP service such as Vonage or Skype. That broadband connection serves a critical gateway function – it determines the overall quality of the voice signal and represents an important component of the overall cost of the VoIP service to the customer. VoIP providers consequently have a great deal at stake in how the FCC chooses to regulate or not to regulate broadband.

B. Brand X and the Wireline Broadband Order.

After years of legal uncertainty over the status of broadband service under the Act, the Commission finally received judicial approval in 2005 to treat both cable modem and DSL broadband services as deregulated Title I “information services.”

On June 27, 2005, the Commission prevailed in its three-year effort to (1) treat cable modem services as interstate information services under Title I and (2) foreclose any requirement that cable companies offer the transmission component of their high-speed Internet services to unaffiliated ISPs. This effort began in 2002, when the FCC issued an order (“*Cable Modem Order*”) providing that cable companies (1) “merely use telecommunications” to provide an integrated information service (*i.e.*, high-speed Internet

⁸² *VoIP E911 NPRM* at ¶ 63.

access), (2) do not provide a Title II “telecommunications service,” and (3) should not be subject to the legacy *Computer II* unbundling rules.⁸³ The Commission’s decision was vacated one year later by the Ninth Circuit in *Brand X Internet Services v. FCC*.⁸⁴ Believing itself bound by a prior panel’s decision in a case from 2000 that had classified cable modem service as both a telecommunications service and an information service,⁸⁵ the *Brand X* panel issued a *per curiam* opinion without reaching the merits.

By a 6-3 vote, the Supreme Court overturned the Ninth Circuit’s decision and affirmed the FCC’s authority to conclude that cable modem service is an interstate information service exempt from any unbundling regulations.⁸⁶ The Court held that the “offering” of telecommunications to the public “can reasonably be read to mean a ‘stand alone’ offering of telecommunications, *i.e.*, an offered service that, from the user’s perspective, transmits messages unadulterated by computer processing.”⁸⁷ Deferring to the Commission’s view that that the telecommunications component of cable modem service is

⁸³ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (“*Cable Modem Order*”). One month earlier, the FCC also tentatively concluded that broadband Internet access is an information service when Internet access is provided using the provider’s own transmission facilities, and questioned the “necessity and usefulness” of applying *Computer II* to DSL service. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019 (2002). However, the FCC put this inquiry on hold for three years pending resolution of the regulatory status of cable modem services.

⁸⁴ *Brand X Internet Serv. v. FCC*, 345 F.3d 1120 (2003) (per curiam).

⁸⁵ *AT&T v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

⁸⁶ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Services*, 125 S.Ct. 2688 (2005).

⁸⁷ *Id.* at 2704.

“part and parcel of [the information service] and is integral to [the information service’s] other capabilities,” the Court concluded that the bundled offering may reasonably be deemed a unitary information service.⁸⁸

In addition to its direct impact on cable modem service, *Brand X* is also potentially significant because the Supreme Court took a very broad view of the FCC’s Title I authority. In particular, the Court seemed willing to allow the FCC broad leeway to apply Title I regulation to services that do not fit neatly within the 1996 Act’s definitional categories.

Shortly after the *Brand X* decision, the FCC (under new Chairman Kevin Martin), put ILECs offering high-speed Internet services on the same regulatory footing as cable companies providing cable modem services. On August 5, 2005, the Commission voted to classify wireline broadband Internet access as a Title I information service, and to relieve facilities-based carriers of their *Computer II* mandatory unbundling obligations as to the underlying transmission. In an order (“*Wireline Broadband Order*”) released on September 23, 2005, the Commission emphasized that the “appropriate framework for wireline broadband Internet access service, including its transmission component, is one that is eligible for a lighter regulatory touch.”⁸⁹ The *Order* also included an NPRM raising questions about whether certain Title II common carrier obligations should apply to wireline broadband services.⁹⁰

⁸⁸ *Id.* at 2709 (additions in original) (internal quotations omitted).

⁸⁹ *Wireline Broadband Order* at ¶ 3.

⁹⁰ These include Customer Proprietary Network Information (§ 222) restrictions, slamming (§ 258), truth-in-billing, network outage reporting, Section 214 discontinuance requirements, and Section 254(g) requirements for geographic rate averaging and rate integration. *Id.* at ¶¶ 146-158.

The upshot of the FCC's victory in *Brand X* and its subsequent *Wireline Broadband Order* is that both cable companies' and the ILECs' broadband Internet access offerings are subject only to discretionary Title I regulation – and so far the FCC has not imposed any. Moreover, neither cable nor ILECs are required to make the underlying transmission services available to non-affiliated providers on a common carrier or non-common carrier basis, although either may choose to do so. The Commission believes that this deregulatory treatment will provide cable companies and the ILECs with the necessary incentives to invest in facilities (including high-bandwidth “fiber to the home”) and to compete with each other on price.

C. The Standalone DSL Order.

Another broadband issue affecting the commercial environment for VoIP services is whether consumers will be able to purchase standalone broadband access, rather than bundled broadband and voice service. Today, the cable companies, Qwest, and (to a limited degree) Verizon offer standalone broadband;⁹¹ BellSouth and SBC, in contrast, require customers to purchase circuit-switched voice service in order to qualify for DSL service. Though the Commission has not yet spoken on the permissibility of tying DSL to circuit-switched voice, it issued an order (“*Standalone DSL*

⁹¹ Verizon's initial offering of standalone DSL (in April 2005) applied only to customers in the former Bell Atlantic region who subscribed to both voice and DSL service and who wished to port their telephone number to a wireless, cable, or Internet-based provider.

Order”) on March 25, 2005 that hints at an unwillingness to ban the practice.⁹²

The Commission issued the *Standalone DSL Order* in response to a petition from BellSouth seeking federal preemption of state commission decisions (in Florida, Kentucky, Louisiana, and Georgia) that required BellSouth to provide DSL service over UNE loops used by CLECs to provide circuit-switched voice service. The FCC granted BellSouth’s petition on the ground that the state commissions were effectively trying to undo an earlier FCC determination that the ILECs do not have to offer unbundled access to the low-frequency portion of the UNE loop that is used to provide circuit-switched voice. Read narrowly, this decision is not especially important for VoIP providers, because few consumers are likely to purchase voice service from a CLEC, DSL from an ILEC, and PSTN-interconnected VoIP service from an unaffiliated service provider. Further, the *Standalone DSL Order* specifically raised the question of potential anti-competitive effect, opening a Notice of Inquiry into “the competitive consequences when providers bundle their legacy services with new services, or ‘tie’ such services together such that the services are not available independent from one another to end users.”⁹³

The FCC’s reasoning in the *Standalone DSL Order*, however, adopted a theory that is arguably inconsistent with a future standalone DSL mandate. Specifically, the FCC reaffirmed its conclusion in the *Triennial Review Order* that ILECs (and, in theory, CLECs) will not invest in broadband

⁹² *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, WC Docket No. 03-251 (rel. March 25, 2005).

⁹³ *Id.* at ¶ 37.

facilities if they cannot reap the full revenue from a UNE loop – meaning the profit from providing circuit-switched voice *and* high speed Internet.⁹⁴ This aspect of the FCC’s reasoning led the two Democratic commissioners (Copps and Adelstein) to warn that the *Order* “unwisely flashes the green light for broadband tying arrangements” and fails to consider the needs of the “savvy consumer who wants stand-alone broadband only for VoIP.”

The topic of standalone DSL has also attracted some attention in the FCC’s ongoing examination of the proposed SBC-AT&T and Verizon-MCI mergers. Some parties have asked the Commission to require SBC and Verizon to offer standalone DSL as a condition of approving the mergers.

IV. Legislative Developments

In 2005, Congress began considering and circulating several draft bills that would create a statutory framework for the FCC’s regulation of broadband and VoIP. At the time of this writing, the three bills of greatest importance to VoIP providers are an unnamed bill commonly known as the Broadband Internet Transmission Service bill (“BITS Bill”) (House of Representatives staff draft, not yet introduced), the IP-Enabled Voice Communications and Public Safety Act of 2005 (HR.2418/S.1063), the Broadband Investment and Consumer Choice Act (S.1504), and the Universal Service for the 21st Century Act (S.1583). Though it is unclear whether any bill will accumulate enough legislative support to be enacted, and though the content of particular draft bills continues to change, several basic trends are emerging.

⁹⁴ *Id.* at ¶¶ 28-30. The FCC noted that under its line-splitting rules, two CLECs can lease a UNE loop and separately provide voice and high-speed data services.

A. Jurisdiction

The draft bills generally reserve regulation of VoIP and broadband services for the FCC – and displace any significant policy-making role for the states – by expressly classifying such services as interstate information services. The BITS Bill limits also limits Commission authority by prohibiting rate, term, or entry regulations other than those authorized by the bill itself.

B. Intercarrier Compensation

The draft bills (including the BITS Bill) demonstrate support for a significant federal role in regulating the financial arrangements by which VoIP providers will exchange traffic with existing telecommunications carriers. Congress appears inclined to leave the precise compensation mechanisms up to the FCC, and the BITS Bill, for example, expressly provides that the FCC may establish a bill-and-keep system. Overall, the trend appears to be to direct the FCC to develop a unified intercarrier compensation scheme, at least for IP-to-PSTN or PSTN-to-IP traffic.

C. 911

There is significant support for legislating 911 requirements for VoIP providers. The draft bills do leave the FCC room to exempt VoIP providers from providing 911 services where doing so would be technologically or operationally infeasible. But the basic approach appears to be that 911 service should be available for particular products unless manufacturers and service providers can show why it should not be. In return, Congress is considering offering VoIP providers the same immunity from liability that wireless and wireline providers currently enjoy and directing owners of the existing 911 infrastructure to grant VoIP providers reasonable access.

D. Net Neutrality

The bills evince at least some degree of support for ensuring access to broadband networks through adoption of mandatory net neutrality or similar duties. At least one bill expressly prohibits broadband service providers from attempting to block their customers from purchasing VoIP services from a competing provider. On the other hand, proposed legislation would allow broadband providers to deviate from strict net neutrality principles to offer anti-spam, parental control, and anti-virus services, as well as to enforce non-discriminatory bandwidth and network capacity limits. A more contentious question appears to be whether or the degree to which new legislation will enable broadband providers to offer “premium” services that offer higher transmission speeds to particular types of traffic (including video). Two existing bills allow such premium services, but prohibit providers from “unreasonably” impairing or “adversely affecting” subscribers’ access to non-premium content.

E. Consumer Protection

There is also significant support for codifying express consumer protection provisions. In some cases, this may mean applying existing provisions of the Act – such as those addressing telephone harassment (§ 223(a)), telephone solicitation (§ 227), and pay-per-call services (§ 228), and consumer proprietary network information (§ 222) – to VoIP providers. Other proposals include requiring the FCC to open a rulemaking docket to provide more detailed regulations on how VoIP providers can use customer location information (which would be valuable to advertisers) and how they may organize their bills.

F. Universal Service

Another issue of great interest to Congress is deciding whether VoIP providers should contribute to the USF and whether the USF should support VoIP services. The BITS bill, for instance, would give the FCC 180 days to decide whether the USF contribution base must be expanded to include VoIP in order to ensure that the system remains equitable and nondiscriminatory. If the FCC decides that such expansion is necessary, the BITS bill would require it to revise the USF regulations accordingly within 180 days of making such a determination. The Universal Service for the 21st Century Act likewise requires FCC action on universal service within six months of enactment and would expand the contribution base for universal service to require contributions from all communications services capable of supporting two-way voice communications including VoIP.