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Developments in VoIP and Broadband Regulation 2007

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I. Introduction

Two years ago, in the introduction for a similar overview article for this conference, we wrote that “2005 marked the beginning of substantive regulation of voice over Internet protocol, or VoIP, services.”² In that same article, we wrote that the Federal Communications Commission (FCC or Commission), “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[.]”³ In the ensuing two years, that trend has accelerated. Over the past two years, the FCC has moved quickly to extend remaining “social obligation” regulation and to begin extending regulation in other areas, such as consumer protection, to interconnected VoIP services – those VoIP services that most closely resemble traditional telephone services.⁴

For those services, the Commission has continued to address the issues it raised in its 2004 *IP-Enabled Services Notice of*

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² John Nakahata, Brita Strandberg & Bruce Gottlieb, *Developments in VoIP and Broadband Regulation*, 23rd Annual Institute on Telecommunications Policy & Regulation, 119 (Dec. 2005), available at http://www.harriswiltshire.com/harriswiltshire/backoffice/upload/documents/BDS-Dev_VoIP_BB_Reg_12-05.pdf (“2005 Article”).

³ 2005 Article at 124.

⁴ See Section II (defining interconnected VoIP service).

Proposed Rulemaking,⁵ one-by-one imposing new social policy regulations on providers of interconnected VoIP. Following on its 2005 decisions requiring interconnected VoIP providers to provide E911 and to meet the law enforcement access requirements of the Communications Assistance to Law Enforcement Act (CALEA), the Commission now requires interconnected VoIP providers to meet its Universal Service contribution, disability access, Telephone Relay Service and Customer Proprietary Network Information (CPNI) requirements, as well as to register with the FCC and to pay FCC Regulatory Fees. The era of interconnected VoIP as an “unregulated” Internet application, at least at the federal level, has been conclusively closed.⁶ Interconnected VoIP providers must now be cognizant of this wide range of requirements, which include substantial reporting requirements.

This dramatic expansion of regulation is not yet complete. Chairman Martin recently signaled that regulations addressing numbering and additional consumer protection issues are in the offing.⁷ In short, while interconnected VoIP service remains unclassified by the Commission, it is increasingly difficult to distinguish its regulatory treatment from that of traditional telecommunications services.

Turning to broadband regulation, the Commission has continued the broadband deregulation that it began in 2005

⁵ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“*IP-Enabled Services NPRM*”).

⁶ Jason Oxman, *The FCC and the Unregulation of the Internet* (Fed. Communications Commission Office of Plans & Policy, Working Paper No. 31, 1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

⁷ *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Statement of Chairman Martin, 22 FCC Rcd 11275 (2007) (“*Disabilities Access Order*”).

with its *Wireline Broadband Access Order*,⁸ but now must react primarily to a flood of forbearance petitions seeking broadband relief. Verizon was granted significant deregulation of its enterprise broadband services not covered by the 2005 *Wireline Broadband Access Order* when, in March 2006, it had a forbearance petition “deemed granted” by operation of law. The absence of any Commission decision laying out the precise scope of relief or the justification for relief, however, has created considerable uncertainty, particularly as other incumbent local exchange carriers have sought similar relief. At the time of this writing, the Commission is facing statutory deadlines on a series of “me too” petitions requesting equivalent relief. The Commission’s resolution of those petitions should begin to clarify its views about the scope of relief achieved by Verizon. More importantly, these decisions should set forth the applicable standards and analysis for awarding future broadband relief.

A. Summary

In Part II, we discuss the scope of Commission regulation of VoIP services, noting its current focus on interconnected VoIP services – those services most like traditional telephony

⁸ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Access Order*”).

– as well as the possibility that it may seek to expand regulation beyond this category as currently defined.

In Part III, we continue the overview of social regulation of interconnected VoIP that we began in our 2005 article, documenting the steady progression of Commission regulation in this area and noting the Commission’s successful defense of its actions in federal appeals courts.

In Part IV, we survey new areas of interconnected VoIP regulation, including registration, consumer protection, interconnection, and regulatory fees.

In Part V, we discuss the Commission’s repeated decision not to classify interconnected VoIP as either an information or a telecommunications service, and discuss the preemptive effect of the *Vonage Order* with respect to fixed interconnected VoIP service.

In Part VI we briefly review state approaches to VoIP services, including state PUC and legislative efforts to exercise jurisdiction over these services.

In Part VII, recognizing the close relationship between broadband and VoIP services, we examine the Commission’s recent changes in broadband regulation. We begin with the *Wireline Broadband Access Order* and extension of that order to other delivery technologies, review the “deemed” grant of Verizon’s request for enterprise broadband transmission forbearance, and discuss developments in the area of net neutrality. In addition, we briefly note important broadband developments in such areas as UNE forbearance, universal service, pole attachments and CALEA.

In Part VIII, we conclude with a discussion of notable recent legislative developments.

II. Scope of Regulation

The Commission's initial regulation of VoIP services has focused on "interconnected VoIP service."⁹ As defined by the Commission, interconnected VoIP service is a service that:

- (1) Enables real-time, two-way voice 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.¹⁰

In its *VoIP E911 Order*, the Commission explained that this definition applies "only to providers that offer a single service that provides the functionality described" by the definition.¹¹ In other words, services that permit connections only to the PSTN or only from the PSTN are not covered by the Commission's interconnected VoIP requirements. In its Notice of Proposed Rulemaking accompanying its *VoIP E911 Order*, the Commission did tentatively conclude that providers offering a VoIP service "that permits users generally to receive calls that originate on the PSTN and separately makes available a different offering that permits users generally to terminate calls to the PSTN" should be subject to the Commission's VoIP 911 rules "if a user can combine those separate offerings or can use them

⁹ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 24 (2005) ("*VoIP E911 Order*").

¹⁰ 47 C.F.R. § 9.3.

¹¹ *VoIP E911 Order* at ¶ 24.

simultaneously or in immediate succession.”¹² The Commission likewise asked whether it should impose 911 obligations on other types of VoIP services.¹³ These questions, and the record addressing them, provide the Commission with a basis to expand the definition of interconnected VoIP services at any time. Moreover, growing consumer adoption of VoIP services, including services like Skype that appear to fall outside the definition of interconnected VoIP service, is creating pressure for the Commission to expand its regulation of VoIP services.

III. Social Regulation of Interconnected VoIP

A. 911 & E911

In May 2005, the FCC adopted 911 and E911 requirements for interconnected VoIP providers.¹⁴ Specifically, the Commission required all interconnected VoIP providers to route all 911 calls through the selective router for any PSAP connected to a selective router, and for those 911 calls to provide E911 information – *i.e.*, the calling party’s callback number and location – to the PSAP whenever the PSAP is able to “receive and utilize” such information.¹⁵ The Commission made these rules applicable only where the caller is located within an area served by a PSAP connected to a selective router,¹⁶ and specifically prohibited the use of ten digit “administrative” numbers to deliver 911 calls to a PSAP within these areas.¹⁷ The Commission did not require interconnected VoIP providers to determine a customer’s location automatically, but instead required interconnected VoIP providers to collect customer location information (or

¹² *VoIP E911 Order* at ¶ 58.

¹³ *Id.*

¹⁴ *VoIP E911 Order*; *see also* 47 C.F.R. §§ 9.1, 9.3, 9.5.

¹⁵ *VoIP E911 Order* at ¶ 43.

¹⁶ 47 C.F.R. § 9.5(a).

¹⁷ *VoIP E911 Order* at ¶ 42.

“Registered Location”) and to allow customers to update that location information freely.¹⁸ The Commission also adopted an extensive customer notification regime.¹⁹ While some of the consumer notification requirements had earlier effective dates, all of these requirements were in effect as of November 28, 2005.

In conjunction with its adoption of VoIP 911 rules, the FCC released a Notice of Proposed Rulemaking seeking comment on a series of additional issues. The Commission asked, for example, whether to require providers to adopt methods to automatically determine subscriber location without subscriber interaction, whether to extend 911 and E911 requirements to other types of VoIP services, whether to extend 911 and E911 requirements to areas not served by a selective router, whether to adopt any customer privacy requirements related to 911 over interconnected VoIP, how wireless broadband affects 911 and E911 requirements, and whether persons with disabilities could call a PSAP directly using a TTY over an interconnected VoIP service.²⁰

1. E911 Rules Upheld

The DC Circuit rejected challenges to the Commission’s *VoIP E911 Order* in *Nuvio Corporation v. FCC*,²¹ removing the last legal cloud over the Commission’s E911 rules. Some interconnected VoIP providers had challenged the requirement that interconnected VoIP providers, within 120 days, route 911 calls from both fixed and nomadic users to PSAPs via the wireline 911 network and transmit location information and callback number for 911 calls to local

¹⁸ *Id.* at ¶ 44

¹⁹ *Id.* at ¶¶ 48- 49.

²⁰ *Id.* at ¶¶ 56-63.

²¹ *Nuvio Corp. v. Federal Communications Commission*, 473 F.3d 302 (D.C. Cir. 2006).

emergency authorities able to receive and utilize that information. The Court decided that the Commission reasonably concluded that the 120-day deadline was feasible based on evidence in the record that two VoIP providers had already found a solution to implement the service before the Commission's deadline and because two trials for VoIP E911 access provided the FCC with reasonable grounds to determine that the deadline was technologically feasible.²² The Court also rejected the argument that the Commission was arbitrary and capricious in requiring interconnected VoIP providers to connect to Wireline E911 networks (*i.e.*, E911 networks utilizing a selective router) without imposing a corresponding obligation on ILECs to provide such access, because the record contained evidence that major ILECs were cooperating with VoIP providers.²³

2. Progress in covering VoIP customers.

Interconnected VoIP providers have moved aggressively to implement 911 calling as required by the Commission's rules. Many interconnected VoIP providers are now reporting that well over 90% of their customers are receiving 911 and E911 service in accordance with the Commission's rules.²⁴ However, this does not mean that interconnected

²² *Id.* at 305-308.

²³ *Id.* at 309.

²⁴ *See* Letter from Scott Blake Harris, Vonage, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 05-196 (Sept. 27, 2007) (reporting Vonage provides "either basic or enhanced 911 service to more than 98% of its subscribers"); Letter from Jack Zinman, AT&T Services, Inc., to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 05-196 (Sept. 13, 2007) (reporting AT&T offers E911 service to 100% of its customers served by PSAPs that provide E911 service, and basic 911 to less than 1% of its customers); Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 05-196 (July 30, 2007) (reporting Verizon "is able to offer E911 services to approximately 94% of its VoiceWing customers").

VoIP services are available throughout the country, as many interconnected VoIP providers have halted or not extended service to areas where they cannot provide 911 and E911 service as required by the Commission.²⁵

3. Autolocation Notice of Proposed Rulemaking

On June 1, 2007, the Commission released a Notice of Proposed Rulemaking that further addressed E911 location requirements for interconnected VoIP services.²⁶ In addition to raising a number of questions with respect to autolocation for CMRS services under 47 C.F.R. § 20.18, the Commission sought comment on whether and to what extent interconnected VoIP service providers should be required to provide Automatic Location Information and should be subject to the same location accuracy requirements that apply to CMRS carriers. The Commission tentatively concluded that providers of portable VoIP services must use an automatic location technology that meets the same accuracy standards that apply to CMRS services providing Phase II E911 services.²⁷

²⁵ *Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice Over Internet Protocol 911 Compliance Letters*, 20 FCC Rcd 17949, *11 (EB 2005) (“*Enforcement Bureau 911 Compliance Letter Requirements*”).

²⁶ *Wireless E911 Location Accuracy Requirements; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers*, Notice of Proposed Rulemaking, 22 FCC Rcd 10609 (2007) (“*911 Autolocation Order & NPRM*”).

²⁷ *Id.* ¶ 18. CMRS providers providing Phase II enhanced 911 service are subject to one of two accuracy standards depending on the type of location technology the provider has adopted. If the CMRS provider uses a network-based technology, it must estimate location within 100 meters for 67 percent of calls, and 300 meters for 95 percent of calls. 47 C.F.R. § 20.18(h)(1). If the CMRS provider uses

The variety and flexibility of interconnected VoIP services make achieving autolocation of interconnected VoIP subscribers particularly challenging. Interconnected VoIP service can be used with a wide variety of wired and wireless Internet connections, and providers often do not control – or even know – how their users connect to the Internet. Further, interconnected VoIP service is often used with equipment such as laptops and PDAs that is not specially designed for interconnected VoIP service. And, VoIP is often used indoors, where existing location technologies face significant challenges.

Comments filed in response to the proceeding raised these concerns, as well as highlighting the current technical infeasibility of meeting any autolocation mandate for interconnected VoIP services. Commenters also noted the benefits of the current rules, which mandate delivery of street addresses rather than typically less precise latitude and longitude information. Nonetheless, it has been clear since the Commission first adopted E911 requirements for interconnected VoIP that members of the Commission would like providers to determine automatically interconnected

a handset-based technology or a solution that is a hybrid handset-network solution, it must estimate location within 50 meters for 67 percent of calls, and 300 meters for 95 percent of calls. 47 C.F.R. § 20.18(h)(2). In either case, for the last five percent of calls, the CMRS provider must attempt to estimate the location and a location estimate must be provided for each call. 47 C.F.R. § 20.18(h)(3). Until recently, the FCC had not specified the geography over which compliance with the accuracy requirements must be measured. In an order adopted on September 11, 2007, but not yet released at the time of writing, the Commission directed CMRS carriers to meet these requirements at the PSAP-level within five years, with compliance at the Economic Area level within one year. *FCC Clarifies Geographic Area Over Which Wireless Carriers Must Meet Enhanced 911 Location Accuracy Requirements*, News Release (Sept. 11, 2007) (“*CMRS Location Accuracy News Release*”).

VoIP subscriber location when customer location changes.²⁸ The Commission has already acted on the portion of its NPRM that addressed the appropriate geographic area for measuring CMRS autolocation accuracy,²⁹ and could act on remaining issues at any time.

B. CALEA

The Communications Assistance for Law Enforcement Act (“CALEA”) is meant to address technical difficulties faced by law enforcement conducting law surveillance of changing telecommunications technologies, and requires covered entities 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 reasonably available call-identifying information. In September 2005, the Commission determined in the *First CALEA Order* that CALEA obligations applied to facilities based broadband Internet access and interconnected VoIP providers.³⁰ At that time, the FCC set a date of May 14, 2007 for interconnected VoIP and broadband Internet access providers to be able to meet CALEA’s requirements.³¹

1. Commission’s Rules Upheld

²⁸ The Commission endorsed the use of technologies that temporarily disable interconnected VoIP service when a user’s terminal adapter loses power. These technologies require the customer to validate his or her location before service is restored. *Enforcement Bureau 911 Compliance Letter Requirements*.

²⁹ *CMRS Location Accuracy News Release*.

³⁰ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005) (“*First CALEA Order*”).

³¹ *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Second Report and Order and Memorandum Opinion and Order, 21 FCC Rcd 5360 (2006) (“*Second CALEA Order*”).

The DC Circuit upheld the Commission's rules imposing CALEA obligations on facilities based broadband Internet access and interconnected VoIP providers in *American Council on Education v. FCC*.³² The Court concluded that the Commission reasonably interpreted CALEA's definition of "telecommunications carrier" both to be different than the Telecommunication Act's definition of "telecommunications carrier" and to extend to the portion of broadband services that serve as replacement for the traditional switching or transmission of a dial-up Internet connection. The Court accepted as reasonable the Commission's conclusion that the information services exception to CALEA's definition of telecommunications carrier excluded only the capabilities for "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications" of a service that has both transmission and information service components, leaving the transmission portion of the service potentially subject to CALEA requirements.³³ The Court also rejected a claim that the Commission had arbitrarily and capriciously refused to classify interconnected VoIP service as either an information service or a telecommunications service, explaining that the Commission had classified interconnected VoIP providers as "telecommunications carriers" pursuant to CALEA.³⁴

2. Second CALEA Order

In May 2006, the Commission released its *Second CALEA Order*, which confirmed that all covered providers were required to comply fully with their CALEA obligations by May 14, 2007.³⁵ Only providers whose equipment, facilities and services were deployed before October 25, 1998 may

³² *American Council on Education v. Federal Communications Commission*, 451 F.3d 226 (D.C. Cir. 2006).

³³ *Id.* at 228 (quoting 47 U.S.C. § 1001(6)(A)).

³⁴ *Id.* at 235.

³⁵ *Second CALEA Order* at ¶ 15.

seek an extension of that deadline.³⁶ This cutoff excludes most, if not all, interconnected VoIP service providers.

The Commission acknowledged that its definitions of “reasonably available” and “call-identifying information” were created for circuit switched technologies, and should not be carried over directly to packet technologies. The Commission then declined to create such definitions for packet technologies, and instead determined that industry standard-setting bodies should, in the first instance, determine the appropriate definitions.³⁷ The Commission would review those definitions if they were challenged by a deficiency petition.³⁸ The Commission also declined to dictate the technological solutions for compliance, and instead allowed covered providers to comply with their CALEA obligations by meeting standards set by industry standard-setting bodies.³⁹ It retained the option to intervene in the process, however if an interested party filed a deficiency petition.⁴⁰ The Commission also allowed covered providers to meet their CALEA obligations by using a “trusted third party” to manage the call intercept process remotely.⁴¹

The *Second CALEA Order* also clarified that the Commission, as well as the courts, could take enforcement actions against covered providers that failed to meet their CALEA obligations.⁴² The Commission required each provider of facilities-based broadband Internet access and interconnected VoIP service to file with the Commission, by February 12, 2007, a monitoring report addressing the

³⁶ *Id.* at ¶¶ 31, 42.

³⁷ *Id.* at ¶ 14.

³⁸ *Id.* at ¶ 21.

³⁹ *Id.* at ¶ 22.

⁴⁰ *Id.* at ¶ 14.

⁴¹ *Id.* at ¶ 26.

⁴² *Id.* at ¶ 66.

provider's expected compliance with the new requirements.⁴³ In addition, by March 12, 2007, each provider was required to file the policies and procedures it would use to comply with CALEA's system security requirements relating to employee supervision and control and maintenance of secure and accurate records.⁴⁴ After this date, new entrants must make this filing upon starting service.

The *Order* also clarified that the costs of CALEA development and implementation are to be born by the broadband Internet access or interconnected VoIP provider, not the federal government, for all equipment and facilities deployed after January 1, 1995.⁴⁵ However, in "extraordinary cases," if a provider is facing "significant difficulty or expense" in complying with CALEA, a provider may seek a determination from the Commission that CALEA compliance is not "reasonably achievable." If the Commission makes such a finding, the Department of Justice may agree to pay compliance costs; if the Department of Justice does not agree to pay, the carrier will be deemed to be in compliance.⁴⁶

The *Order* also determined it would be inappropriate for the Commission to identify future services and entities that may be subject to CALEA.⁴⁷ The Commission will make future determinations on a case-by-case basis.⁴⁸

2. DOJ Deficiency Petition

⁴³ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 71 Fed. Reg. 77625-01 (Dec. 27, 2006).

⁴⁴ See *Second CALEA Order* at ¶ 75; see also 47 C.F.R. § 1.20005.

⁴⁵ *Id.* at ¶ 70.

⁴⁶ *Id.* at ¶¶ 38-40.

⁴⁷ *Id.* at ¶ 80.

⁴⁸ *Id.*

On May 15, 2007, the Department of Justice filed with the Commission a Petition for Expedited Rulemaking, claiming an industry-developed CALEA standard for CDMA2000 was deficient. The DOJ claimed that J-STD-025-B was deficient because it does not include capabilities that would provide packet activity reporting, time stamping, all reasonably available handset location information at the beginning and the end of a communication, and adequate security, performance and reliability requirements.⁴⁹ The Petition requested that the Commission find the standard is deficient and establish rules requiring telecommunications carriers to implement the requested capabilities within twelve months of the effective date of the Commission's decision.⁵⁰ The Commission has not yet acted on the Petition, but any deficiency determination may have implications for other packet-based services.

C. Universal Service Contributions

1. The Universal Service Contribution Order

In June 2006, the Commission released an *Order* that required interconnected VoIP providers to report revenues and to contribute directly to the federal Universal Service Fund.⁵¹ Telecommunication carriers that provide "interstate telecommunications services" were already required to contribute to the Universal Service Fund based on their

⁴⁹ See *Petition for Expedited Rulemaking to Establish Technical Requirements and Standards Pursuant to Section 107(b) of the Communications Assistance for Law Enforcement Act*, RM-11376 at 4-5 (filed May 15, 2007).

⁵⁰ *Id.* at 5-6.

⁵¹ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ("*VoIP USF Order*").

interstate and international end user telecommunications revenues.⁵²

In this *Order*, the Commission did not determine that interconnected VoIP was a telecommunications service, but instead relied on its permissive authority under Section 254(d) of the Communications Act to require universal service contributions from providers of “interstate telecommunications,”⁵³ as well as its ancillary jurisdiction under Title I of the Communications Act. Section 254(d) is the same authority that the FCC had previously used to require providers of private carrier telecommunications to contribute to federal universal service even though they were not telecommunications carriers.⁵⁴

Because, for some services, interconnected VoIP users may use their service from more than one location and may have telephone numbers that are associated with wire centers that do not correspond to the end user’s true location, the Commission recognized that some interconnected VoIP providers would face difficulties in calculating universal service contributions. To address this, the *Order* provided two alternatives to calculating contributions based on actual traffic.⁵⁵ Of course, an interconnected VoIP provider may always contribute based on actual traffic.

First, the Commission established a safe harbor of 64.9 percent of total end user interconnected VoIP revenue, which interconnected VoIP providers may use as an approximation of their revenues generated from interstate and international calls. The Commission determined the 64.9 percent level by analogizing interconnected VoIP to wireline toll service,

⁵² *Id see also* 47 C.F.R. §§ 54.706, 54.709.

⁵³ *VoIP USF Order* at ¶ 35.

⁵⁴ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶¶ 793-96 (1997) (“*First USF Order*”).

⁵⁵ *VoIP USF Order* at ¶ 52.

which Commission statistics had showed to be 64.9 percent interstate and international revenue. This safe harbor is different, and much higher than, the safe harbor for wireless voice service, which the Commission (in the same *Order*) set at a 37.1 percent.⁵⁶

Second, the Commission decided that interconnected VoIP providers could contribute below the safe harbor level based on traffic studies. However, providers were required to receive Commission approval of their studies before relying on them.⁵⁷ Although the Commission had not required prior approval of traffic studies for wireless carriers, and did not do so in this order, the Commission said that having “identified concerns in the wireless context with the use of traffic studies,” it feared that allowing VoIP providers to calculate contributions based on traffic studies it had not approved previously “would risk extending the problems . . . identified with the use of traffic studies . . . to a new technology.”⁵⁸

The Commission also required telecommunications carriers providing wholesale services to interconnected VoIP service providers to continue to make universal service contributions for two quarters following the issuance of the *Order*, even though interconnected VoIP providers would now be contributing directly based on the end user revenues derived from the same transmission.⁵⁹ For two quarters (the fourth quarter of 2006 and the first quarter of 2007), this meant that interconnected VoIP providers did not benefit from the “carrier’s carrier” rule in which services provided for resale by a universal service contributor are not themselves subject

⁵⁶ *Id.* at ¶ 53. Wireless previously had been subject to a 28.5% safe harbor.

⁵⁷ *Id.* at ¶ 57.

⁵⁸ *Id.*

⁵⁹ *Id.* at ¶¶ 58-59.

to universal service assessments.⁶⁰ Because the underlying carriers generally passed their universal service assessments on to their interconnected VoIP customers, this meant that interconnected VoIP services were, for two quarters, subject to double assessment of federal universal service contributions.

In addition, the *Order* removed the preemptive effect of the *Vonage Order* for VoIP providers who contribute to the fund on the basis of actual interstate telecommunications revenues. The Commission reasoned that these carriers have the capability to determine the geographic jurisdiction of their traffic,⁶¹ and thus could not rely on the rationale of the *Vonage Order*, which preempted state regulation because of the impracticability of separating VoIP calls into interstate and intrastate components.

2. Appeal to the DC Circuit

On appeal, the DC Circuit upheld the Commission's exercise of its permissive contribution authority under the Universal Service statute to impose Universal Service obligations on interconnected VoIP service without classifying it as a telecommunications service.⁶² The Court also upheld the safe harbor of 64.9 percent imposed by the Commission, accepting the Commission's determination that VoIP usage was more like wireless than wireline toll service and its reasoning that VoIP customers were likely to make a high percentage of interstate calls.⁶³

⁶⁰ *Id.* at ¶ 59; *First USF Order* at ¶¶ 845, 848; 47 C.F.R. § 54.706(b) (basing contributions on “end-user telecommunications revenues”).

⁶¹ *VoIP USF Order* at ¶ 56.

⁶² *Vonage Holdings Corp. v. Federal Communications Commission*, 489 F.3d 1232 (D.C. Cir. 2007); *see also* 47 U.S.C. § 254(d).

⁶³ *Vonage*, 489 F.3d at 1242-43.

However, the Court vacated the Commission's requirement that interconnected VoIP providers obtain prior approval of traffic studies, saying the Commission's explanation that it would not apply pre-approval to wireless carriers because it would be "disruptive" as those contributors were "already relying on the current regime" did not justify treating VoIP and wireless providers differently, and did not create confidence that the Commission had met its statutory requirement to "apportion USF obligations on 'an equitable and nondiscriminatory basis.'"⁶⁴

In addition, the Court vacated the two quarter exclusion of interconnected VoIP service from the "carrier's carrier" rule. The Court noted that the Commission had claimed double assessments were needed to prevent a decrease in universal service contributions, but failed to explain how the switch to direct contributions by interconnected VoIP providers would result in a decrease in universal service collections.⁶⁵

D. Disability Access and TRS Obligations

On June 15, 2007, relying on its ancillary jurisdiction under Title I of the Communications Act, the Commission issued an *Order* applying its existing disability access rules for telecommunications service providers and equipment manufacturers "without substantive modification" to interconnected VoIP service providers and to manufacturers of equipment and customer premise equipment "specifically designed" to provide interconnected VoIP service.⁶⁶ The *Order* also required interconnected VoIP providers to comply with the Commission's existing Telecommunications Relay Service rules, which "facilitate the ability of individuals with hearing or speech disabilities to engage in 'communication

⁶⁴ *Id.* at 1243-44.

⁶⁵ *Id.* at 1244.

⁶⁶ *Disabilities Access Order* at ¶¶ 20, 25.

by wire or radio’ in a manner that is ‘functionally equivalent’ to that of individuals who do not have such disabilities.”⁶⁷

Generally, Section 255 of the Communications Act and the disability access rules adopted thereunder require covered entities to ensure that their covered equipment and services are “accessible to and usable by individuals with disabilities, if readily achievable.”⁶⁸ Prior to the Commission’s June 2007 *Order*, these requirements already applied to telecommunications carriers and manufacturers of telecommunications or customer premises equipment. The Commission defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense,” consistent with the definition of the term in the Americans with Disabilities Act.⁶⁹ Where such accessibility is not readily achievable, covered service providers and equipment manufacturers must ensure that the service is compatible with peripheral devices or customer premises equipment commonly used by individuals with disabilities.⁷⁰ The June 2007 *Order* applied these requirements to interconnected VoIP providers and equipment manufacturers. The *Order* also required that interconnected VoIP providers, like telecommunications carriers, designate an agent for service of complaints and inquiries and send such information to the Commission within thirty days after the effective date of the *Order* (*i.e.*, by November 4, 2007).⁷¹

The Telecommunications Relay Service rules include “mandatory minimum standards,” that include operational standards such as the types of assistance that must be provided, confidentiality requirements, the kinds of calls for

⁶⁷ *Id.* at ¶ 32.

⁶⁸ *Id.* at ¶¶ 27, 28.

⁶⁹ *Id.* at ¶ 3.

⁷⁰ *Id.* at ¶¶ 27-28.

⁷¹ *Id.* at ¶ 31.

which the service must be provided, and technical standards that include information on service standards that must be maintained and a requirement that service users have access to interexchange carriers equal to that of non-TRS customers.⁷²

The *Order* also requires interconnected VoIP providers to contribute to the TRS fund on the basis of interstate end-user communications revenues, which can be calculated using actual revenues, a traffic study, or a safe harbor of 64.9 percent,⁷³ and to provide 711 abbreviated dialing for access to relay services.⁷⁴

IV. New Areas of Interconnected VoIP Regulation

A. Registration

In its *VOIP USF Order*, the Commission required all interconnected VoIP service providers, including those that satisfy the *de minimis* exemption from USF contribution

⁷² See 47 C.F.R. § 64.604.

⁷³ *Disabilities Access Order* at ¶¶ 36, 40.

⁷⁴ *Id.* at ¶ 42. Two parties have filed petitions requesting a stay of these rules, which have been opposed by the Coalition of Organizations for Accessible Technology. The Commission has not acted on these petitions as of the date of this writing. See Motion for Stay or Waiver of the Voice On the Net (VON) Coalition, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105 (filed Sept. 14, 2007); United States Telecom Association Petition for Waiver of Certain Regulations Concerning Provision of 711 Dialing, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105 (filed Sept. 21, 2007); Opposition of the Coalition of Organizations for Accessible Technology (COAT) to the Motion for Stay or Waiver of the Voice On the Net (VON) Coalition and the Petition for Waiver by the United States Telecom Association of Certain Regulations Concerning Provision of 711 Dialing, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105 (filed Sept. 27, 2007).

obligations, to register with the Commission and designate an agent for service of process.⁷⁵ This is the same registration and agent designation requirement that applies to telecommunications carriers, and is completed when the provider files an FCC Form 499-A, the same form used annually to report revenues for universal service assessment, TRS assessment and FCC regulatory fee purposes, and for other fees that do not apply to interconnected VoIP providers.

B. Consumer Protection

1. Customer Proprietary Network Information

On March 13, 2007, the Commission both expanded its Customer Proprietary Network Information (“CPNI”) rules and extended those rules to cover interconnected VoIP service providers.⁷⁶ CPNI is “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service” that is available to a carrier “solely by virtue of the carrier-customer relationship.”⁷⁷ CPNI includes information contained in customer bills.⁷⁸ Section 222 of the Communications Act generally prohibits carriers from using CPNI without the customer’s approval except in certain limited circumstances, including for marketing certain telecommunications and related services to that customer.⁷⁹

In its *CPNI R&O*, the Commission relied only on its ancillary jurisdiction under Title I of the Communications Act to

⁷⁵ *VoIP USF Order* at ¶ 61 & n.205.

⁷⁶ *Telecommunications Carriers’ Use of Customer Proprietary Network Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 at ¶ 5 (2007) (“*CPNI R&O*”).

⁷⁷ 47 U.S.C. § 222(h)(1).

⁷⁸ *Id.*

⁷⁹ *CPNI R&O* at ¶ 5.

justify its extension of CPNI rules to interconnected VoIP services.⁸⁰ The Commission explained that it would extend the CPNI rules to interconnected VoIP providers because consumers expected that their telephone calls would be private, regardless of whether a call is made “using the service of a wireline carrier, a wireless carrier, or an interconnected VoIP provider,” given that to a customer making a call, the services “are virtually indistinguishable.”⁸¹ In addition, the Commission said that extending the CPNI protections to interconnected VoIP customers was necessary to “protect the privacy of wireline and wireless customers that place calls to or receive calls from interconnected VoIP customers.”⁸² The Commission also determined that CPNI protection might spur consumer demand for interconnected VoIP services, in turn driving demand for broadband connections, which would encourage more broadband investment and deployment, consistent with the Commission’s directive to “encourage the deployment of advanced telecommunications capability to all Americans.”⁸³

The Commission’s reliance in this order solely on its ancillary jurisdiction represents perhaps its farthest extension of that jurisdiction in the interconnected VoIP context yet. In the USF and CALEA contexts, the Commission relied on USF and CALEA-specific statutory provisions.⁸⁴ With respect to 911, the Commission cited its plenary numbering authority as well as its previous history of relying on Title I to impose 911 and E911 requirements.⁸⁵ In the disability access context, the Commission again relied on its previous exercise of ancillary authority to impose disability access

⁸⁰ *Id.* at ¶¶ 54-59.

⁸¹ *Id.* at ¶ 56.

⁸² *Id.* at ¶ 57.

⁸³ *Id.* at ¶ 59.

⁸⁴ *VoIP USF Order* at ¶¶ 38-45; *First CALEA Order* at ¶¶ 39-44.

⁸⁵ *VoIP E911 Order* at ¶¶ 26-35.

requirements on information services.⁸⁶ Moreover, the FTC's jurisdiction over non-common carriers with respect to consumer privacy issues suggests that Congress may not have intended that the Commission exert jurisdiction over non-common-carriers in this area.⁸⁷ Although there is some precedent upholding the Commission's assertion of jurisdiction to impose detailed regulatory obligations under Title I alone,⁸⁸ the courts have also struggled to find the limits of the Commission's ability to rely on its Title I ancillary jurisdiction.⁸⁹

The new rules add significant requirements, both for interconnected VoIP providers and for telecommunications carriers. First, the *Order* added Carrier Authentication Requirements. These prohibit carriers and interconnected VoIP providers from releasing call detail information to customers during customer-initiated telephone contact unless the customer provides a password.⁹⁰ If a customer does not provide a password, the carrier can provide the call detail information only by sending it to an address of record or by calling the customer at the telephone number of record.⁹¹ Carriers and interconnected VoIP providers can, however, still provide CPNI to customers who request the information in person and present a valid photographic identification.⁹² These rules also require carriers to provide mandatory

⁸⁶ *Disability Access Order* at ¶¶ 21-24.

⁸⁷ See 15 U.S.C. § 45(a) (defining unfair practices); 15 U.S.C. § 46(a) (exempting from FTC jurisdiction common carrier activities that are subject to the Communications Act).

⁸⁸ See *2005 Article* at n.3; see also *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁸⁹ See *2005 Article* at n.4 (2005); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

⁹⁰ *CPNI R&O* at ¶ 13.

⁹¹ *Id.*

⁹² *Id.* at ¶ 23.

password protection for access to online accounts.⁹³ The *Order* does create a limited exemption from the Carrier Authentication Requirements for certain business customers.⁹⁴

The new rules also require carriers and interconnected VoIP providers to notify customers immediately when a password, customer response to a back-up means of authentication for lost or forgotten passwords, online account, or address or record is created or changed.⁹⁵

In the event a carrier or interconnected VoIP provider determines CPNI has been breached, the *Order* requires the carrier to notify law enforcement within seven business days. It permits the carrier or interconnected VoIP provider to notify the customer or disclose the breach to the public after seven days if law enforcement has not requested the carrier to postpone disclosure. However, the carrier or interconnected VoIP provider is permitted to immediately notify the customer or publicly disclose the breach if, after consulting with the relevant law enforcement agency, the carrier believes that there is “an extraordinarily urgent need to notify a customer or class of customers in order to avoid immediate and irreparable harm.”⁹⁶ The *Order* also requires carriers and interconnected VoIP providers to maintain a record of discovered breaches.⁹⁷

The *Order* further requires carriers and interconnected VoIP providers to “obtain opt-in consent from a customer before disclosing that customer’s CPNI to a carrier’s joint venture partner or independent contractor for the purpose of marketing communications-related services to that

⁹³ *Id.* at ¶ 20.

⁹⁴ *Id.* at ¶ 25.

⁹⁵ *Id.* at ¶ 24.

⁹⁶ *Id.* at ¶ 29.

⁹⁷ *Id.*

customer.”⁹⁸ This was a change from prior rules, which allowed CPNI to be shared with communications-related joint venture partners or independent contractors based on “opt-out” consent. The difference between “opt-in” and “opt-out” consent is significant. With “opt-in” consent, the provider must obtain affirmative consent from the subscriber. With “opt-out” consent, the provider can provide a subscriber notice of the ability to “opt out” of consent for use of CPNI, and if the subscriber does not affirmatively opt-out, consent is deemed granted.

The *Order* requires carriers and interconnected VoIP providers to file an annual CPNI certification with the Commission. This is to include an explanation of any actions the carrier or interconnected VoIP provider has taken against data brokers and a summary of customer complaints from the preceding year about unauthorized disclosure of CPNI.⁹⁹ Carriers must file the annual CPNI certifications by March 1 of each year.

Finally, the *Order* required generally that carriers and interconnected VoIP providers take reasonable measures to discover and protect against unauthorized disclosure of CPNI. The Commission said that it will infer from evidence of unauthorized access to CPNI information that a carrier or interconnected VoIP provider did not provide sufficient CPNI protection. The carrier or interconnected VoIP provider must then demonstrate that the measures it has taken to protect CPNI from unauthorized disclosure are reasonable.¹⁰⁰ As guidance, the Commission said it would expect carriers and interconnected VoIP providers to implement the minimum requirements set forth in its rules, as well as to take any additional steps that would be feasible for the particular carrier or interconnected VoIP provider, such

⁹⁸ *Id.* at ¶ 37.

⁹⁹ *Id.* at ¶ 51.

¹⁰⁰ *Id.* at ¶ 63.

as encrypting customers' CPNI if that would provide significant additional protection at a reasonable cost.¹⁰¹

Various parties have filed petitions for reconsideration or brought appeals of the Commission's *CPNI Report & Order*.¹⁰² Those petitions and appeals remain pending.

2. Potential Consumer Protection Regulation

In the *IP Enabled Services NPRM*, the Commission sought comment about whether several additional consumer protections should be applied to any providers of VoIP or other IP-enabled services. These include the Commission's "truth-in-billing" and other billing and disclosure requirements, regulations to prevent "slamming," and discontinuance requirements.¹⁰³ It remains an open question whether the Commission will choose to regulate these areas. As with CPNI,¹⁰⁴ any Commission decision to exercise ancillary jurisdiction to impose consumer protection obligations on VoIP providers would overlap with the FTC's jurisdiction with respect to non-common carriers.

C. Interconnection and Number Portability

¹⁰¹ *Id.* at ¶ 64.

¹⁰² Petition for Reconsideration of CTIA – The Wireless Association®, CC Docket No. 96-115, WC Docket No. 04-36 (filed July 9, 2007); Petition for Clarification or Reconsideration of the United States Telecom Association, CC Docket No. 96-115 & WC Docket No. 04-36 (filed July 9, 2007); *NCTA v. FCC*, Docket No. 07-1312 (D.C. Cir. filed Aug. 7, 2007).

¹⁰³ *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 at ¶ 72 (2004) ("*IP-Enabled Services NPRM*"). See also Adam Bender, Regulation, *Bad Timing Killed SunRocket, Former Employee Says*, COMMUNICATIONS DAILY, July 18, 2007 (describing Sunrocket discontinuance of service).

¹⁰⁴ See Section IV.B.1 & n.87.

Because the Commission has not classified interconnected VoIP services as telecommunications services and interconnected VoIP providers have generally not sought state or federal certification as telecommunications carriers, the vast majority of interconnected VoIP providers are not currently entitled to statutory rights of interconnection pursuant to Sections 251 and 252 of the Communications Act. Section 251 addresses interconnection between telecommunications carriers, and Section 252 creates state commission mediation and arbitration procedures for interconnection between an incumbent local exchange carrier and a “requesting telecommunications carrier.”¹⁰⁵ As such, most interconnected VoIP providers that are not affiliated with a telecommunications carrier interconnect with other carriers through a telecommunications carrier.

However, some carriers had challenged whether Section 251 and 252 applied to interconnection of a telecommunications carrier to deliver traffic from a VoIP provider, such as a cable company. It was argued that the telecommunications carrier was not actually providing a telecommunications service when it was only providing the ability to interconnect to the PSTN, and that Section 251, and in particular Sections 251(a) and (b)(5), only applied to the exchange of the interconnecting carrier’s traffic from its retail end users.

In March 2007, the Commission’s Wireline Competition Bureau, acting on delegated authority, issued a declaratory ruling in response to a petition from Time Warner Cable (“TWC”) to clarify the scope of Section 251’s interconnection and traffic exchange duties with respect to wholesale interconnection services.¹⁰⁶ TWC’s petition sought affirmation that “requesting wholesale

¹⁰⁵ 47 U.S.C. §§ 251, 252.

¹⁰⁶ *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (“*Time Warner Order*”).

telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers (including VoIP-based providers).¹⁰⁷ TWC uses VoIP technology to provide its telephone service, and purchases wholesale telecommunications services from competitive telecommunications carriers to connect its interconnected VoIP customers with the PSTN.¹⁰⁸ However, TWC claimed its suppliers of wholesale telecommunications service had been unable to provide service in certain areas of South Carolina and Nebraska because those state commissions had determined that “rural incumbent LECs are not obligated to enter into interconnection agreements with competitive service providers. . . to the extent that such competitors operate as wholesale service providers.”¹⁰⁹

The *Time Warner Order* directly established that “telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs . . . for the purpose of providing wholesale telecommunications services.”¹¹⁰ In this decision, the Wireline Competition Bureau further explained that “the rights of telecommunications carriers under sections 251 (a) and (b) apply regardless of whether the telecommunications services are wholesale or retail.”¹¹¹ Thus, “[t]he regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider’s rights as a telecommunications carrier to interconnect under section 251.”¹¹² Relying on this reasoning, the Bureau “clarif[ied] that the statutory classification of a third-party provider’s VoIP service as an information service or a telecommunications service is

¹⁰⁷ *Id.* at ¶ 2 (internal quotation marks omitted).

¹⁰⁸ *Id.* at ¶ 2.

¹⁰⁹ *Id.* at ¶ 3.

¹¹⁰ *Id.* at ¶ 8.

¹¹¹ *Id.* at ¶ 14.

¹¹² *Id.* at ¶ 15.

irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b).”¹¹³ In making this ruling, the Bureau emphasized the need to avoid inhibiting the “important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband deployment policies.”¹¹⁴ By enabling interconnection for the purpose of provision of wholesale telecommunications services, the Commission’s decision effectively enables interconnected VoIP providers to reach customers served by rural LECs by contracting with carriers providing wholesale services.

With respect to number porting obligations, the *Order* required interconnected VoIP service providers to port numbers back to LECs when a LEC wins back a VoIP provider’s customer.¹¹⁵ The Commission left other issues about number porting for interconnected VoIP services to be addressed in the *IP-Enabled Services* proceeding.¹¹⁶

D. Regulatory Fees

On August 6, 2007, the Commission released a Report and Order adopting methodologies for the collection of regulatory fees for Fiscal Year 2007 and extending such fees to providers of interconnected VoIP service.¹¹⁷

In determining the basis and rate for fees on interconnected VoIP providers, this *Order*, like the *Universal Service Order*, treats interconnected VoIP in the same manner as wireline carriers. While CMRS providers pay regulatory fees based

¹¹³ *Id.*

¹¹⁴ *Id.* at ¶ 8.

¹¹⁵ *Id.* at ¶ 16.

¹¹⁶ *Id.* at ¶ 16.

¹¹⁷ *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, MD Docket No. 07-81 (rel. Aug. 6, 2007) (“*2007 Regulatory Fees Order*”).

on their number of subscribers, the *Order* requires interconnected VoIP providers to pay regulatory fees based on their interstate and international revenues, at the same rate paid by interstate telecommunications service providers.¹¹⁸

The Commission acknowledged that some interconnected VoIP providers would have difficulty separating out their telecommunications service revenues for these calculations, and so provided the same alternatives to calculating fees based on actual traffic and revenues that were adopted in the *Universal Service Order*. First, as an alternative to actual interstate and international traffic and revenues, an interconnected VoIP provider may base their regulatory fee obligations on a safe-harbor level of 64.9 percent.¹¹⁹ Second, an interconnected VoIP provider may base its fees on a lower percentage if it submits traffic studies in support of the lower percentage.¹²⁰

V. Classification and Jurisdiction

A. Telecommunications or Information Service

The Commission has continued to impose regulation on interconnected VoIP service providers without resolving whether such service is a telecommunications service or an information service. The Commission repeatedly has left that question for another day in its orders about 911, Universal Service, CPNI, disability access, and interconnection.

¹¹⁸ The 2007 rate was \$.00266 per dollar of interstate and international end user telecommunication revenue. Significantly, regulatory fees do not exclude international revenues when the interstate revenues are less than 12 percent of total interstate and international end user telecommunications revenues, as universal service contributions do.

¹¹⁹ *2007 Regulatory Fees Order* at ¶ 17.

¹²⁰ *Id.*

Thus far, the appellate courts have been content to let the FCC take this approach. The Eighth Circuit, in *Minnesota Public Utilities Commission v. FCC*, rejected the argument that the Commission arbitrarily or capriciously failed to classify VoIP service.¹²¹ The MPUC challenged the FCC's decision to preempt state regulation of interconnected VoIP service without first classifying VoIP services as telecommunications or information services. The Court decided, however, that because the impossibility exemption (which allows state preemption of services for which it is impossible or impracticable to separate the interstate and intrastate aspects of the service) would be dispositive of the case if it applied, it was "sensible for the FCC to address that question first without having to determine whether [interconnected] VoIP service should be classified as a telecommunications service or an information service."¹²²

Similarly, the DC Circuit did not find it necessary to address the issue in *Vonage v FCC*, accepting that the Commission had jurisdiction to require interconnected VoIP providers to contribute to the Universal Service Fund under the language of the statute itself.¹²³ Indeed, the Court decided it was irrelevant whether interconnected VoIP was an information service or a telecommunications service for purposes of requiring interconnected VoIP providers to contribute to Universal Service.¹²⁴ And, in *Nuvio v. FCC*, the question of classification of interconnected VoIP service providers as telecommunications services or information services was not presented to the Court.¹²⁵

¹²¹ *Minnesota Public Utils. Commission v. Federal Communication. Commission*, 483 F.3d 570, 577-78 (8th Cir. 2007).

¹²² *Id.* at 578.

¹²³ *Vonage Holdings Corp. v. Federal Communications Commission*, 489 F.3d 1232 (D.C. Cir. 2007).

¹²⁴ *Id.* at 1241.

¹²⁵ *Nuvio Corp. v. Federal Communications Commission*, 473 F.3d 302 (D.C. Cir. 2007).

This limbo leaves interconnected VoIP providers without access to various benefits, including numbering resources, including pseudo-ANIs used for delivering 911 calls,¹²⁶ interconnection rights,¹²⁷ and pole attachment rights,¹²⁸ but, for the time being, leaves them free of exit regulation and common carrier obligations that have not been specifically extended to interconnected VoIP.

B. Preemption of State Regulation of Fixed Interconnected VoIP Services

In 2004, the Commission granted a Vonage petition seeking preemption of a Minnesota Public Utility Commission order attempting to apply Minnesota telephone regulation to Vonage's service.¹²⁹ The Commission determined that the impossibility of tracking the jurisdiction of Vonage's calls warranted preemption of "traditional 'telephone company' regulation" imposed by states,¹³⁰ and noted that it would likely preempt state regulation of services sharing Vonage's "similar basic characteristics." As explained by the Commission, these characteristics include "a requirement for a broadband connection from the user's location; a need for

¹²⁶ See Letter from Thomas J. Navin, Wireline Competition Bureau, to Thomas M. Koutsky, North American Numbering Council, and Amy L Putnam, Number Pooling Services (Sept. 8, 2006).

¹²⁷ See *Time Warner Order* at ¶ 13.

¹²⁸ Section 224 grants pole attachment rights to "cable television system providers" and "providers of telecommunications service." 47 U.S.C. § 224.

¹²⁹ *Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and requiring Compliance, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003).

¹³⁰ *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"); see also attached Statement of Michael K. Powell.

IP-compatible CPE; and a service offering that includes a suite of integrated capabilities and features . . . that allows customers to manage personal communications dynamically.”¹³¹ Notably, qualities that make it particularly difficult to locate nomadic VoIP users – ability to use the service from any broadband connection and availability of telephone numbers that are not geographically relevant – were not included in the list of “basic characteristics.” As a result, providers of fixed VoIP services have argued that the *Vonage Order* preempts state regulation of their services.

Although a challenge was presented to preemption of state regulation of fixed VoIP services to the Eighth Circuit in *Minnesota Public Utilities Commission v. FCC*, the Court did not address the substance of the argument. The challenge claimed the Commission’s statements regarding preemption with respect to all interconnected VoIP services in the *Vonage Order* exceeded its jurisdiction, because it was possible to determine the geographic beginning and end points of calls places using fixed VoIP.¹³² The Court, however, decided the issue was not ripe for review because the *Vonage Order* did not specifically address fixed VoIP service providers, but instead only suggested that the Commission would preempt state regulation of fixed VoIP services if it were faced with the issue.¹³³ This outcome, coupled with the Commission’s indication in the *VoIP USF Order* that the preemptive effect of the *Vonage Order* does not extend to interconnected VoIP service providers capable of tracking the geographic end points of their calls,¹³⁴ strongly suggests that state regulation of fixed VoIP services may not be preempted by courts or the Commission.

VI. State Developments

¹³¹ *Vonage Order* at ¶ 32.

¹³² *Minnesota Public Utils. Commission*, 483 F.3d 570 at 581-82.

¹³³ *Id.* at 582-83.

¹³⁴ *VoIP USF Order* at ¶ 56.

As the Federal Communications Commission has increasingly regulated VoIP providers on a national level, some states have sought to exercise jurisdiction over interconnected VoIP service providers. As discussed above, tension exists between these state efforts and the Federal Communication Commission's *Vonage Order*. This tension is especially acute in the area of fixed VoIP service, as the Commission has since indicated, in its *VoIP USF Order*, that providers capable of determining the jurisdiction of their calls would not benefit from the preemptive effects of the *Vonage Order*.¹³⁵

A. State Utility Commissions

In the past two years, certain state public utility commissions have taken steps either to regulate or to consider regulation of VoIP providers.

The New Mexico Public Regulation Commission ("NMPRC") has enacted rules requiring interconnected VoIP service providers to contribute to the state Universal Service Fund.¹³⁶ The NMPRC has since determined that interconnected VoIP service providers may contribute to the New Mexico fund using any one of the three contribution methods adopted by the FCC: safe harbor (applying a safe harbor of 35.1 percent, or 100 percent less the federal safe harbor of 64.9 percent), traffic study, or actual revenues.¹³⁷

The Missouri Public Service Commission is considering whether to require Comcast to apply for and receive

¹³⁵ *VoIP USF Order* ¶ 56.

¹³⁶ N.M. CODE R. §§ 17.11.10.17, 17.11.10.20 (2007).

¹³⁷ *Implementation of the State Rural Universal Service Fund*, Order on Methods of Determining VoIP Providers' Contributions to State Universal Service Fund at 21-22, Case No. 06-0026-UT (N. Mex. P.R.C. Oct. 5, 2006).

Commission authority to provide its VoIP service. Commission staff argue that because the *Vonage Order* said only that the FCC “would” preempt state regulation of entities such as cable companies that provide fixed VoIP service, the state Commission is still free to regulate fixed VoIP service providers.¹³⁸ Comcast has responded by arguing that the state Commission is preempted from regulating VoIP services due to comprehensive federal efforts to regulate VoIP and the state Commission will not have jurisdiction to regulate Comcast until the FCC classifies VoIP service and determines whether and to what extent states may regulate interconnected VoIP.¹³⁹ At the time of this writing, this proceeding is still ongoing.

B. State Legislation

State legislatures also have begun to address regulation of VoIP service providers, but have taken different approaches to the issue. Two states have passed laws imposing requirements on VoIP providers, while a number of others have instead passed statutes explicitly precluding their state utility commissions from exercising jurisdiction over VoIP service providers. Many other states have considered bills that address VoIP, and a new round of bills is expected as state legislatures return to work this fall.

Both Nebraska and Montana have enacted laws seeking to regulate providers of VoIP service. The Nebraska law codifies expansive definitions of “communications provider” and “telecommunications company,” each of which would

¹³⁸ *Staff of the Public Service Comm’n of the State of Missouri v. Comcast IP Phone, LLC*, Case No. TC-2007-0111, Staff’s Initial Brief at 5-7 (Sept. 14, 2007).

¹³⁹ *Staff of the Public Service Comm’n of the State of Missouri v. Comcast IP Phone, LLC*, Case No. TC-2007-0111, Initial Post-Hearing Brief of Comcast IP Phone, LLC at 2, 5-10 (Sept. 14, 2007).

encompass providers of VoIP service.¹⁴⁰ Providers within these definitions must contribute to the state universal service fund, register and pay a registration fee with the state, and provide a contact person for the state universal service fund, the state Relay System for the hearing-impaired, E911, and consumer complaints. In addition, the law extends Nebraska's E911 regulations and fees and telecommunications relay service collection and fees to each "functional equivalent" of a telephone number.

The Montana law only regulates providers of VoIP service in regard to telecommunications access service for persons with disabilities. The law explicitly requires VoIP providers to collect and remit to the state a monthly Telecommunications Relay Service contribution.¹⁴¹

In contrast, a number of states, including Delaware,¹⁴² Florida,¹⁴³ Georgia,¹⁴⁴ Maryland,¹⁴⁵ and Virginia¹⁴⁶ have adopted statutes that preclude their state utility commissions from exercising jurisdiction over providers of VoIP service. Often these statutes provide that they should be construed to neither prohibit nor require assessment of 911 fees or payment of intercarrier compensation.

VII. Broadband Regulation

The discussion of developments with respect to broadband regulation follows from three 2005 FCC decisions, the FCC's *Wireline Broadband Access Order*, its *Broadband Internet Policy Statement*, with which the Commission engaged the

¹⁴⁰ L.B. 661, 100th Leg., 1st Sess. (Neb. 2007) (enacted).

¹⁴¹ H.B. 611, 60th Leg. (Mont. 2007) (enacted).

¹⁴² DEL. CODE ANN. Tit. 26 § 202 (2007).

¹⁴³ FLA. STAT. § 364.011 (2007).

¹⁴⁴ O.C.G.A. § 46-5-222 (2007).

¹⁴⁵ MD. CODE ANN., [Public Utility Co.'s] § 8-602 (West 2007).

¹⁴⁶ VA. CODE ANN. § 56-1.3 (2007).

issue that has come to be colloquially known as “Net Neutrality,” and the Commission’s *CALEA First Report & Order*.

A. Wireline Broadband Access Order

On September 23, 2005, the Commission released the *Wireline Broadband Access Order*, in which 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.”¹⁴⁷ Following close on the heels of the United States Supreme Court’s June 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services*,¹⁴⁸ this *Order* held that facilities-based wireline broadband Internet access service is an information service and that providers of such service could choose to offer the transmission component of the service on either a common carrier or non-common carrier basis.¹⁴⁹ In short, the *Order* allowed incumbent LECs to place their broadband Internet access offerings in the same regulatory status as the cable industry’s broadband services, subject only to discretionary Title I regulation, and it freed them from the obligation to separately offer the underlying transmission component as a stand-alone common carrier service, subject to a one year transition period.¹⁵⁰

As broad as the scope of the *Wireline Broadband Access Order* was, however, it did not address certain enterprise services. The Commission specifically stated that the relief it was granting did not extend to “stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have

¹⁴⁷ *Wireline Broadband Access Order* at ¶ 3.

¹⁴⁸ 545 U.S. 967 (2005).

¹⁴⁹ *Wireline Broadband Access Order* at ¶ 5.

¹⁵⁰ *Id.* at ¶ 86.

traditionally used for basic transmission purposes.”¹⁵¹ These were, at that time, already the subject of a petition for forbearance filed by Verizon pursuant to Section 10 of the Communications Act. We discuss this petition and the FCC’s handling of it and follow-on “me-too” petitions further below.

Furthermore, although the Commission did not limit the types of incumbent LEC eligible to elect to provide wireline broadband transmission (to itself or others) on a non-common carrier basis, it sidestepped cost allocation issues that arise when a rate-of-return carrier shifts from offering wireline broadband internet transmission on a common carrier basis to providing it only as a non-common carrier service.¹⁵² In general, the Commission allowed carriers to continue to treat the costs of the wireline broadband transmission component as “regulated” costs for the purposes of Part 64’s allocation between “regulated” and “non-regulated” operations.¹⁵³ With respect to rate-of-return carriers, however, the Commission stated that because all the rate-of-return carriers that had commented had said they would continue to offer the broadband transmission component as a common carrier service, it would not, “at this time, address the treatment of private carriage arrangements by rate-of-return carriers because the issue is entirely hypothetical.”¹⁵⁴ The Commission also rejected, at least with respect to the non-rate-of-return carriers for which it directly addressed cost allocation, arguments that Section 254(k) required allocation of some portion of loop costs to any non-common carrier broadband transmission component.¹⁵⁵ The Commission, however, did state, “[i]n the event that an earnings determination is needed for some ratemaking

¹⁵¹ *Id.* at ¶ 9.

¹⁵² *Id.* at ¶ 138.

¹⁵³ *Id.* at ¶¶ 128-138.

¹⁵⁴ *Id.* at ¶ 138.

¹⁵⁵ *Id.* at ¶¶ 139-144.

purpose, the affected carrier will have to propose a way of removing the costs of any non-Title II services from the computation.”¹⁵⁶ As it turned out, some rate-of-return carriers have elected to shift to non-common carrier treatment of their broadband transmission component.

The Commission required wireline broadband Internet access providers electing to move broadband transmission to non-common carrier classification to continue to contribute to federal universal service, Telecommunications Relay Service (TRS) and North American Numbering Plan Administration (NANPA) funding in the same manner they had been for 270 days following the effective date of the *Order* (*i.e.*, until August 2006), notwithstanding the classification changes the Commission had made.¹⁵⁷ With respect to federal universal service contributions, the Commission noted that it was working on federal universal service contribution reform, and stated, “[i]f we are unable to complete new contribution rules within the 270-day period of time, the Commission will take whatever action is necessary to preserve existing funding levels, including extending the 270-day period discussed above or expanding the contribution base.”¹⁵⁸ The Commission, however, neither completed its new contribution rules by August 2006, nor extended contribution requirements for the broadband transmission component that a wireline broadband Internet access provider self-provisions for its own broadband Internet access service. As a result, the broadband transmission component of ILEC broadband Internet access for those ILECs that elected non-common carriage status is no longer subject to federal universal service contribution obligations. However, if an ILEC or a CLEC continues to offer the broadband transmission component as a common carrier service, the end user interstate and international revenues from that component

¹⁵⁶ *Id.* at ¶ 137.

¹⁵⁷ *Id.* at ¶¶ 113, 124, 125.

¹⁵⁸ *Id.* at ¶ 113.

remain subject to federal universal service, TRS and NANPA assessments.¹⁵⁹

The Commission also directly addressed the impact of the *Wireline Broadband Access Order* on incumbent LECs' obligations to provide access to unbundled loops pursuant to Section 251(c)(3) of the Communications Act. The Commission agreed that "regardless of how the Commission classifies wireline broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act."¹⁶⁰

The Commission further explained that "[a]n incumbent LEC's obligations under section 251(c) will remain until the incumbent LEC is either determined not to be an incumbent LEC under section 251(h), or the Commission forbears from section 251 obligations; we have not done either to date."¹⁶¹

Finally, although it took no specific regulatory action, the Commission observed that it had previously used its Title I jurisdiction to require some information services to meet the Section 255 disabilities access requirements and indicated that it would "exercise [its] Title I ancillary jurisdiction to ensure achievement of important policy goals of section 255 and also section 225 of the Act."¹⁶²

Various parties appealed the *Wireline Broadband Access Order*. Those appeals were consolidated and are currently pending before the Third Circuit Court of Appeals.¹⁶³

¹⁵⁹ In this case, the sale to an information service provider, including an affiliate, is a sale to an end user.

¹⁶⁰ *Wireline Broadband Access Order* at ¶ 126.

¹⁶¹ *Id.* at ¶ 127 n. 398.

¹⁶² *Id.* at ¶ 123.

¹⁶³ *Time Warner v. Federal Communications Commission*, No. 05-4769 (3d Cir. filed Oct. 26, 2005).

Although oral argument was held on March 16, 2007, as of this writing, a decision has not yet been issued.

B. Extension of the *Wireline Broadband Access Order* to Other Delivery Technologies.

The Commission has continued to advance its goal of “developing a consistent regulatory framework across broadband platforms” by extending the regulatory classifications from the *Wireline Broadband Access Order* to broadband delivered by other technologies.¹⁶⁴

On November 3, 2006, the Commission released the *BPL-Enabled Internet Access Services Order*, which established a “minimal regulatory environment” for Broadband over Power Line (BPL)-enabled Internet access service.¹⁶⁵ This *Order* classified BPL-enabled Internet access service as an information service.¹⁶⁶ It also established that providers of this service could choose to offer the transmission component of the service “to an ISP as a wholesale input for the ISP’s own BPL-enabled Internet access service offering” on either a common carrier or a non-common carrier basis.¹⁶⁷

On March 23, 2007, the Commission released the *Wireless Internet Access Order*, which classified wireless broadband Internet access service as an information service.¹⁶⁸ This *Order* also established that providers of the service could choose to offer the transmission component of the service on

¹⁶⁴ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 at ¶ 7 (2007) (“*Wireless Internet Access Order*”).

¹⁶⁵ *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

¹⁶⁶ *Id.* at ¶ 8.

¹⁶⁷ *Id.* at ¶ 12.

¹⁶⁸ *Wireless Internet Access Order* at ¶ 22.

either a common carrier or a non-common carrier basis.¹⁶⁹ In addition, the Commission clarified that mobile wireless broadband Internet access is not a commercial mobile service, and so will not be treated as a common carrier service under CMRS regulations.¹⁷⁰ However, the Commission did emphasize that Title III licensing requirements continued to apply to providers of wireless broadband Internet access services.

In the *Wireless Internet Access Order*, the Commission also addressed how other regulatory issues would interact with the classification of wireless broadband Internet as an information service. The Commission stated that it would monitor the development of wireless broadband Internet access and its effects on access and use by persons with disabilities, and that if necessary, it would use its Title I and Title III authority to ensure that the goals of disability access were achieved.¹⁷¹ The Commission also clarified that Section 224(e) of the Communications Act would continue to apply where a wireless service provider “uses the same pole attachments to provide both telecommunications and wireless broadband Internet access services.”¹⁷² The Commission did not, however, decide whether Section 224’s pole attachment rights applied if the provider only provided wireless broadband Internet services, and said that it may address the issue in other pending proceedings.¹⁷³ Similarly, the Commission clarified that Section 332(c)(7)(B), addressing state and local authority over zoning and land use decisions for personal wireless service facilities, would continue to apply when a wireless service provider used the same infrastructure to provide personal wireless and wireless

¹⁶⁹ *Id.* at ¶ 32.

¹⁷⁰ *Id.* at ¶¶ 37, 39.

¹⁷¹ *Id.* at ¶ 59.

¹⁷² *Id.* at ¶¶ 60, 62.

¹⁷³ *Id.* at ¶ 62.

broadband Internet access services.¹⁷⁴ The Commission also noted that a CMRS carrier that also provided wireless broadband Internet access would continue to have the same rights and obligations regarding interconnection as it would have if it only provided CMRS.¹⁷⁵ Finally, the Commission stated that providers of wireless broadband Internet access service will have to comply with any consumer protection obligations the Commission adopts in its *Consumer Protection in the Broadband Era* proceeding.¹⁷⁶

C. Verizon Enterprise Broadband Transmission Forbearance

In 2004, Verizon filed a petition requesting forbearance from Title II regulations, common carrier regulations, and the *Computer Inquiry* requirements “to the extent that any of those requirements might ultimately be construed to apply . . . to any broadband services offered by Verizon.”¹⁷⁷ The petition stated that Verizon was requesting the same relief that BellSouth Telecommunications, Inc., had requested in an earlier petition; BellSouth had sought “forbearance from traditional common carriage requirements for all broadband services that [it] does or may offer.”¹⁷⁸ These petitions predated the FCC’s adoption of the *Wireline Broadband Access Order*.

Following adoption of the *Wireline Broadband Access Order*, Verizon filed an *ex parte* on February 7, 2006,

¹⁷⁴ *Id.* at ¶¶ 63-65.

¹⁷⁵ *Id.* at 66.

¹⁷⁶ *Id.* at ¶¶ 69-70; *see also Wireline Broadband Access Order* at ¶¶ 146-59.

¹⁷⁷ *See* Petition of the Verizon Telephone Companies for Forbearance, WC Docket No. 04-440 at 1 (filed Dec. 20, 2004) (“*Verizon Petition*”).

¹⁷⁸ *See id.* at 2; *see also* Petition of BellSouth Telecommunications, Inc., for Forbearance, WC Docket No. 04-405 (filed Oct. 27, 2004). BellSouth subsequently withdrew this petition.

narrowing the scope of its requested relief.¹⁷⁹ Verizon noted that the Commission's *Wireline Broadband Access Order* had removed mandatory common carriage of broadband transmission primarily when sold to mass-market customers and when such underlying broadband transmission was used to provide Internet access service.¹⁸⁰ Verizon then stated that it was seeking forbearance for two principal categories of services: (1) packet-switched services capable of 200 kbps in each direction that "route or forward packets, frames, cells, or other data units based on the identification, address or other routing information contained in the packets, frames, cells, or other data units," specifically including Frame Relay services, ATM services, IP-VPN services and Ethernet services, which the Commission had excluded from the scope of the *Wireline Broadband Access Order*; and (2) non-TDM based optical networking, optical hubbing, and optical transmission services, including services provided over SONET-based networks, or over Wave Division Multiplexing or Dense Wave Division Multiplexing Networks.¹⁸¹ Verizon attached a list of ten of its services that fell into these two categories.¹⁸² Verizon stated that it was "seeking forbearance from the mandatory application of Title II common-carriage regulation," which would allow it to offer these services on a private carriage basis only, including providing such services only to itself.¹⁸³ Verizon also stated that it believed the Commission could exclude traditional

¹⁷⁹ See Letter from Edward Shakin, Vice-President and Associate General Counsel of Verizon, to Marlene Dortch, WC Docket No. 04-440 (filed Feb. 7, 2006) ("*Verizon ex parte*").

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.* at 2-3.

¹⁸² The ten services enumerated by Verizon were Frame Relay Service, ATM Cell Relay Service, Internet Protocol – Virtual Private Network, Transparent LAN Service, LAN Extension Service, IntelliLight Broadband Transport, Custom Connect, Verizon Optical Networking, Optical Hubbing Service, IntelliLight Optical Transport Service. *Id.* at Attachment 1.

¹⁸³ *Id.* at 3.

TDM-based special access services from the definition of “broadband” services.¹⁸⁴

In March 2006, the maximum 15-month statutory deadline for FCC action mandated in Section 10 lapsed without Commission action either granting or denying Verizon’s forbearance request.¹⁸⁵ Accordingly, because the Commission had not denied the petition prior to the statutory deadline, Verizon’s petition was deemed granted by operation of law.¹⁸⁶

Because there is no Commission decision setting forth the scope of the granted forbearance, it is unclear whether the relief deemed granted by the Commission is the originally requested relief or the requested relief as narrowed in the *ex parte*. It is also unclear whether the petition as deemed granted included TDM-based special access services, which Verizon had said the Commission “could” exclude from the definition of broadband, or whether it includes future packet-based services exceeding 200 kbps in each direction that Verizon may choose to offer beyond the ten services listed by Verizon. The Commission did issue a news release stating that the relief was deemed granted and including statements by the Commissioners.¹⁸⁷ The joint statement of Chairman Martin and Commissioner Tate suggests that the relief granted was narrowed by Verizon’s February 7, 2006 *ex parte*, thus excluding “traditional special access services (DS1 and DS3 services) and . . . TDM-based optical

¹⁸⁴ *Id.* at 2.

¹⁸⁵ *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Service is Granted by Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, 2006) (“*Verizon Forbearance Release*”). The 15-month deadline is the combination of the initial one-year statutory deadline with a one-time 90 day extension that the Commission is permitted to grant. 47 U.S.C. § 160(c).

¹⁸⁶ *See* 47 U.S.C. § 160(c).

¹⁸⁷ *See Verizon Forbearance Release.*

networking.¹⁸⁸ However, the statements of Commissioners Copps and Adelstein suggest that there is doubt about whether the relief was narrowed.¹⁸⁹

Even if narrowed by the February 7, 2006 *ex parte*, the relief granted is both broad and vague. Further, because there is no written order concluding Verizon in fact satisfied the statutory forbearance standard, the precedential value of the grant is unclear. In July 2007, a group of CLECs asked the Commission to apply the statutory forbearance standard and deny Verizon relief, and to issue a written order addressing the merits of Verizon's petition.¹⁹⁰

The Verizon forbearance decision has been appealed to the DC Circuit. Oral argument is pending in that appeal at the time of this writing.

D. ACS of Anchorage Broadband Forbearance

In August 2007, the FCC granted ACS of Anchorage (ACS) partial forbearance from certain dominant-carrier and *Computer Inquiry* duties. In relevant part, ACS had requested relief for its mass-market broadband Internet access services and for its enterprise broadband services.

The Commission granted ACS relief for its mass-market broadband Internet access transmission services consistent with the relief granted in the *Wireline Broadband Access Order*.¹⁹¹ Although the Commission did not expressly limit

¹⁸⁸ *Id.* at *1-*2.

¹⁸⁹ *Id.* at *2-*6.

¹⁹⁰ Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No. 04-440 (filed July 25, 2007).

¹⁹¹ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation*, Memorandum Opinion and Order, WC Docket No. 06-109 (rel. Aug. 20, 2007) (“*ACS Forbearance Order*”).

the *Wireline Broadband Access Order* to price cap carriers, as discussed above, the Commission had not in that *Order* addressed cost allocation issues for rate-of-return carriers. In the *ACS Order* the Commission stated that, for rate-of-return carriers, addressing such cost allocation issues is “as a practical matter, . . . a prerequisite to a carrier’s availing itself of the ability to offer the transmission component of wireline broadband Internet access services on a non-common carrier basis.”¹⁹² In order to avoid the possibility that shifting broadband Internet access transmission services to non-common carriage could increase the rates for other interstate special access services that remain subject to rate-of-return regulation, the Commission conditioned forbearance for ACS’s mass-market broadband Internet access services on ACS submitting to the Commission, and receiving Commission approval for, a description of how ACS would address the cost-allocation issues presented by granting such relief to a rate-of-return carrier instead of a price cap carrier.¹⁹³ The Commission also noted that ACS had not sought forbearance from Section 254(k), and that compliance with Section 254(k) also necessitated addressing cost allocation issues.¹⁹⁴

ACS had also requested forbearance similar to what it characterized as the relief granted by operation of law to Verizon: specifically, relief from regulation as a common carrier with respect to any packetized broadband services it offers or may offer in the future. The Commission granted ACS partial relief for specified enterprise broadband services not included within the scope of the *Wireline Broadband Access Order*, and therefore not included within the scope of parallel forbearance granted to ACS in the *Order*. The enterprise broadband transmission services for which ACS received forbearance were its Transparent Local Area

¹⁹² *Id.* at ¶ 75.

¹⁹³ *Id.* at ¶¶ 75, 80.

¹⁹⁴ *Id.* at ¶ 81.

Networks, LAN-extension services, and video transmission services.¹⁹⁵ The Commission granted ACS relief from dominant carrier requirements with respect to such services, and also forbore from the *Computer II* requirement that ACS offer these services pursuant to tariff.¹⁹⁶ However, the Commission declined to forbear from the *Computer II* requirement to “offer as telecommunications services the basic transmission services underlying its enhanced services” and to “offer those telecommunications services on a nondiscriminatory basis to all enhanced service providers, including its own enhanced services operations.”¹⁹⁷ The Commission again conditioned its relief on ACS obtaining Commission approval of its cost allocation proposal.¹⁹⁸ Notably, the Commission declined to grant ACS relief with respect to packetized broadband transmission services that ACS may offer in the future.¹⁹⁹ The Commission also noted that its grant of forbearance specifically excluded TDM-based DA-1 and DS-3 special access services.²⁰⁰ In what may have been a veiled reference to Verizon, the Commission also stated that “such [TDM-based DS-1 and DS-3 special access] services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.”²⁰¹

This was the Commission’s first decision on one of the Verizon “me-too” petitions. The fact that ACS was a rate-of-return carrier and operated in a market far from the 48 contiguous states makes it difficult to generalize from this decision how the FCC may approach other Verizon “me-too” petitions.

¹⁹⁵ *Id.* at ¶ 93 n.259.

¹⁹⁶ *Id.* at ¶¶ 93-137.

¹⁹⁷ *Id.* at ¶¶ 120-122.

¹⁹⁸ *Id.* at ¶ 108.

¹⁹⁹ *Id.* at ¶ 112.

²⁰⁰ *Id.* at ¶ 96.

²⁰¹ *Id.* at ¶ 96.

E. Remaining Verizon “Me Too” Petitions

Following on the heels of Verizon’s broadband forbearance petition being “deemed granted” by operation of law, carriers in addition to ACS sought forbearance relief. Qwest,²⁰² AT&T,²⁰³ Embarq,²⁰⁴ and Frontier/Citizens²⁰⁵ each filed petitions requesting the same relief as that granted to Verizon. Generally, these petitions all request forbearance from most Title II common carrier and *Computer Inquiry* requirements for broadband services. The statutory deadline for the original Qwest “me too” petition was September 11, 2007. However, on the statutory deadline, Qwest withdrew the request.²⁰⁶ Qwest subsequently re-filed its petition, and the FCC has sought comment on an accelerated schedule.²⁰⁷ At the time of writing, the next statutory deadline for FCC action is the October 11, 2007 for AT&T’s petition. The Commission’s actions on these petitions may shed light on the Commission’s understanding of the Verizon order, and whether it is willing to make factual findings that would sustain the full breadth of relief obtained by Verizon. If the Commission’s decisions with respect to these petitions suggests that Verizon did not, in fact, or would not now meet the conditions of Section 10 with respect to the forbearance

²⁰² See Qwest Petition for Forbearance, WC Docket No. 06-125 (filed June 13, 2006).

²⁰³ See Petition of AT&T for Forbearance, WC Docket No. 06-125 (filed July 13, 2006).

²⁰⁴ See Petition of the Embarq Local Operating Companies for Forbearance, WC Docket No. 06-147 (filed July 26, 2006).

²⁰⁵ See Petition of the Frontier and Citizens ILECS for Forbearance, WC Docket No. 06-147 (filed Aug. 3, 2006).

²⁰⁶ See Letter from Melissa Newman, Federal Regulatory Vice-President of Qwest Corp. to Marlene H. Dortch, WC Docket No. 06-125 (filed Sept. 11, 2007).

²⁰⁷ *Pleading Cycle Established For Comments On Qwest Petition For Forbearance Under 47 U.S.C. § 160(C) From Title II And Computer Inquiry Rules With Respect To Broadband Services*, Public Notice, DA 07-3923 (rel. Sept. 13, 2007).

that was deemed granted, the Commission will face an interesting legal question as to whether it can continue, with respect to Verizon, to forbear to the full extent of the deemed granted relief.

F. Net Neutrality

On August 5, 2005, 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.²⁰⁸

As adopted by the Commission, these principles are not rules, and as Chairman Martin noted, are not enforceable.²⁰⁹ The principles, further, are “subject to reasonable network management.”²¹⁰ The Commission stated that it would “incorporate the . . . principles into its ongoing policymaking

²⁰⁸ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986 (2005) (“*Internet Openness Policy Statement*”).

²⁰⁹ *See, e.g., Chairman Kevin J. Martin Comments on Commission Policy Statement*, News Release (Aug. 5, 2005).

²¹⁰ *Internet Openness Policy Statement* at ¶ 4 n.15.

activities.”²¹¹ To date, the Commission has made good on that pledge by applying the principles in the merger context and opening a Notice of Inquiry to address broadband market practices. At the same time, the Commission has come under pressure from the FTC and DOJ to decline to expand its application of these principles.

1. Bell Merger Conditions

The Commission has applied its broadband principles in the merger context, incorporating merger applicants’ commitments to abide by the principles for a fixed period as conditions to merger approval.²¹² The Commission has also conditioned its merger approvals on the on provision of stand-alone broadband service for a certain period of time,²¹³ in effect using this requirement to foster nondiscrimination by ensuring the availability (for some period) of unbundled broadband access.

2. 2007 Broadband Practices Inquiry

In June 2007, the Commission released a Notice of Inquiry²¹⁴ asking a series of questions relating to its August 2005 *Policy Statement*, which, as discussed above, set forth four Commission principles directed at maintaining open access

²¹¹ *Id.* at ¶ 5.

²¹² *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 at ¶ 144 (2005) (“*SBC/AT&T Merger Order*”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 at ¶ 143 (2005) (“*Verizon/MCI Merger Order*”).

²¹³ *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 at Appendix F (ADSL Conditions) (2007); *SBC/AT&T Merger Order* at Appendix F (ADSL Conditions); *Verizon/MCI Merger Order* at Appendix G (ADSL Conditions).

²¹⁴ *Broadband Industry Practices*, Notice of Inquiry, 22 FCC Rcd 7894 (2007) (“*Broadband Industry Practices NOI*”).

to the Internet.²¹⁵ The Commission sought comment on the “behavior of broadband market participants,”²¹⁶ asking in particular whether particular market practices “are helpful or harmful to consumers.”²¹⁷ The Commission asked as well whether its policy statement should be amended to “incorporate a new principle of nondiscrimination.”²¹⁸

3. 700 MHz C Block Service Rules

In July 2007, the Commission applied requirements for “open platforms for devices and applications” to a portion of the spectrum covered by its 700 MHz auction rules.²¹⁹ Specifically, for the C Block, the Commission “will require licensees to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choice, subject to certain conditions.”²²⁰ The Commission declined to extend these

²¹⁵ *Internet Openness Policy Statement.*

²¹⁶ *Broadband Industry Practices NOI* at ¶ 8.

²¹⁷ *Id.* at ¶ 10.

²¹⁸ *Id.*

²¹⁹ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc., Upper 700 MHz Guard Band, Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, Second Report and Order, WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166, ¶ 195 (rel. Aug. 10, 2007).*

²²⁰ *Id.* at ¶ 195.

requirements to all the to-be-auctioned spectrum, and also declined to adopt wholesale or interconnection requirements.²²¹ While the Commission noted that it had found the Commercial Mobile Radio Services market to be “effectively competitive,”²²² it based its action on concerns that wireless carriers had limited access to the Internet and required equipment manufacturers to disable Wi-Fi or other functions in mobile devices.²²³ Verizon has appealed the Commission’s 700 MHz rules,²²⁴ and a number of parties have sought reconsideration of the Commission’s decision.²²⁵

²²¹ *Id.*

²²² *Id.* at ¶ 200.

²²³ *Id.* at ¶¶ 198-199.

²²⁴ See *Cellco Partnership v. Federal Communications Commission*, No. 07-1359 (D.C. Cir. filed Sept. 10, 2007).

²²⁵ See Petition for Partial Reconsideration and/or Clarification of the Blooston Rural Carriers, WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 24, 2007); Petition for Reconsideration of the Ad Hoc Public Interest Spectrum Coalition, WT Docket No. 06-150; PS Docket No. 06-229; WT Docket No. 0-211; WT Docket No. 96-86 (filed Sept. 24, 2007); Petition for Reconsideration of Frontline Wireless, LLC, WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86 (filed Sept. 24, 2007); Petition for Reconsideration of Pierce Transit, WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 24, 2007); Petition for Reconsideration and Clarification of AT&T, Inc., WT Docket No. 06-150; PS Docket No. 06-229; WT Docket No. 96-86 (filed Sept. 20, 2007); Petition for Reconsideration of the Rural Telecommunications Group, Inc., WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 24, 2007); Petition for Reconsideration of the Commonwealth of Virginia, WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 24, 2007); Petition for Partial Reconsideration

4. FTC and DOJ

The Federal Trade Commission recently made clear its view that it has jurisdiction over broadband services. In a letter to Congressmen Sensenbrenner, FTC Chairman Deborah Platt Majoras explained “broadband Internet access services are non-common carrier services and are clearly within the FTC’s jurisdiction.”²²⁶ In February 2007, the FTC hosted two days of workshops addressing “Broadband Connectivity Competition Policy.” In June 2007, the FTC released a Staff Report that recommended “proceeding with caution before enacting broad, *ex ante* restrictions,” essentially counseling against adoption of net neutrality statutory or regulatory obligations.²²⁷

The Department of Justice has also weighed in on net neutrality, recently filing an *ex parte* in response to the *Broadband Industry Practices NOI* that argues “[t]he FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open

and for Clarification of Cyren Call Communications Corp., WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 24, 2007); Petition for Partial Reconsideration of NTCH, Inc., WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 21, 2007); Petition of MetroPCS Communications, Inc., for Clarification and Reconsideration, WT Docket No. 06-150; CC Docket No. 94-102; WT Docket No. 01-309; WT Docket No. 03-264; WT Docket No. 06-169; PS Docket No. 06-229; WT Docket No. 96-86; WT Docket No. 07-166 (filed Sept. 20, 2007).

²²⁶ Letter from Deborah Platt Majoras, Chairman, FTC, to F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives (Apr. 14, 2006).

²²⁷ *Broadband Connectivity Competition Policy*, FTC Staff Report at 9 (June 2007).

competition enforced by the antitrust laws.”²²⁸ The Department supports, instead “free market competition unfettered by unnecessary governmental regulatory restraints.”²²⁹ Collectively, this filing and the FTC’s report evince a strong executive branch resistance to the adoption of statutory or regulatory net neutrality requirements.

G. UNE Forbearance Orders and Petitions.

Because it affects the ability of CLECs and non-LEC or cable-affiliated ISPs to provide broadband Internet access services, we note here the Commission’s actions with respect to petitions requesting forbearance from the obligation to provide access to unbundled loops. Although access to unbundled loops is limited to telecommunications carriers for the provision of a telecommunications service, CLECs can and do offer broadband transmission services as common carrier offerings, which can then be purchased by ISPs seeking to offer broadband Internet access services.²³⁰

On December 2, 2005 the Commission issued its first grant of forbearance from UNE obligations, relieving Qwest of Section 251(c)(3) unbundling obligations in nine of the twenty-four wire centers in the Omaha Metropolitan Statistical Area.²³¹ The Commission relied on the state of competition and degree of competitive facilities deployment in those nine wire centers, and on the continuing availability of unbundled elements under Section 271.²³² The

²²⁸ Ex Parte Filing of United States Department of Justice at 1, WC Docket No. 07-52 (filed Sept. 6, 2007).

²²⁹ *Id.* at 2.

²³⁰ See Section VII.A (discussing the impact of the *Wireline Broadband Access Order* on access to unbundled network elements).

²³¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005).

²³² *Id.* at ¶ 25.

Commission noted that in the wire centers where it granted relief, the local cable operator had built out “extensive facilities” and was using those facilities to provide service to customers in competition with Qwest.²³³ To avoid customer disruption, the Commission adopted a six-month transition period.²³⁴

The Commission subsequently granted similar relief to ACS in Anchorage.²³⁵ Specifically, the Commission granted ACS relief from Section 251(c)(3) unbundling obligations and Section 252(d)(1) pricing obligations in 5 of the 11 wire centers in the Anchorage study area, again relying on the “level of facilities-based competition.”²³⁶ Because ACS is not subject to Section 271 obligations, the Commission adopted a requirement that ACS make loops and certain subloops available in wirecenters in which the Commission had granted forbearance at the same rates, terms, and conditions that ACS had negotiated with its chief competitor in Fairbanks,²³⁷ The Commission, recognizing the challenge of constructing loops in light of Alaska’s “severe weather conditions” provided for a one-year transition.²³⁸

As a practical matter, these orders mean that, in the areas where the FCC granted forbearance from Section 251(c)(3), unbundled network elements are no longer available at TELRIC-based rates. The FCC is presently considering ten more petitions, six filed by Verizon and four by Qwest, seeking relief from Section 251(c)(3) unbundling requirements in the Boston, Providence, New York,

²³³ *Id.* at ¶ 36.

²³⁴ *Id.* at ¶ 74.

²³⁵ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007).

²³⁶ *Id.* at ¶ 2.

²³⁷ *Id.* at ¶ 39.

²³⁸ *Id.* at ¶ 47.

Philadelphia, Pittsburgh, Virginia Beach, Seattle, Denver, Minneapolis and Phoenix MSAs. The Verizon petitions have a 15-month statutory deadline of December 5, 2007, and the Qwest petitions have a 15-month statutory deadline of July 26, 2008. The FCC's decisions on these petitions will determine the extent to which use of unbundled loops remains a viable means of obtaining the underlying network facilities necessary to provide broadband Internet access.

H. Universal Service Support for Broadband

Portions of the Commission's high cost universal service support mechanisms have long supported the deployment of broadband-capable loop plant. For example, the Commission permits an incumbent LEC to include in regulated loop plant the costs of loop plant that is jointly used to provide broadband services, which are not included in the definition of supported services, and voice services, which are included.²³⁹

On September 6, 2007 the Commission released the Federal-State Joint Board on Universal Service's "Statement on Long Term, Comprehensive High-Cost Universal Service Reform." Among the principles for reform tentatively agreed to by the Joint Board is that "[s]upport mechanisms for the future will focus on . . . broadband."²⁴⁰ This strongly suggests that universal service support will be available for

²³⁹ *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, GN Docket No. 04-54 at 32 (rel. Sept. 9, 2004); *Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 11244 (2001) (adopting Rural Task Force recommendations).

²⁴⁰ *Federal-State Joint Board on Universal Service Statement on Long Term, Comprehensive High-Cost Universal Service Reform*, Public Notice, WC Docket No. 05-337, CC Docket No. 96-45 (rel. Sept. 6, 2007).

broadband services when universal service reforms are adopted. The availability of such support in turn will raise questions about whether broadband providers should be required to contribute to universal service support mechanisms.

I. Pole Attachments

In a trio of decisions by the FCC's Enforcement Bureau, the FCC has made clear that the *Wireline Broadband Access Order* did not, as a practical matter, affect the ability of a state-certified common carrier to obtain pole attachments for tariffed private line services, irrespective of the number of customers taking service under the tariff or whether the rates listed in the tariff are on an "individual case basis."²⁴¹ The decisions also make clear that a customer of the common carrier broadband transmission service may be an Internet Service Provider that combines the transmission with data storage, manipulation, processing and retrieval and offers an Internet access information service to end user consumers.²⁴²

The Commission also has before it two requests to address pole attachment rates and conditions. The United States Telecom Association ("USTelecom"), on behalf of incumbent local exchange carriers, has petitioned the FCC to apply the FCC pole attachment telecommunications rate formula to attachments by incumbent LECs.²⁴³ Fibertech Networks has asked the Commission to adopt a series of best practices addressing competitor access to poles and

²⁴¹ See *Salsgiver Telecom Inc. v. North Pittsburgh Tel. Co.*, 22 FCC Rcd 9285 (2007); *Fiber Technologies Networks, LLC v. North Pittsburgh Tel. Co.*, 22 FCC Rcd 3392 (2007); *DQE Comm. Network Services, LLC v. North Pittsburgh Tel. Co.*, 22 FCC Rcd 2112 (2007) ("DQE").

²⁴² See, e.g., *DQE* at ¶¶ 23-24.

²⁴³ *Petition of the United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, RM-11293 (filed Oct. 11, 2005).

conduit.²⁴⁴ These petitions, and a White Paper filed by Time Warner Telecom,²⁴⁵ demonstrate both the continued importance of pole access to competitors seeking to deploy broadband and other services and the increasing pressure for reform of the Commission's current approach.

J. CALEA

As discussed above, the Commission has extended CALEA obligations to interconnected VoIP service providers and facilities-based broadband Internet access providers.²⁴⁶ These requirements took effect as of May 14, 2007. Significantly, facilities-based broadband Internet access providers that were formerly unregulated are now subject to both compliance and filing requirements.

VIII. Legislative Developments

For a number of reasons, including the Commission's action on franchise reform²⁴⁷ (which reduced RBOC pressure to adopt federal franchise reform legislation) and the newly Democratic Congress's focus on Commission oversight, there has been little Congressional interest in broad telecommunications reform bills. Instead, a few narrowly targeted bills addressing issues such as VoIP 911, number portability, and Internet taxation have gathered momentum.

²⁴⁴ Petition for Rulemaking of Fibertech Networks, RM-11303 (filed Dec. 7, 2005).

²⁴⁵ Letter from Thomas Jones, Wilkie, Farr & Gallagher, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-11293, RM-11303 (filed Jan. 16, 2007).

²⁴⁶ See Section III.B.

²⁴⁷ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006).

A. 911

The 911 Modernization and Public Safety Act of 2007 (H.R. 3403) would codify the Commission's 911 rules and provide interconnected VoIP providers with protections not contained in those rules. Specifically, the bill would provide access to 911 components necessary to provide 911 service at the same rates, terms and conditions provided to CRMS providers and provide interconnected VoIP providers with liability protection in connection with emergency services that is equivalent to the protection afforded CMRS carriers. Finally, the bill directs the National Telecommunications and Infrastructure Administration to develop a national plan for migrating to a national IP-enabled emergency network.

A hearing on this bill was held by the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee on September 19, 2007. At the time of writing, committee staff were preparing this bill for consideration by the full Committee.

In the Senate, a substantially similar bill, the IP-Enabled Voice Communications and Public Safety Act of 2007 (S. 428) has been reported out of Committee and is awaiting action by the full Senate.

B. Number Portability

The Same Number Act (H.R. 3482 & S. 1769) would direct the Commission to adopt rules that would streamline the number porting process. While the House and Senate bills are not identical, they would generally require the Commission to establish number portability performance standards for carriers and interconnected VoIP providers, including addressing the time necessary to complete ports and the information exchanged between carriers. The bills would also make numbering resources available on an equitable

basis to interconnected VoIP service providers.

C. Internet Tax Moratorium

At the time of this writing, the Internet tax moratorium remains scheduled to sunset on November 1, 2007. There are a number of competing bills to extend the deadline, with a chief area of debate being the length of any extension. While it appears as of this writing that Congress will take action to extend the deadline, it is not clear which bill will be the vehicle for this extension or how long an extension may last.