

JUSTIFICATIONS FOR REGULATION

Daniel Benoliel*

Panelists

Rebecca Arbogast, *Legg Mason*
Harold Feld, *Media Access Project*
James Gattuso, *Heritage Foundation*
Russell Hanser, *FCC*
David Isenberg, *isen.com*
Eli Noam, *Columbia University*
Christopher Savage, *Cole, Raywid & Braverman*

Background

Voice over Internet Protocol (“VoIP”) software enables real-time transmission of voice communications over the Internet. VoIP applications ride over telecommunications infrastructure but is separate and distinct from that infrastructure in three noteworthy ways that give rise to the present regulatory controversy facing the Federal Communications Commission (“FCC”). To begin with, VoIP access is purchased (if it is not free) separately from access to the broadband telecommunications service over which it rides. In addition, it requires the use of special customer equipment. Lastly, it engages in protocol conversion when it converts Internet Protocol (“IP”) packets into standard telephone signals. VoIP software, essentially, takes voice calls, breaks them up into “packets” and transmits those packets over the lines that handle IP data and e-mail.

VoIP service providers such as AT&T, Vonage, and Free World Dialup (“FWD”) have all filed petitions over the past two years seeking leniency from paying access charges to local public switched telephone networks (PSTNs) for the ability to initiate or terminate Internet calls using the local PSTN.¹

The Federal Telecommunications Act of 1996 mandates these access fees for “telecommunications services” or “telecommunications”² If VoIP providers are deemed “telecommunications services,” then they will have to pay access fees to the local PSTN for use of their copper wire networks for initiating or terminating phone calls or data transmissions.³ In addition, these companies would be subject to

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¹ See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-21, filed with Federal Communications Commission on Sep. 22, 2003; Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling, WC Docket No. 03-45, Public Notice, DA 03-439, released by Federal Communications Commission on Feb. 14, 2003;

² See generally 47 U.S.C. §§ 201, *et seq.*

³ See generally 47 U.S.C. §§153, 201, *et seq.*

Communications Assistance Law Enforcement Act (“CALEA”) obligations. Alternatively, if these companies are merely considered “information services” under the Act, then they are free from paying the access fees, free from CALEA, and free from other tariffs that could be imposed by federal and state authorities.⁴

A telecommunications service is defined under the Telecommunications Act as “*the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received.*”⁵ An information service, on the other hand, is defined as “*the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, ... but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.*”⁶

Because telecommunications services are regulated more sternly than information services, this distinction makes a difference. Because some technologies have both “telecommunications” and “information services” elements, this distinction is not always easy to make. Beginning in 1980, the FCC distinguished “basic” telecommunications services from “enhanced” information services in the belief that guaranteeing access to the former would promote competition in the latter and provide consumers with a wider variety of information services.⁷

The FCC initially did not take a clear position on the regulatory classification of cable modem service. In its 1998 Commissioner’s report to Congress concerning VoIP and telecommunications services, it stated that certain “phone-to-phone IP telephony” services lack the characteristics that would render them “information services” within the meaning of the statute, and instead bear the characteristics of “telecommunications services.”⁸ In May 2004, Vonage Holdings Corp. filed a brief urging the 8th Circuit to affirm a lower court’s ruling that the company’s VoIP service is properly classified as an information service, not a telecommunications service.⁹

In reaction to the 8th Circuit’s process, however, the FCC filed an amicus curiae brief asking the 8th Circuit to suspend its proceedings and allow the federal

⁴ In re Petition for Declaratory Ruling That Pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service, FCC 04-27, WC Docket No. 03-45 (F.C.C. Feb. 19, 2004).

⁵ 47 U.S.C. § 153(44).

⁶ *Id.* § 153(20).

⁷ In the Matter of Section 64.702 of the Comm’n’s Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 417 (1980).

⁸ In the Matter of Federal-State Joint Board on Universal Service, Report to Congress, ¶ 83, CC Docket 96-45, 13 FCC Rcd 11501 (rel. April 10, 1998).

⁹ Minnesota Public Utilities Commission et al. v. Vonage Holdings Corp., No. 04-1434, brief filed (8th Cir. May 18, 2004).

agency to implement primary jurisdiction at the same time as it considers the matter. The FCC advised the court that it is currently involved in rulemaking and that the issues underlying VoIP service present multifaceted questions of law, fact and policy.

In the IP-enabled Services rulemaking that is the subject of this conference, the Commission, in reversal of its past tendency, adheres to minimal regulation of the Internet and the services provided over it.¹⁰ Congress, in fact, has addressed the burgeoning market for advanced computer services in the Telecommunications Act of 1996,¹¹ through which it sought to provide a “*pro-competitive, de-regulatory national policy framework*” designed to promote the “*deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition.*”¹² To that end, the statute maintained noteworthy common carrier obligations on providers of “telecommunications services” but left providers of “information services” subject to much less stringent regulation.

The Commission has clearly expressed its interest in preempting most forms of IP-enabled services regulation. It has suggested making this regulatory framework “predominantly federal” due to the fact that “*most forms of IP communications appear to transcend jurisdictional boundaries, rendering obsolete the traditional separation of services into interstate and intrastate buckets.*”¹³

As posited by some panelists of the Bellhead/Nethead conference, if the FCC is to regulate VoIP it should do so sooner rather than later, so that no state commission economic regulatory authority challenges its authority. Such a development partially took place in October 2003, when the U.S. Court of Appeals (9th Cir) issued its opinion in *Brand X Internet Services v. FCC*, vacating the FCC’s declaratory ruling that cable modem service is an information service, and that there is no separate offering as a telecommunications service.¹⁴ For these reasons, the FCC is now eager to take on exclusive regulatory jurisdiction.¹⁵ In a declaratory

¹⁰ IP-Enabled Servs., Notice of Proposed Rulemaking, WC Docket No. 04-36 (Mar. 10, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-0428A1.pdf. *Id.* at ¶ 2 (footnote omitted).

¹¹ Pub. L. 104-104, 110 Stat. 56.

¹² H.R. Conf. Rep. No. 104-458, at 113 (1996).

¹³ *Id.*, *supra* note 1.

¹⁴ See *Brand X Internet Services v. FCC* (October 6, 2003), available at <http://www.techlawjournal.com/courts2003/brandx/20031006.pdf>. See also story titled “9th Circuit Vacates FCC Declaratory Ruling That Cable Modem Service is an Information Service Without a Separate Offering of a Telecommunications Service” in TLJ Daily E-Mail Alert No. 754, October 7, 2003. This opinion is also reported at 345 F.3d 1120.

¹⁵ See Remarks of Michael K. Powell Chairman, Federal Communications Commission Voice on the Net Conference Boston, Massachusetts October 19, 2004, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253325A1.pdf. (“[V]oIP services – like Vonage - should be subject to exclusive federal jurisdiction ... To hold that packets flying across national and indeed international digital networks should be subject to state commission economic

ruling hailed as fulfilling the FCC's statutory obligation to keep the Internet free from unnecessary government regulation, the agency has decided that VoIP communications are not telecommunications services and are properly classified as information services.¹⁶ The FCC thus wants to further regulate VoIP on grounds of primary jurisdiction.

Panel Summary

In the first panel of the conference, the speakers were asked to comment on the FCC's jurisdiction over IP-enabled services. Professor Susan Crawford from the Cardozo Law School moderated the panel. Rebecca Arbogast from Legg Mason, Inc., which is a global financial services company, spoke first. She referred to what later became the central concern among the panelists – market considerations. Sounding cautious about VoIP market penetration, Arbogast said: “It is not clear why there should be VoIP regulation – for now it is still a fairly marginal industry.” Moreover, as Arbogast added, “it is too quick and easy to suggest that we need regulation.” Instead, in case regulation does take place, “regulation should not concern only DSL but also every other IP-enabled services.” Arbogast, nevertheless cautioned us of the FCC’s bureaucratic and slow nature and that as a result, “most IP services will remain unregulated.” Currently, Arbogast reminds us, there is no regulation of VoIP.

Harold Feld from the Media Access Project answered Susan Crawford’s question more directly, observing that there are “artificial dichotomies between social goals and economic goals.” As Feld explained, rather than creating social-economic categories, society should overcome it and look for good policies. Market mechanisms, as Feld concluded in later agreement with Eli Noam, are no longer a means but are instead an end in themselves. Implicit in Feld’s view of FCC regulation of VoIP is the idea that “ultimately, the efforts to centralize are profoundly ill-conceived policy.” Nevertheless, as Feld acknowledged, regulation is inevitable and thus we should “stop trying to pretend we’re not doing what we’re doing.”

Russell Hanser from the FCC’s Wireline Competition Bureau tried to balance these somewhat pessimistic observations. He opened by clarifying that in the present state of affairs he is in favor of FCC regulation. Hanser believes that it will be socially important to ensure access to emergency services like E911 and ensure the application of CALEA obligations to IP-enabled services. Only in instances where the Internet has changed user-behavior preferences should the FCC regulate. Such could be implicitly the case with IP-enabled services.

regulatory authority is to dumb down the Internet to match the limited vision of government officials. That would be a tragedy”), at 5.

¹⁶ See *supra* note 4.

David Isenberg from isen.com was the next to add to the controversy. In his view, regulating VoIP would be unconstitutional. Regulating VoIP will also be expensive. Spectrum does not need to be owned. Technology mandates such as the Broadcast Flag system, in fact, are unconstitutional. In Isenberg's view, freedom of assembly (group formation), freedom of speech, freedom of religion and freedom of the press should all be protected by Congress on the Internet. The main regulatory agenda should, furthermore, be focused on constitutional rights to greater communication.

Christopher Savage from Cole, Raywid & Braverman LLP went on to discuss a market-approach analysis. In his view, regulation should only take place where a market failure has occurred. Competition in the market for VoIP services can preempt regulation. Regulatory arbitrage therefore is a good thing. When arbitrage starts occurring it means that traditional regulation is wrong. Thus, if VoIP only works because it is escaping the evil access charges, it is a sign that access charges need to be eliminated for VoIP. Stressing that he was not talking on behalf of his clients he added that our national policy ought to disadvantage the incumbents. "In our entire history, never has an insurgent taken over from an incumbent networked technology without the government putting its finger firmly on the scales in favor of the insurgents." Thus, for example, land grants for railroads displaced the value of canals. The alternative to social loss deriving from competition, therefore, should be to create multiple actors to solve as much of VoIPs market inefficiencies as possible.

James Gattuso, a Research Fellow in Regulatory Policy in the Thomas A. Roe Institute for Economic Studies, at The Heritage Foundation, spoke next. In his view, the Internet is a crucial part of society. Social regulation, therefore, should be justified by demand. The Internet changes the overall premise that has guided telecommunications regulation -- that competition can be easily monopolized by few incumbents. Regulation of VoIP, in fact, will infringe on the autonomy of competitors that already exist. Competition in the market for VoIP is underestimated.

Eli Noam from the University of Columbia was the last speaker. Professor Noam's overriding thesis was that that the Internet is not separate from society. If we talk about deregulation of communications, we have to be consistent. An island of libertarianism in a regulated society is wrong. Instead, as communications become more important, the social objectives of regulation become more important. The importance of these social objectives trumps even the layer analysis of IP-enabled services, in Noam's view.

Conclusion

Is the FCC the most suitable institution to address the regulation of VoIP? One could argue that the Congress is better suited than the FCC to safeguard the

public interest by continuing its established policy of minimal regulation of the Internet and the services provided over it.

To begin with, it is questionable whether the FCC's pronouncements in its Notice of Proposed Rulemaking will necessarily mean that VoIP regulation will achieve the goals that consumer groups, government law enforcement agencies, and industry officials have been looking for.

Thus, as opposed to Pulver's FWD pure VoIP service (one that does not connect to the PSTN), most VoIP transmissions originate on the Internet and then move through the PSTN/POTS.¹⁷ In other words, calls that begin on the Internet and then move through public phone networks are less clearly susceptible to a minimal regulation policy. These services, such as those offered by Vonage or Net2Phone, are clearly real threats to the Bells' services. On the other hand, it is not clear that the major goal of the FCC's Notice proceedings regarding VoIP should be that the FCC "*makes clear that functionally equivalent services ... be subject to similar obligations and that the cost of the PSTN should be born equitably among those that use it in similar ways.*"¹⁸

What is more, the FCC has recognized the need for law enforcement agencies to have some control over the design of VoIP services so that they are easily tappable.¹⁹ The Bells collect tariffs at the local level to pay for guaranteed universal access to phone networks. They also provide 911 emergency services. In providing such public services, the Bells have reaped stable profits backed by state regulators. Traditionally, states have considered local-phone service as their specific area of authority. The FCC, on the other hand, largely regulated long-distance service and equal-access issues involving broadband. Thus, a policy of minimal regulation of the Internet, in fact, would fracture this longstanding regulatory balance.

One could argue that this kind of authority ultimately rests with Congress, not with the FCC. Indeed, without congressional modifications to the Telecommunications Act, the federal courts are currently split on how to interpret the Act when applied to VoIP providers.

On the one hand, in the Vonage case, the federal district court in Minnesota declared VoIP service provider Vonage to be free from state regulation.²⁰ The Ninth Circuit conversely declared in *Brand X Internet Services v. FCC* that to the extent a cable operator provides its subscribers Internet transmission over its cable broadband facility, it is providing telecommunications services as defined in the

¹⁷ Alex Salkever, "These Phone Calls Aren't Phone Calls," BusinessWeek Online, Feb. 13, 2004, available at http://businessweek.com/technology/content/feb2004/tc20040213_1268_tc024.htm.

¹⁸ Statement of Commissioner Kevin J. Martin Re: In the Matter of IP-Enabled Services, Federal Communications Commission Open Meeting of Feb. 12, 2004, adopted Feb. 12, 2004.

¹⁹ *Id.*

²⁰ *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F. Supp. 2d 993 (D. Minn. 2003).

Act.²¹ Judge O’Scannlain, in writing his concurring opinion in the Brand X case, expressed the present day jurisdictional concern: “*it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until the Supreme Court reverses us [the Ninth Circuit] or Congress decides to act.*”²²

As in other cases of fast moving technologies, the most responsible approach by the FCC would be to avoid redoing the Communications Act without sufficient public control and intervention. This task should be left to Congress.

²¹ Brand X Internet Services v. Federal Communications Commission, 345 F. 3d 1120 (9th Cir. 2003).

²² *Id.* at 1133. The Supreme Court will hear argument in this case on March 29, 2005.

ANCILLARY JURISDICTION

Jeanne C. Fromer^{*}

Panelists

Robert Blau, *BellSouth*
Jeffrey Carlisle, *FCC*
Bill Hunt, *Level3*
James Lewis, *MCI*
Randy May, *PPF*
Gigi Sohn, *Public Knowledge*
James Speta, *Northwestern University Law School*

Background

It might be worthwhile as a matter of policy for the FCC to regulate the Internet (or particular aspects of it). It might not. Nonetheless, if the FCC decides to so regulate, it must have the authority to do so. This regulatory authority must be located in a delegation to the FCC from Congress. Such a delegation, if it exists, is most likely located in the act that generally governs the FCC, the Communications Act of 1934 (the “Act”) and its subsequent amendments¹ The Act specifically delegates regulatory authority to the FCC only with regard to interstate common carriers under Title II, spectrum licensees under Title III, and cable operators under Title VI. This authority constitutes the FCC’s primary jurisdiction.

The FCC also possesses jurisdiction to regulate certain entities that are ancillary to these three specific grants of primary jurisdiction but that does not directly derive from Titles II, III, or VI. Rather, this ancillary jurisdiction is deduced from sections 2(a) and 4(i) of Title I of the Act, taken together. Section 2(a) of Title I recites that

[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio.²

Section 4 dictates miscellany about the FCC, including its membership, expenditures, and quorum requirements.³ Specifically, section 4(i) states that “[t]he Commission may

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¹ Communications Act of 1934, Ch. 652, § 1, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151 *et seq.* (2000)).

² 47 U.S.C. § 152(a).

³ *Id.* § 154.

perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions.”⁴

The Supreme Court has adjudicated the scope of the FCC’s ancillary jurisdiction. Over thirty-five years ago, in *United States v. Southwestern Cable Co.*,⁵ the Supreme Court concluded that section 2(a) confers the FCC with regulatory authority over “all interstate communication by wire or radio,” even if the communication does not fall within the FCC’s primary jurisdiction, as long as the authority exercised is “reasonably ancillary to the effective performance of the [FCC’s] various responsibilities” lying within its primary jurisdiction.⁶ The litigation in *Southwestern Cable* arose at a point in time when the FCC had primary jurisdiction over communications by common carriers and broadcasters but not by cable operators. Giving rise to the litigation was the FCC’s restriction of a cable television company’s transmission of Los Angeles broadcasting signals into San Diego.⁷ The FCC justified its regulatory authority on the basis that it was trying to diminish the threat that the cable company posed to the audience and revenues of San Diego’s broadcast station.⁸ Based on its expansive reading of Title I, the Supreme Court determined that the FCC had ancillary jurisdiction to regulate the cable television company as it did. First, the cable company could properly be viewed as communicating interstate by wire or radio.⁹ Second, the FCC possessed primary jurisdiction to regulate the availability of widely dispersed broadcast television services, and its regulation of the cable company was reasonably ancillary to this purpose.¹⁰

Four years later, the Supreme Court appeared to relax the *Southwestern Cable* test for ancillary jurisdiction in *United States v. Midwest Video Corp.* (“*Midwest I*”).¹¹ In that case—purportedly pursuant to its ancillary jurisdiction to promote the public interest of ensuring rapid, efficient, uncostly, and equitable distribution of wire and radio communication—the FCC had required that cable television systems serving more than 3,500 subscribers provide some original programming.¹² Although a majority of the Court upheld the FCC’s regulation,¹³ only a plurality of four Justices concluded that the FCC had ancillary jurisdiction within the meaning of *Southwestern Cable*.¹⁴ The plurality first reasoned that section 2(a) “does not in and of itself prescribe any objectives for which the [FCC’s] regulatory power over [cable television] might properly be exercised.”¹⁵ It then determined that the FCC had ancillary jurisdiction to regulate merely because the rule “further[s] the achievement of long-established regulatory goals

⁴ *Id.* § 154(i).

⁵ 392 U.S. 157 (1968).

⁶ *See id.* at 173-75, 177-78.

⁷ *Id.* at 159-60.

⁸ *See id.* at 159-60, 164-67.

⁹ *See id.* at 173.

¹⁰ *Id.* at 173-77.

¹¹ 406 U.S. 649 (1972).

¹² *Id.* at 653-56 (plurality opinion).

¹³ *Id.* at 670; *id.* at 676 (Burger, C.J., concurring in the judgment).

¹⁴ *Id.* at 670 (plurality opinion).

¹⁵ *Id.* at 661.

in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."¹⁶

Just seven years later, the Supreme Court reined in the bounds of ancillary jurisdiction in *FCC v. Midwest Video Corp.* (“*Midwest II*”).¹⁷ Following *Midwest I*, the FCC had promulgated rules that cable television systems with more than 3,500 subscribers and that carry broadcast signals had to develop at least a twenty-channel capacity by 1986, make certain channels available for third-party access, and make accessible certain equipment and facilities at prescribed terms.¹⁸ The Court determined that the FCC had no jurisdiction to so regulate because the regulations effectively “relegated cable systems ... to common-carrier status,”¹⁹ something the Act forbade the FCC to do with regard to broadcasters.²⁰ The Supreme Court thought that “without reference to the provisions of the Act directly governing broadcasting, the Commission’s jurisdiction under § 2(a) would be unbounded.”²¹ Therefore, as “Congress has restricted the Commission’s ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting”²² and cable operators share similar quanta of editorial discretion,²³ the Court concluded that the FCC overstepped its jurisdictional bounds in regulating the cable companies as it did.²⁴

Since *Midwest II*, the Supreme Court has not adjudicated the bounds of the FCC’s ancillary jurisdiction.

It is in the shadow of the Act’s structure and the Supreme Court’s not-too-recent ancillary-jurisdiction jurisprudence that the FCC has taken steps toward regulating certain aspects of the Internet. First, in 2003, the FCC promulgated the “broadcast flag” rule, pursuant to which any device—including networked computers—that can receive television content must check if the content is flagged as protected digital television content and, if so, must encrypt and otherwise protect the content against unapproved distribution.²⁵ To so regulate consumer electronics manufacturers and others not subject to the FCC’s primary jurisdiction, the FCC has relied on its ancillary jurisdiction. The FCC maintains that Title I, taken together with provisions of Title III of the Act authorizing the FCC to regulate “to assure the quality of the signal used to provide advanced television services”²⁶ and to promulgate regulations relating to advanced television services “as may be necessary for the protection of the public interest,

¹⁶ *Id.* at 667-68 (internal quotation marks omitted).

¹⁷ 440 U.S. 689 (1979).

¹⁸ *Id.* at 691.

¹⁹ *Id.* at 700-01.

²⁰ *Id.* at 702-05 (citing section 3(h) of the Act).

²¹ *Id.* at 706.

²² *Id.* at 707.

²³ *Id.*

²⁴ *Id.* at 708-09.

²⁵ In re Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC No. 03-273 (Nov. 4, 2003).

²⁶ 47 U.S.C. § 336(b)(4).

convenience, and necessity,”²⁷ grant it ancillary jurisdiction to promulgate the “broadcast flag” rule.

Second, in 2004, the FCC released a notice of proposed rulemaking for IP-enabled services.²⁸ The FCC asserted jurisdiction broadly over “services and applications relying on the Internet Protocol family.”²⁹ The FCC sought comment on “whether there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services”³⁰ and thought that “those provisions designed to ensure disability access, consumer protection, emergency 911 service, law enforcement access for authorized wiretapping purposes, consumer privacy, and others ... should continue to have relevance as communications migrate to IP-enabled services.”³¹ One such service in which the FCC seems particularly interested is voice over IP (“VoIP”), which provides voice telephony over a data network using packet-switching and which is growing in popularity.³²

Panel Summary

Whether the FCC has ancillary jurisdiction to promulgate rules regarding the broadcast flag, IP-enabled services, or any other aspect of the Internet is an open and disputed question. And even if it does not have this jurisdiction, the question remains what is the optimal structure and bounds of a jurisdictional grant to the FCC with regard to the Internet. These are the principal questions considered by the panelists.

As to construing the scope of the FCC’s ancillary jurisdiction, Jeffrey Carlisle, Chief of the Wireline Competition Bureau of the FCC, thinks that section 2(a) of Title I of the Act is broadly inclusive because of its explicit statement that the FCC has jurisdiction over all interstate communications by wire and radio. He reads the Supreme Court case law as an acknowledgment of Congress’s broad grant of authority to the FCC. Carlisle highlights *Southwestern Cable* as the most notable relevant case, as the case highlights the breadth of the FCC’s authority under the Act. He thinks that subsequent courts have emphasized only one aspect of *Southwestern Cable*—that unless the FCC can tie its exercise of ancillary jurisdiction to one of the statutory objectives within its primary jurisdiction, the FCC is acting *ultra vires*—while neglecting another—the breadth of the jurisdiction granted to the FCC in section 2(a).

²⁷ *Id.* § 336(b)(5).

²⁸ In the Matter of IP-Enabled Services, WC Docket No. 04-36, FCC No. 04-28 (Mar. 10, 2004).

²⁹ *Id.* at 2 n.1.

³⁰ *Id.* at 5.

³¹ *Id.* Later that year, relying on the jurisdiction it thinks it possesses under the Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4279 (codified as amended at 18 U.S.C. § 2522; 47 U.S.C. §§ 229, 1001-1010 (2000)), the FCC released another notice of proposed rulemaking requesting comment on whether some IP-enabled services should be designed to help law enforcement officials implement wiretapping orders. In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, FCC No. 04-187 (Aug. 9, 2004).

³² *E.g.*, In the Matter of IP-Enabled Services, WC Docket No. 04-36, FCC No. 04-28, at 5-6 (Mar. 10, 2004).

Carlisle is of the opinion that although the scope of the FCC's ancillary jurisdiction is somewhat murky, a properly broad construction of the jurisdictional scope of the Act must account for the development of new technologies, even if they are not explicitly set out within the FCC's primary jurisdiction. According to him, the FCC might have jurisdiction to regulate those Internet services that are replacing or supplementing traditional services, as VoIP is doing to traditional telecommunication services.

Professor James B. Speta of Northwestern University School of Law disagrees with the position that Title I should be read expansively. Unlike Carlisle, he would declare *Midwest II* to be the beacon directing a narrow interpretation of Title I because it cuts back on the broad aspects of *Southwestern Cable*. Speta thinks that even though the Internet-based services might fall within section 2(a)'s description about interstate communication by wire, there is no ancillary jurisdiction over them as a general matter because of the limited applicability of section 4(i). He explains that the other titles in the Act are substantive and have their own rulemaking grants. Consequently, section 4(i) of Title I is merely a housekeeping provision rather than an independent substantive delegation. He reasons further that there is no suggestion that Congress gave the FCC any authority over Internet technologies. He also points to 47 U.S.C. § 230—which states that it is U.S. policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”³³—as evidence that Congress denied the FCC jurisdiction to regulate the Internet as a general matter.³⁴

That said, Speta thinks it is too vague to speak about whether the FCC has ancillary jurisdiction over the Internet generally. Rather, he suggests that the FCC likely has authority to regulate the physical layer of the Internet—that is, the interconnection by wire—either under Title I or as a telecommunications service. By contrast, he thinks there has been no congressional grant of authority to the FCC to regulate other Internet layers (namely, the logical, applications, and content layers) because there is nothing in Titles II, III, or VI to which any exercise of jurisdiction would be reasonably ancillary.

Gigi B. Sohn, the President and Co-Founder of Public Knowledge, also does not think that the FCC has ancillary jurisdiction to regulate all aspects of the Internet. Specifically, she believes that the FCC had no authority to promulgate its “broadcast flag” regulation because nothing in the FCC's primary or ancillary jurisdiction addresses how computer and electronics manufacturers should build their machines. She buttresses her argument by pointing out that in the past, the FCC never mandated an architectural fix for consumer electronic devices, such as closed captioning or the V-chip, without an explicit congressional mandate.

³³ 47 U.S.C. § 230(b)(2).

³⁴ On the other hand, Speta notes that the FCC would likely point to section 706 of the 1996 Telecommunications Act, reproduced in the notes of 47 U.S.C. § 157, as evidence of its jurisdiction over IP-enabled services.

Robert Blau, Vice President of Public Policy Development for the Bellsouth Corporation, posits that the FCC has jurisdiction to regulate at least certain aspects of the Internet. He thinks it is probable that the FCC has jurisdiction to impose social policies, such as universal access, under its ancillary jurisdiction. Moreover, the industry would prefer to see the FCC exercise jurisdiction over it under Title I—even with the inherent litigation risks and uncertainty due to the uncertain scope of Title I—rather than under Title II, because many in the industry view the application of Title II to telecommunications services as a disaster that they would like to avoid.

Regardless of whether the FCC currently has jurisdiction to regulate the Internet or aspects of it, James L. Lewis, Senior Vice-President for Policy and Planning for MCI, opines that it would be useful for Congress to rethink the FCC's jurisdiction. The current Act is structured on "silos," or the particular service provided (i.e., cable operators, common carriers, spectrum licensees). Lewis would reframe the Act in terms of the layers of a network (physical, logical, applications, content), which he suggests would clarify the FCC's jurisdiction over the Internet. According to the layers model, there is less need for regulation as one moves from the physical layer to the content layer because there is correspondingly progressively less market power as one moves in that direction. As such, there would be a presumption against regulation, which could be rebutted by showing market power. Blau, on the other hand, disagrees with the assessment of the various layers, in that, to him, there is more market power in the applications-layer industry than in the industry concerned with the physical layer.

Randolph J. May, Senior Fellow and Director of Communications Policy Studies for The Progress & Freedom Foundation, is reluctant to reshape the FCC's jurisdiction using a layers model. He thinks the layers approach—much like the silos approach—mirrors the functional features of today's technology and is unlikely to withstand the changes to be wrought by technological development over time. He would rather give the FCC jurisdiction to regulate broadly defined "communication services," which would include the Internet. This model would include a presumption that markets are competitive and thus, need no regulation. This presumption against regulation could then be rebutted on a case-by-case basis using an antitrust analysis. Although Speta and Carlisle generally agree with May's approach, Sohn objects to the flexible model on the ground that it would invite government overregulation.

Conclusion

Returning to the state of the FCC's jurisdiction under the current Act, the panelists pointedly disagree about the FCC's authority to regulate the Internet or particular aspects thereof. There is good cause for this disagreement: The bounds of the FCC's ancillary jurisdiction are unclear both due to a statute that was principally written before the Internet was a mere twinkle in anyone's eye and a lack of recent Supreme Court interpretation of this jurisdiction.

Absent definitive Supreme Court interpretation of the bounds of the FCC's ancillary jurisdiction with regard to the Internet, the FCC is faced with the worry of

overstepping its jurisdictional bounds or understepping them (by choosing not to act when it could). Nonetheless, it seems clear that the FCC does not have ancillary jurisdiction to regulate anything and everything regarding the Internet. It is true that section 2(a) of the Act allows the FCC to regulate interstate communication by wire, a category that plainly includes Internet communications. However, the Supreme Court has emphasized that the FCC does not have ancillary jurisdiction unless its regulations are “reasonably ancillary to the effective performance of the [FCC’s] various responsibilities” lying within its primary jurisdiction.³⁵ It is dubious that any conceivable regulation of the Internet would meet the Supreme Court’s well-established test.

It is also just as doubtful that the FCC has no authority to regulate any aspects of the Internet. For instance, it seems likely that the FCC could choose to regulate some aspects of VoIP—which is supplanting and supplementing traditional telecommunication services, something within its primary jurisdiction—in the same way that the Supreme Court sanctioned certain FCC regulations of cable television services—which were supplanting and supplementing traditional broadcast television services, something within its primary jurisdiction. It seems that any analysis of the FCC’s ancillary jurisdiction over the Internet will have to proceed on a case-by-case basis, something that is unhelpful in achieving legal clarity but should serve to ensure that the FCC is thoughtful about the particular regulatory steps it will take.

Although the question of the FCC’s ancillary jurisdiction over the Internet is analytically distinct from the question whether it is good policy to regulate the Internet, the two questions are practically and strategically inextricably intertwined. For one thing, if the FCC implements what is generally considered to be a bad policy and Congress is sufficiently mobilized to do something about it, it can either legislate substantively to negate the policy or it can legislate to revoke jurisdiction from the FCC in that area. If Congress decides to restrict the FCC’s jurisdictional reach, it might limit the FCC even further than the reach of the policy it actually adopted. It thus behooves the FCC to regulate the Internet with great care lest Congress take away whatever power the FCC currently has to regulate the Internet.

Moreover, it is also possible that the FCC will act beyond its authority and promulgate a regulation concerning the Internet on the mistaken assumption that it has ancillary jurisdiction to do so. If challenged, a court should strike down the regulation and instruct the FCC that it has no jurisdiction to so regulate. In that case, the FCC will be powerless to re-enact the regulation absent affirmative action from Congress granting it the authority. In such a case, if the FCC had promulgated what Congress considers to have been a good regulation of the Internet, it is more likely that Congress will grant the FCC the jurisdiction it desires than if it had promulgated a bad regulation of the Internet.

As many of the panelists argue in the course of trying to imagine a better statutory structure for the FCC, it would be appropriate for Congress to rethink the Act’s structure and jurisdictional reach. As things stand, the FCC is left in the unfortunate position of having to guess on a case-by-case basis whether it has jurisdiction over Internet

³⁵ *Southwestern Cable*, 392 U.S. at 173-75, 177-78.

communications, subjecting itself to the risk of litigation. Likewise, the communications industry is in the unfortunate and uncertain position of possibly being regulated in ways that are beyond the FCC's power and of potentially expending time and money to challenge the authority of such regulations.

Whether the optimal jurisdiction reach and structure of a rethought Act is premised on the layers approach championed by Lewis, the flexible approach put forth by May, or otherwise, it would be useful for Congress to rethink the scope of the FCC's authority to regulate with regard to its traditional areas of regulation—common carriers, spectrum licensees, and cable operators. Such reconsideration should take into account the Internet's considerable role in supplementing and superseding these traditional areas through VoIP, streaming digital media, broadband access, and the like. Likewise, it would be helpful for Congress to assess the shape of Internet communications and decide whether they should be regulated, and if so, to what extent. It is undeniable that the Internet has revolutionized how communications transpire. It behooves Congress, the FCC, federal courts, and the relevant industries to work toward shaping the appropriate role for the FCC in the digital age.

UNIVERSAL SERVICE

Marvin Ammori*

Panelists

Jon Askin, *pulver.com*

Matthew Brill, *FCC*

Robert Frieden, *College of Communications, Penn State University*

Brad Ramsay, *National Association of Regulatory Utilities Commissioners*

Jonathan Weinberg, *Wayne State University Law School*

Kevin Werbach, *The Wharton School*

I. Universal Service: Background

“Universal service” is a shorthand designation for a very complicated set of implicit and explicit subsidies initiated in the 1930s that attempt to provide phone service to everyone in the US, regardless of distance from central switches or ability to pay.³⁶ The panelists concluded that the universal service system should be completely transformed. They reached this conclusion even though they generally endorsed the system’s underlying policies. They did not reach the conclusion, however, based on voice over internet protocol (“VoIP”). The system already has central problems that pre-date VoIP, and that more urgently warrant attention. The panel agreed, however, that universal service policy suffers from a political deadlock based on state and federal politics.

A. Mechanisms

Universal service’s goal is to promote both availability and access for quality, advanced telecommunications services at reasonable rates to all consumers. Matthew Brill, of the FCC, discussed universal service in terms of contribution to and distribution from its funds. The FCC distributes funds to four programs. From largest to smallest, the programs include: 1) support for high-cost, generally rural areas; 2) support for schools and libraries; 3) support for low-income users; and 4) support for health care facilities. Through these programs, the FCC distributes about 6 billion dollars annually. Kevin Werbach of Wharton added, however, that in addition to these explicit subsidies, universal service provides a vast array of complex, almost inscrutable, implicit subsidies.

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³⁶ See FCC explanation of “universal service,” available at http://www.fcc.gov/wcb/universal_service/welcome.html.

To provide for these distributions, the FCC assesses contribution that function like a tax. By statute, the FCC must ensure that providers of telecommunications services contribute to the universal-service funds equitably and without discrimination. All telecommunications carriers that provide service between states, including long-distance companies, local telephone companies, licensed-wireless telephone companies, paging companies, and pay-phone providers pay into the fund. They must pay a percentage of their interstate end-user revenues. The FCC sets the rate quarterly; this rate started at 3%, and now stands at 9%. It is assessed on a diminishing tax base.

Complicating matters further, many states have their own universal service funds, which involve specific systems of distribution and contribution.

Most panelists apparently agreed that universal service served the valuable goal of including all Americans in the telecommunications network. Whether or not the social reasons for universal service are legitimate, panelists agreed that universal access will remain a political reality. Indeed, the universal-service fund is *structured* to continue perpetually, with cost-plus rules. At the state level, regulators want to retain authority over telecommunications because they provide disproportionate amounts of state taxation. At the federal level, senators from rural states are disproportionately influential and benefited by universal service.

B. Current Problems

The panelists suggested that the system already has severe problems, before even taking VoIP into account. First, its biggest problems are complexity and the lack of transparency, especially in implicit subsidies. Werbach called the system a “morass.” He explained that he is supposed to be an expert in universal service, but that even he gets confused by it.

Second, while universal service is a tax, it appears to be an inefficient tax. Several panelists noted that the system is part of a framework that taxes telecommunications almost as much as tobacco and alcohol, two substances taxed specifically to deter their use. High taxation, however, may not be necessary. For example, Brill noted that Canada provides universal service at a tenth the rate that the U.S. does.

Third, artificial or obsolete distinctions truncate the system’s contributions-base. The distinction between interstate and intrastate charges is obsolete. The FCC assesses universal service against interstate charges, yet VoIP permits Americans to make VoIP interstate calls with local dial-up. The FCC arbitrarily determines the percentage of the count as “interstate,” and subject to assessment, or “intrastate,” and exempt. Moreover, the distinction between wireless and wireline leads to an arbitrary assessment. Licensed-wireless and wireline are both assessed. However, a safe harbor estimates the interstate portion of revenue for licensed-wireless. A third distinction is between information and

telecommunication services. The FCC can assess telecommunication services, not information services. Meanwhile many new services may be considered one or the other, and perhaps should be included in or excluded from universal service however they are classified. Another significant artificial distinction is between cable broadband and DSL broadband. DSL pays into the funds, while cable does not, despite their nearly-identical service. Unfortunately, the FCC has imposed many of these distinctions upon itself, according to Brad Ramsay of the National Association of Regulatory Utilities Commissioners. These problems continue to plague the system.

The system's final problem is that it has perhaps harmed broadband deployment. The panelists disagreed on this point. According to Jonathan Askin of pulver.com, the current system devastates both broadband-deployment and increasing capacity. Robert Frieden, of Penn State University disagreed. He argued that the U.S. trails much of the world in broadband deployment because our dialup rates are, comparatively, cheap and priced for unlimited minutes. The rest of the world has usage-sensitive rates for dial-up.

II. Universal Service Should Be Overhauled

Mr. Brill noted what he considered the central tension for the panel, especially with regard to VoIP—demand for distributions is increasing, but the base for contributions is decreasing. Brill predicted distribution would continue to grow, and stated that the base is shrinking, in part, because consumers have migrated from wireline telephony to substitute services, like email--or VoIP--which do not directly contribute to the fund. Brill offered two options, both targeted at contribution, either 1) “reform” the system to capture traffic outside wireline, while policing bundles and assessing the interstate portions, or 2) “overhaul” the system by abandoning the reliance on revenue and rely instead on a flat rate for numbers or connections. In theory, both options would broaden the tax base, but would do so in different ways.

A. Discussion of the Proposals In General

The panelists agreed that universal service should be overhauled. To scattered applause, both Werbach and Jonathan Weinberg, of Wayne State Law School, suggested “blowing up” universal service. The panel debated whether to move from the revenue-based model to a connection-based or phone-number-based model.

The panelists highlighted the benefits and drawbacks of each model. A connection-based system would be more uniform. It would include services, like Skype, that might not be captured in the numbers-model, because it does not rely on numbers. It would be, however, less administrable than a number-based system. Many phone companies, “believe it or not,” Brill said, do not know how many connections they have.

By contrast, although phone numbers would be easier to administer, their use may lead to regulatory arbitrage. Companies could implement non-numbered plans to avoid the regulation. Based on such arbitrage, Weinberg favored a connections-based model. Since universal-service contribution is like a tax, policy-makers should attempt minimize market distortions when assessing it. They should avoid dissimilarly taxing substitutable

services. Meanwhile, Frieden provided a possible defense of the numbers-system. In short, that regulatory arbitrage has benefits: inconsistent regulatory treatment provides opportunities. These opportunities, or windfalls, may draw attention to regulatory problems, and be a catalyst for real reform.

On the distribution side, the panel discussed more options, reaching less consensus. The panel discussed a reverse auction model for subsidies. The general idea is to offer a maximum amount of subsidies and let the companies bid down. The company that accepts the lowest amount of subsidies to deliver the service wins the auction. The exact mechanisms were discussed, including the need for technological neutrality and to disclose the incumbent's embedded costs. But Brill said that the idea has been around since GTE's comments to the FCC in 1996, and is politically infeasible. Another panelist suggested larger initial subsidies that decreased over time.

For both distribution and contribution, the system could benefit from an audit. A member of the audience argued that there are billions missing from the network, and the FCC should audit the system before considering taxing VoIP.

Askin proposed a constitutional amendment. He complained that national telecommunication policy was subject to the whims of a dozen senators, and suggested ten at-large senators. After the panel, Andrew Pincus, from Mayer, Brown, Rowe, and Maw, also spoke wistfully of a different constitutional framework. He suggested a compromise of our two disparate options: 1) having one regulator, the FCC, or 2) having fifty-one state and federal regulators. A middle-ground option could be best.

Short of a constitutional amendment, however, Askin argued for a comprehensive national broadband policy. Werbach suggested part of the policy: with the FCC's aid, wireless may best serve the underlying goals of universal service; so may broadband. Several thousand ISPs use wireless for broadband, and they could clearly provide voice as well (over IP) to rural areas.

Brad Ramsay rejected one potential reform. He suggested that, as a political matter, the FCC would be tempted to call every bundled service "interstate," for assessment, to increase revenue without raising the contribution percentage. This would provide political cover. However, eliminating the intrastate/interstate distinction, he said, would only exacerbate problems, and undermine states' universal-service funds. Twenty-four states have state universal-service funds, five more than in 1998. In seventeen states, laws require assessments against only intrastate services; federal courts meanwhile suggest none of them can assess against interstate services. If the FCC classes all services as interstate, the state funds would have no contribution-base. He thought this was undesirable.

B. Discussions of the Proposals Based On VoIP

The panel largely agreed that VoIP is not the central threat to the already troubled universal-service system. VoIP is still nascent, while, for example, licensed-wireless is draining the universal-service fund. More and more Americans are avoiding landlines altogether for licensed-wireless.

For contribution, the panelists saw little benefit to merely tinkering with the already flawed universal service, let alone by merely including VoIP. As Weinberg wanted to overhaul universal service altogether, the only benefit he saw to including VoIP was that this could add pressure to overhaul the entire system. The panelists also felt that including VoIP could discourage VoIP use. VoIP is still in its infancy. Universal service is more a threat to VoIP than VoIP is to it. In addition, DSL already pays into the fund, as a member of the audience noted. So an assessment on VoIP would be akin to a second assessment, or burden, on VoIP, at least over DSL.

On distribution, however, in slight tension with this position, a panelist said that VoIP shows universal service must be technologically neutral. Technological neutrality would permit new competitors, like VoIP-providers, to receive the universal-service subsidy, so that incumbents do not remain entrenched. This would lead to an asymmetric approach if adopted with the panel's suggestion on contribution: VoIP providers would not contribute, but would receive distributions. This seems politically infeasible.

C. Questions Remaining

Following the panel, several questions remained. The most prominent was whether we should think of universal service exclusively as voice. Panelists suggested we could promote universal service of broadband internet, whether or not it is classified as a telecommunication or information service. Three main reasons pointed towards including broadband. Eli Noam, of Columbia University, on a previous panel noted that the Internet is central to the American community. Even more than telephone service, broadband service unifies people. Without broadband, an individual is isolated from society in many ways.

Second, universal access helps realize broadband's demand-side network effects. If few people have broadband, then there is no critical mass for new applications, platforms, and communities. Encouraging people to adopt broadband helps create this critical mass, because broadband would then be more valuable to their friends and other subsequent adopters.

Third, universal access can dampen broadband's supply-side effects. Werbach noted that the major costs of wiring rural areas are initial fixed costs. Adding capacity to an existing network requires much smaller, incremental, costs. Because of the disconnect

between high initial costs for supply, and lower initial value related to demand, universal service could help in deployment.

Indeed, Werbach suggested replacing the current distribution system with a large initial subsidy that gets smaller every year. Universal service now relies on heavy, recurring expenditures that slowly get larger. By contrast, broadband-deployment costs are largely fixed, with low marginal costs. He suggested the system match actual costs with universal-service distributions, and so be most effective. He did not discuss how contributions would be affected. If the distributions will be large and will get smaller over time, perhaps the contributions should not. A huge tax during broadband deployment may hinder deployment. So this question remains, as well.

D. Likelihood Of Change

Despite the system's severe problems, the panelists were not optimistic that the FCC would take any meaningful action soon. Brill explained that years ago, the 1996 Telecommunication Act called for universal-service reform. There has been none. He noted that in 1992, there was "talk" of replacing the current contribution-system with a flat fee per connection, with a higher tier for capacity. This proposal did not carry an FCC majority, so the FCC adopted an "interim" measure, raising the wireless safe-harbor assessment percentage, and barring carriers from passing on their own costs to consumers through the universal-service charge on phone bills. The "interim" measure remains in place.

Shortening the horizon, Susan Crawford suggested that nothing has happened at least during the last six years. Six years ago, the FCC issued a statement of policy called the Stevens Report, which found that the record at that time was incomplete, but that phone-to-phone IP telephony likely bore the characteristics of a telecommunications service. The panelists agreed that nothing had happened in six years.

Crawford asked if anything meaningful would happen in the next six years. Weinberg hoped that the last six years had been slow because of the telecom bust, and that perhaps the next six years would be different. Werbach spoke for most of the panel when he said, "hopefully" six years would bring changes. Ramsay was least hopeful, stating that he would not be invited in six years, because state regulation may be eliminated altogether with new federal legislation. If there is a new telecommunication act soon, the states will have few allies, unlike in 1996. All the industry people are on the side of state preemption, he said.

Meanwhile, Brill was most optimistic. He predicted reforming the contribution-system to make it much more efficient. He also predicted, however, that the distribution-system will remain, if not totally unchanged, still complicated and problematic.

Bruce Mehlman, of the Internet Innovation Alliance, spoke earlier in the conference of the physician's maxim, "First, do no harm." That is, the FCC should be cautious to enter an arena, to regulate in any way, for fear of doing harm. Unfortunately, the theme from the panel was that harm is already happening in and through the universal-service system. Here inaction, not action, may be most harmful.

Communications Assistance Law Enforcement Act

Eddan Katz*

Prefatory Speakers

John Rogovin, *FCC*

Stewart Baker, *US Internet Service Provider Association*

Panelists

Mike Godwin, *Public Knowledge*

John Morris, *Center for Democracy & Technology*

Geraldine Matise, *FCC*

Douglas McCollum, *Fiducianet*

Christopher Murray, *Vonage*

David Young, *Verizon*

Tim Wu, *Columbia Law School*

Background: The FCC's NPRM

When the Communications Assistance Law Enforcement Act ("CALEA") was passed by Congress in 1994, the concept of Voice over IP ("VoIP") had not really taken hold and the term had not yet been coined. CALEA was enacted to facilitate the fighting of crime by establishing certain criteria for telecommunications carriers that enable law enforcement to have easier access to the content and call identifying information and the information they need in criminal investigation. It does not establish any substantive requirements or affect law enforcement's wiretapping authority, but rather requires that systems be engineered in a certain way and meet certain specifications.

John Rogovin, General Counsel at the FCC, introduced the FCC's Notice of Proposed Rulemaking ("NPRM") on CALEA and VoIP by describing the details of how new Internet-based services are covered by CALEA and how their obligations are to be fulfilled. With solicitation of commentary from the public and members of the panel in mind, Rogovin explained that the NPRM is comprised of the FCC's tentative conclusions and that they anticipate that the comments received will sharpen the debate over how IP-enabled services are covered by CALEA.

Rogovin summarized the five major tentative conclusions of the NPRM as introduction to his commentary on the several more controversial conclusions which have invited intense debate. First, the term "telecommunications carrier" in CALEA is more inclusive or broader than the same term in the Telecommunications Act. Second, the substantial replacement language in the CALEA statute means that the replacement of

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any portion of a subscribers functionality previously provided by Plain Old Telephone Service (“POTS”) would be covered. Third, the commission tentatively concluded that facilities-based providers of broadband Internet Access service, whether provided on a wholesale basis or a retail basis, would be subject to CALEA. Fourth, the FCC tentatively concluded that managed or mediated VoIP services are subject to CALEA. Finally, Rogovin explained that the FCC concluded that call-identifying information in packet networks is reasonably available under Section 103 of CALEA if the information is accessible without significantly modifying the network.

One of the more controversial sections of the CALEA and VoIP NPRM is that all facilities-based providers of broadband Internet access service – including wireline, cable modem, satellite, wireless, and broadband-over-powerline connections – are subject to CALEA. In reaching this conclusion, the FCC explained that Congress intended telecommunications carriers under CALEA to be more inclusive than the same definition under the Telecommunications Act and points to differences in the statutory language to support this tentative conclusion. The FCC also points to the substantial replacement provision in CALEA to justify its conclusion, thereby extending coverage to those services that provide a replacement for a substantial portion of the local telephone exchange. Applying this substantial replacement provision, the FCC concluded that all broadband internet access service provides a replacement for a substantial portion of the telephone exchange. A tension arises between this substantial replacement provision and the information service carveout included in CALEA as originally enacted, in those circumstances when an information service is also deemed to be a substantial replacement of POTS. As Rogovin explains, the commission decided to give priority to the substantial replacement provision in such situations because it would give effect to the core of CALEA, which is the facilitation of law enforcement enforcements efforts by providing the necessary tools to fight crime.

The second controversial aspect of the CALEA and VoIP NPRM on which Rogovin focused is whether or not managed or mediated VoIP services are subject to CALEA. The term “managed,” he explained, originated in the law enforcement community, which had applied to the FCC for this rulemaking. Law enforcement describes VoIP service as managed where the VoIP provider acts as a mediator between the two endpoints of the call. This role as mediator can include call set-up, connection, termination, and party identification features that often generate the modifying of the dialing, signaling, switching, addressing, or routing functions for the end-users. Those VoIP services that are not designed as managed systems would therefore not be covered by CALEA. The FCC has categorized such services as “disintermediated” – generally referring to the concept of peer-to-peer situations where there is no one entity mediating two ends of a call. Rogovin admitted the blurred boundaries and unsatisfactory distinction between these types of services and queried where to draw the line between managed and non-managed for VoIP.

The last aspect of the CALEA NPRM that Rogovin discussed in detail was the issue of implementation. In particular, he pointed to the FCC inquiry as to whether or not

the reliance on trusted third parties to manage the CALEA obligations of IP-enabled services is feasible or wise.

Rogovin concluded by commenting on the Brand X case and its implications for the categorization of information services and telecommunication services. The Brand X case involved a challenge in the 9th Circuit to the Commission's declaratory ruling that cable modem service is an information service. Rogovin expressed his dissatisfaction with the 9th Circuit's decision having been based not on the merits of the case, but rather on the importation of the decision in the City of Portland case on *stare decisis* grounds. Claiming that the FCC had not "had their day in Chevron court," Rogovin explained that while the law enforcement community welcomes the clarity the decision brings to the coverage of broadband services to CALEA obligations, the decision also frustrates the FCC's general broadband policy, which relies on defining a cable modem service only as an information service. Rogovin warned that the deregulatory posture of the FCC to broadband, at a crucial moment in its penetration into the market, is threatened by the decision.

The 'Regulatory Mush' of CALEA and VoIP

Stewart Baker, a well-known veteran of information technology and national security policy and proponent of law enforcement, spoke next and warned of the excesses of law enforcement at the expense of technology. The CALEA and VoIP NPRM, Baker claimed, places the FCC in the position of over-regulation and effectively subjects all innovation on the Internet to "regulatory mush." There are many important societal values that ought to be regulated, but the significance of those values does not exempt regulation from being focused and cost-effective.

Baker complained that CALEA, a statute that was well-written and included a carefully thought-through set of standards, is reduced by the FCC's NPRM. The NPRM transforms CALEA into a process where everything is negotiable and at the behest of administrative politics. From the perspective inside the FCC, Baker concedes that the Commission may try to resolve the problems of the parties that come before it, but without a clear set of standards the rules implemented are in danger of being arbitrary and capricious.

The first reason Baker identified as causing the lack of clarity of the FCC's direction in the CALEA and VoIP NPRM is the increasingly vague boundaries of telecommunications and information services. No matter how broadly drafted, there is some point at which regulation must stop. Suggesting the limitless venture of regulation over the Internet, Baker asks: "Are you going to tell Intel how to design chips or Cisco how to design its routers?" Baker explained that as CALEA was originally enacted, regulation was generally aligned with the industries, and incorporated the existing relationships between the industry and the FCC into an additional variation of 'taxation.' Baker then contrasted this arrangement with the CALEA and VoIP NPRM where all the

party's interests are trying to be accommodated with the information service exemption from coverage, which itself is subject to a labyrinth of exemptions.

The second way in which the FCC's NPRM risks "regulatory mush" is in its substantial replacement provision. CALEA, as originally enacted, set a performance test for companies such that their telecommunications had to be isolatable and deliverable to law enforcement. The manner in which this would be accomplished is left to industry groups for standards-setting. A company is deemed non-compliant with CALEA in those situations where they fail to deliver actual communication to law enforcement. The way the NPRM proposes the regulatory framework, on the other hand, subjects every innovator and its product to a screening of potential compliance by the FCC and FBI. Reaching far back into the innovation process, well before the product is introduced into the market, a company must meet with the FBI and make sure their product will be compliant even before it is fully developed. As opposed to waiting for a product to actually replace telephone service in successful penetration into the market, the FCC's approach in the CALEA and VoIP NPRM invites an abstract determination of the potential replacement of telephone service by the product in order to now be considered covered by CALEA.

Baker concluded by warning of the enormous harm to the information technology industry and future innovation by a system that essentially requires prior approval of every product for CALEA compliance by the FBI. If there is any doubt about whether or not the product may comply, a company is compelled to seek the guidance of the FBI in developing its product. The FBI, when approached, will more likely than not assume the worst and ask for the most in making sure the product is developed with design more acceptable to them. As an innovator preparing to launch a new product, Baker predicts that companies will flee from the regulatory harangue of the FCC and go abroad. The effect on innovation in the US, he explained, would be disastrous.

Panel Summary: In Search of Limiting Principles

The panel began its inquiry by asking why the rulemaking is taking place now and whether there is an identifiable problem that is being addressed. Geraldine Matise, Deputy Chief of the Policy and Rules Division of the Office of Engineering and Technology at the FCC explained that the persistent delays on the part of telecommunications carriers in becoming compliant with CALEA compelled the Department of Justice ("DOJ") to seek the rulemaking. As enacted, jurisdiction over CALEA is shared by the DOJ and the FCC, while the FCC is left to administer the rules. After the DOJ refused to grant several carriers their request for extension for compliance, the FCC was urged to speed up the pace of CALEA compliance among covered carriers.

The other significant impetus for the DOJ's seeking a rulemaking is the increasing difficulties law enforcement experiences with getting the information they need in order to fight crime and investigate terrorism. The need for real-time content and call-identifying information from carriers places the warrant seeking process as an encumbrance to effective law enforcement. Additionally, since local and state law

enforcement across the country is in need of a standardized means of obtaining information due to their lack of the high technology capabilities of the FBI, CALEA compliance facilitates the delivery of information at the intercept access point. Matisse went on to defend the breadth of the NPRM on CALEA and VoIP because of the convergence of technologies and the interconnection of problems and obstacles.

The panel's inquiry then turned to the information service carveout and the newly created category of managed VoIP as distinct from "disintermediated" VoIP. John Morris, Staff Counsel at the Center for Democracy and Technology, expressed dismay at the distinction and inevitably arbitrary categorization. He did explain, however, that the FCC arrived at such a distinction because of their attempt to avoid covering all Internet applications in the process of updating CALEA. While agreeing that the intention to avoid regulating the entire Internet, he demonstrated that the distinctions collapse with the inclusion of the substantial replacement provisions. As replacement service is currently defined, he explained that there is no limiting principle preventing email and instant messaging applications from being covered by CALEA.

Mike Godwin, Legal Director of Public Knowledge, continued discussion of the slippery slope of the extension of CALEA compliance requirements to all Internet applications, without a principled reason to exclude applications criminals use to communicate. With the increasing digitization of communications, when voice is just another application for communication, the ability for criminals to communicate is not limited to technologies analogous to telephones.

Godwin proposed that given the lack of principled justification for the distinctions between communication technologies, a cost-benefit analysis should be applied. Pointing out that of the information that is being collected, only a small portion is actually processed and utilized in law enforcement. For example, he recalls that it was recently revealed that what amounted to 13 years of recorded communication in Arabic and Farsi was not yet even translated. While law enforcement needs to have access to communications as intended by CALEA, cost-benefit analysis demonstrates the practical limits of trying to design access for all communications through every technology.

When pressed to reply whether or not cost-benefit analysis ought to be the limiting principle through which CALEA coverage is measured, Morris explained that no mainstream participants in the debate over surveillance, including the prominent public interest advocacy groups, deny the need for law enforcement to have the capacity to intercept Internet communications. He emphasized however that CALEA is not the optimal means to accomplish this goal, especially with the coinciding harm it causes to innovation in the IP-enabled services context.

David Young, Director of Internet and Technology Policy in Verizon's Public Policy and External Affairs Department, proposed technical feasibility as another limiting principle. As there are not direct analogies with the information obtained from traditional telephony and IP-enabled services such as VoIP, the technical feasibility of obtaining that information becomes more complex. The limiting principles should keep in mind the

different layers of Internet protocols, so as to achieve a more appropriate goal of information gathering.

Doug McCollum, General Counsel and Vice President of Services at Fiducianet, talked about the feasibility of obtaining the necessary law enforcement information in the VoIP context. He explained the difference in the ways in which his company enables the implementation of CALEA compliance for carriers as a trusted third party with the model implemented by Verisign, their only competitor. As opposed to Verisign's model of collecting all the information and then processing it to select the call identifying information, Fiducianet builds customized solutions for carriers that work within their networks. He announced that Fiducianet has been successful in doing full call content and pen traps with VoIP applications to the satisfaction of law enforcement, not only in terms of the information, but also in terms of the time frame.

Chris Murray, Director of Government Affairs at Vonage, reminded the panel of that law enforcement – catching bad guys – was the ultimate goal of creating such access. The distinctions between managed and non-managed VoIP are irrelevant to the reality that bad guys will gravitate to those technologies that are not CALEA compliant and not capable of being tapped. He insisted that there is a need to capture traffic even when its exact origin on the application layer is unknown, and should therefore be done at the physical layer of the Internet.

David Young replied however that what is technically possible in the physical layer in terms of content and call identification is much different than at the application layer. At the voice application layer, providers can identify to-from phone numbers, call durations, time of call, etc.. At the physical layer, all that can be seen in the ATM cells is VPI/VCI addresses and only to-from IP addresses can be seen at the IP packet layer. Any expectation on the broadband provider to parse out and identify potentially relevant and meaningful information is not only technologically difficult, but also carries with it dangerous privacy and civil liberties implications.

Tim Wu, visiting professor at Columbia Law School, earlier spoke to the impact of the FCC proposed regulation on innovation and the types of applications that would be covered. Pointing out that the FCC has been most successful when regulating *ex post* rather than *ex ante*, Wu warned that the FCC's expansion of regulation to burgeoning technologies creates unfair barriers to entry in markets in early stages of development, thus potentially foreclosing socially valuable innovation. Wu proposed that a more logical approach to determining which applications ought to be covered would correlate to the penetration of that technology into the market. Since email is a mature technology, whose existence would not be threatened by FCC regulation in the context of surveillance, email would be an example of a more logical choice for regulation than VoIP, which is still an emergent product.

John Morris emphasized that no matter where the distinctions are drawn, criminals and terrorists will find ways to circumvent the regulation of the FCC. The solution to gaining access to the different means of communication over the Internet will

not be accomplished in the drawing of arbitrary lines and distinctions on what is covered by CALEA, but with the FBI's focusing monetary and engineering resources to understanding the technology more completely. He recalled that there was a short window of about ten days in the past year when the FBI sought advice and information from engineers and organizations on how the technology worked, but unfortunately abandoned their external outreach efforts.

Geraldine Matise added that in conversations with the FBI, it was evident that their understanding of how phone companies work, not to mention their underlying technology, was minimal. She questioned the prevailing sentiment on the panel that the FCC is forcing companies to have their products be approved before launch. The way CALEA currently reads, she pointed out, companies have four years in order to have their products effective with the capabilities of being CALEA compliant.[???] The more nagging problem occurs with the delay of Congress to act in changing the statute.

John Morris re-oriented the conversation by pointing out that law enforcement must keep up with CALEA, a fallacy repeatedly made in the NPRM. The way the statute was written, he claimed it had the opposite intention. CALEA, especially when referencing the legislative history, was narrowly drawn to extend information-gathering capabilities to digital phones. It specifically maintained a narrow scope so as to avoid regulating all applications related to the Internet. Following this guidance, it is contrary to the purpose of the statute to narrow the meaning of the information services. The FCC, he claimed, is misreading the purpose of CALEA. The blame for this expansion of CALEA lies with law enforcement, which insists that they critically need these capabilities even though there is no public record indicating that there is an inability to wiretap or intercept communication because of the limitations of CALEA.

Susan Crawford replied that as a factual matter, there are claims that law enforcement does experience problems with CALEA. This fact was confirmed when a member of the audience, a lawyer with the Office of the Attorney General of New York, recounted particular instances when criminals being wiretapped explicitly said they would call on push-to-talk phones when being recorded in order to avoid investigation.

Matise added that the need for bringing VoIP and other IP-enabled services under CALEA also exists because of the limitations of individual warrants. Law enforcement does not always know who needs to be involved and with what technology, and end up engaging in ad hoc surveillance that significantly slows down the process of surveillance and lacks standardization. She reports that law enforcement claims that the cost of surveillance sky-rocketed, so much so that they sometimes do not proceed with electronic surveillance due to costs. In terms of a cost-benefit analysis, Matise reminds the panel, the social goal of fighting crime effectively needs to be taken into account.

In reply to Susan Crawford's question of who should pay for the cost of providing standardized information, Mike Godwin underscored his earlier point that there are a great many social imperatives that are important for society to pursue, but that regulation must nevertheless be guided by limiting principles. Godwin emphasized that there is still

an arbitrary line that will be drawn in terms of communication technologies under this NPRM and went on to say that “the murders that are plotted in ASCII text are just as serious as the ones that are plotted in voice telephony.” The way the NPRM proposes the revised process of CALEA compliance, regulation is left to a political judgment every time a new technology is introduced.

David Young indicated that one of the challenges facing surveillance of IP-enabled services is that unlike traditional telephony where one could first obtain pen-traps and then full content, IP-enabled services require gathering the full content of information and then work backwards from there. There is now a higher standard to meet up front and this is a problem for law enforcement.

In response to the claim that the consumer will inevitably bear the costs regardless of where the cost is initially assigned, John Morris pointed out that imposing a tax on some VoIP applications, such as Free World Dial-Up, creates a comparatively enormous burden on individual developers. John Morris later continued that this process of opening-up debate on whether particular technologies fall within the gambit of CALEA prolongs an inevitable political and legislative battle with every application considered, without much progress in actual crime-fighting. The appropriate way to approach these questions, he suggested, is for Congress to consider the whole range of questions and devise a considered solution that is technology-neutral.

When Susan Crawford focused the debate on how the cost-benefit analysis ought to be configured, the means of identifying the benefits became controversial. Mike Godwin pointed out that if the proponents of extending CALEA’s coverage to additional technologies continuously talk about the potential for bioterrorism as the potential harm, regardless of how remote the possibility, the venture of engaging in a cost-benefit analysis become futile.

Conclusion

As the debate over CALEA and VoIP moves forward and the FCC receives comments on its rulemaking, the tension between the needs of law enforcement and the slippery slope of endless regulation is sure to continually appear. The tension is even more difficult since all sides agree on the underlying notion that surveillance of at least some Internet communication is not only inevitable, but also necessary with increasingly technologically sophisticated criminals.

As the FCC is due to receive comments and reply comments on the NPRM by the end of 2004, the process and its arbitrary political nature may do significant damage to innovation in the information technology industry. As a nascent communication technology, the prior approval of technologies as they enter the market will not deter the use of those communication tools, but simply send those to be initially released abroad. Unfortunately, in light of an unsuccessful search among the panelists for limiting principles of where the boundaries of CALEA coverage would end, the FCC will

certainly do something as the consensus remains that doing nothing is just as illogical a step