

## If It Looks Like a Duck: The Need for Regulatory Parity in VoIP Telephony

Amy L. Leisinger\*

### I. INTRODUCTION

On March 10, 1876, Alexander Graham Bell changed the world with a single statement: “Mr. Watson, come here, I want you!”<sup>1</sup> After years of effort, transmission of the human voice by wire became a reality. One can only speculate as to what the two men discussed after Watson went to Bell:

Watson: It worked! It really worked!

Bell: (*smiling in a satisfied way*) I know.

Watson: This will change the world, you know. It’s amazing. Truly amazing!

Bell: Yes, sir. It is just that . . . amazing.

For over a century, this “amazing” service has provided individuals all over the world with the capability of communicating with one another. Telephone service eventually became commonplace, but as the Internet developed, communication became easier and faster and also “amazed” the world. Now, with the advent and everyday usage of Voice over Internet Protocol (VoIP) telephone service, the Internet and telephone service have converged, creating a new form of voice-communication technology that uses the Internet instead of traditional telephone networks. One can only imagine how “amazed” Watson and Bell would be to see the extent to which their communication-by-wire invention has progressed.

After Bell and Watson’s first telephone call, as more telecommunications capabilities developed, legislators recognized the need to regulate these technologies to protect this emerging industry and individual consumers. The Communications Act of 1934 was the first major attempt to regulate telecommunications.<sup>2</sup> Each new technology, however, requires regulatory updates to monitor its use in the market and to ensure continuing availability of cutting-edge technology to the average consumer. Legislators recognized this need following additional technological advancements in the telecommunications indus-

---

\* B.A. 2003, University of Iowa; J.D. Candidate 2006, Washburn University School of Law.

1. JOHN BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS 49 (1976).

2. See Communications Act of 1934, Pub. L. No. 74-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

try, albeit sixty-two years later, and enacted the Telecommunications Act of 1996 (1996 Act).<sup>3</sup>

Change in the telecommunications industry, however, occurs rapidly. Ten years is a lifetime in the whirlwind industry of telecommunications. Now, in 2006, ten-year-old regulations are as outdated as many of the provisions of the Communications Act of 1934. Regulation must keep pace with technological advancement, and the 1996 Act failed to account for such change in telecommunications service.

Although the 1996 Act fails to account for numerous facets of present-day telecommunications service, this note will focus specifically on the development and regulation of VoIP telephony.<sup>4</sup> This service involves the provision of voice communication over a data network—namely, the Internet—and operates as a convergence of two formerly distinct types of communication services.<sup>5</sup> VoIP regulation is presently a subject of substantial controversy in the telecommunications industry because there is a lack of regulatory certainty. The Federal Communications Commission (FCC), courts, Congress, and states have all addressed VoIP regulation differently. The regulatory differences are mostly semantic, centering on the antiquated definitions of “telecommunications services” and “information services” found in the 1996 Act. These definitions affect the way in which the FCC regulates a service. The FCC, however, is currently devising a uniform regulatory scheme that will create regulatory certainty free of these outdated classifications.<sup>6</sup>

Part II of this note will discuss how VoIP telephony developed, how it functions, and how it compares to traditional telephone service. Part II will also outline the sections of the 1996 Act involved in the VoIP-regulation debate and the federal and state attempts to address the regulatory process. This historical outline will lay the foundation for an analysis in Part III of the effectiveness of the steps already taken in the VoIP-regulation process and how the FCC, Congress, and states should direct their inquiries and make decisions regarding the future of VoIP regulation.

This note posits that when Congress drafts legislation in the field of telecommunications, the language employed must be fair to all telecommunications service providers and must consider advancements in

---

3. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

4. VoIP is capable of a “wide range of voice, data and content applications and services, ranging from traditional voice services to video telephony to interactive games.” Katrina Dick, *The Emergence and Regulation of VoIP*, 10 *COMPUTER & TELECOMM. L. REV.* 157, 157 (2004). This note, however, will focus specifically on voice-communication and telephone service provided over VoIP technology.

5. See *NEWTON'S TELECOM DICTIONARY* 917 (21st ed. 2005).

6. *In re IP-Enabled Servs.*, 19 F.C.C.R. 4863 (proposed Mar. 10, 2004).

telecommunications. The narrow lines drawn by Congress in the 1996 Act leave no room for technological evolution; regulators must implement a new approach to properly govern VoIP telephony. Therefore, Part IV of this note will offer a solution to the VoIP regulation debate—a revision of the VoIP Regulatory Freedom Act, a congressional bill proposed in 2004. With the additions and changes advocated in Part IV of this note, the VoIP Regulatory Freedom Act will provide a framework for all types of VoIP telephony while still satisfying the underlying goals of current telecommunications regulation.

## II. BACKGROUND

### A. *VoIP Telephony: Past and Present*

#### 1. Traditional Telephony Versus VoIP Telephony

Traditional telephony, as has been used for over a century, is transmitted over the public-switched telephone network (PSTN), which is the “worldwide voice telephone network [acting as the] local, long distance and international phone system . . . .”<sup>7</sup> This type of telephony uses circuit-switched technology to transport the human voice over the PSTN.<sup>8</sup> Circuit-switched technology is a form of telecommunications service that connects a loop of two wires—a physical circuit—on the PSTN between a customer and the individual with whom he is speaking.<sup>9</sup> The technology reserves the loop for these individuals and maintains this single circuit for the duration of the phone call, including both periods of conversation and of silence.<sup>10</sup> Because circuit-switched technology maintains the circuit during periods of silence, and because the PSTN can only maintain a finite number of circuits at any one time, a number of commentators argue that circuit-switched technology is inefficient.<sup>11</sup>

In contrast to traditional telephony, VoIP telephony allows a user to place a phone call over the Internet,<sup>12</sup> requires a high-speed In-

7. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 678, 680; Elizabeth M. Donahue, *Directly Competing Policies: The Growth of Internet Telephony and the Future of the Universal Service Fund*, 9 COMMLAW CONSPECTUS 225, 226 (2001). The PSTN is sometimes described as a “public switched network,” which is a “common carrier network that provides circuit switching between public users.” NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 680. The PSTN is visible in the form of wires running from pole to pole across the country.

8. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 680; Donahue, *supra* note 7.

9. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 184; R. Alex DuFour, *Voice Over Internet Protocol: Ending Uncertainty and Promoting Innovation Through a Regulatory Framework*, 13 COMMLAW CONSPECTUS 471, 474 (2005).

10. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 184; Stephen E. Blythe, *The Regulation of Voice-Over-Internet-Protocol in the United States, the European Union, and the United Kingdom*, 5 J. HIGH TECH. L. 161, 165-66 (2005); Donahue, *supra* note 7.

11. Blythe, *supra* note 10; Donahue, *supra* note 7.

12. FCC, Voice Over Internet Protocol, <http://www.fcc.gov/voip> (last visited Apr. 8, 2006).

ternet connection, and uses packet-switched technology to convert the human voice into packets of digital signal.<sup>13</sup> Each packet travels over separate and distinct Internet paths, taking any open route.<sup>14</sup> When these digital packets reach their destination, they are reassembled into the original voice data.<sup>15</sup> Numerous packets can travel over a single line.<sup>16</sup> In contrast to circuit-switched telephony, which travels over an uninterrupted, predetermined circuit, the packets created during a VoIP call will separate from each other in any manner necessary for quick transmission.<sup>17</sup> Moreover, a VoIP call will only keep the circuit active long enough to transmit the digital signal.<sup>18</sup> With this type of technology, more circuits remain open for other communications, and users may access voice communications at a reduced cost.<sup>19</sup> Individuals involved in the telecommunications industry expect packet switching to replace circuit switching in the future.<sup>20</sup>

## 2. Development of VoIP Telephony

The public's first use of VoIP telephony occurred with computer-to-computer voice communications using VocalTec's software in 1995.<sup>21</sup> Early on, many users were skeptical of VoIP telephony because the service could not offer quality transmission, and, in general, people were satisfied with existing telephone service.<sup>22</sup> Internet enthusiasts, however, were intrigued by this new type of telephony because of the lower costs associated with routing long-distance calls

---

13. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 621; Konrad L. Trope & Paula K. Royalty, *Current Legal Issues Surrounding the Regulation of Voice Over Internet Protocol*, 16 INTELL. PROP. & TECH. L.J., May 2004, at 10, 10.

14. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 621.

15. *Id.*; Blythe, *supra* note 10, at 166 ("The sending computer chops data into . . . small packets, with an address on each one telling the network where to send them. When the receiving computer gets the packets, it reassembles them into the original data." (quoting Howstuffworks.com, How VoIP Works, <http://computer.howstuffworks.com/ip-telephony.htm> (last visited Mar. 23, 2005))). To find their destination, each of these digital packets contains the address of the receiving equipment. NEWTON'S TELECOM DICTIONARY, *supra* note 5, at 621.

16. Donahue, *supra* note 7, at 227.

17. *See id.*

18. Blythe, *supra* note 10, at 166.

19. *Id.* The cost of VoIP telephony is also lower because VoIP providers have lower overhead and infrastructure costs and are not subject to many mandatory fees under the 1996 Act. DuFour, *supra* note 9, at 487.

20. Blythe, *supra* note 10, at 166; Michael K. Powell, Chairman, FCC, Remarks at the Voice on the Net Conference (Oct. 19, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-253325A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253325A1.doc).

21. Sharon Eisner Gillett, *Foreword* to INTERNET TELEPHONY vii, vii (Lee W. McKnight et al. eds., 2001). Since its founding in 1991, VocalTec has been an international developer in the field of voice telecommunications and is credited with jointly offering the first VoIP telephony solution. Press Release, VocalTec, VocalTec & GNN Provide Internet Phone to GNN Members for Free (Dec. 5, 1995), available at [http://www.vocaltec.com/News/1995/Dec\\_5\\_1995.pdf](http://www.vocaltec.com/News/1995/Dec_5_1995.pdf).

22. Gillett, *supra* note 21; Lee W. McKnight et al., *An Introduction to Internet Telephony*, in INTERNET TELEPHONY, *supra* note 21, at 1.

over the Internet.<sup>23</sup> Users were also excited because VoIP telephony did not waste resources by transmitting silence.<sup>24</sup>

The earliest form of VoIP telephone service required the caller to attach speakers, a microphone, and a sound card to his personal computer and to use an Internet Service Provider to connect to the Internet.<sup>25</sup> Early VoIP telephony also required both users to have compatible software and to have simultaneously active Internet connections.<sup>26</sup> Under this arrangement, VoIP communication could only occur between two computers.<sup>27</sup>

Within one year, however, new technology enabled traditional circuit-switched network telephones to connect with these new Internet-based, packet-switched networks.<sup>28</sup> Traditional telephones connected to personal computers via gateway technology.<sup>29</sup> The transfer of voice in this manner involves two gateways: The first gateway translates voice communications from a telephone receiver into digital data (similar to the data sent with VoIP technology between computers), and the second gateway reassembles the digital data packets into audible voice.<sup>30</sup> Eventually, enough gateways developed so that personal computers were no longer the sole means of using VoIP telephony.<sup>31</sup> Currently, there are four types of VoIP telephone service: (1) computer-to-computer; (2) computer-to-telephone; (3) telephone-to-computer; and (4) telephone-to-telephone.<sup>32</sup>

### 3. Current VoIP Telephony

With the development of these new types of VoIP telephony, VoIP is moving into mainstream telecommunications.<sup>33</sup> Many VoIP

---

23. Donahue, *supra* note 7, at 227.

24. See Sunny Lu, *Cellco Partnership v. FCC & Vonage Holdings Corp. v. Minnesota Public Utilities Commission: VoIP's Shifting Legal and Political Landscape*, 20 BERKELEY TECH. L.J. 859, 861 (2005); see also *supra* note 10.

25. Donahue, *supra* note 7, at 227.

26. See *id.*

27. See *id.*

28. *Id.*

29. *Id.* A "gateway" is a "computer[ ] that transform[s] the circuit-switched voice signal into IP packets, and vice versa, and perform[s] associated signaling, control, and address translation functions." Enrico C. Soriano et al., *A Look at Key Issues Currently Shaping Broadband Deployment and Regulation*, 21 COMPUTER & INTERNET LAW., July 2004, at 1, 11-12.

30. Chérie R. Kiser & Angela F. Collins, *Regulation on the Horizon: Are Regulators Poised to Address the Status of IP Telephony?*, 11 COMM.LAW CONSPECTUS 19, 21 (2003); Soriano et al., *supra* note 29, at 11.

31. Donahue, *supra* note 7, at 227-28.

32. Blythe, *supra* note 10, at 165. Telephone-to-computer VoIP calls can only be completed if the personal computer has the software used by the telephone company. *Id.* Telephone-to-telephone VoIP users must dial into the above-mentioned gateways; this is an extra step when compared with other forms of VoIP service, but the cost of a long-distance call is still less expensive using telephone-to-telephone VoIP than using traditional telephone service. *Id.*

33. See Ben Charny, *FAQ: Why the FCC Is Targeting VoIP 911 Calls*, CNET NEWS.COM, May 19, 2005, [http://news.com.com/FAQ+Why+the+FCC+is+targeting+VoIP+911+Calls/2100-7352\\_3-5712788.html?](http://news.com.com/FAQ+Why+the+FCC+is+targeting+VoIP+911+Calls/2100-7352_3-5712788.html?)

users find the service much more convenient than traditional telephone service; an individual can even take his telephone and use his regular telephone number while traveling.<sup>34</sup> Users also enjoy less costly telephone bills—a savings of ten to thirty percent when compared to traditional telephone service.<sup>35</sup> The public seems to have readily accepted the new technology, and VoIP telephony has become the regular telephone service used by many consumers.<sup>36</sup>

VoIP users do encounter some problems. VoIP telephony often fails during power outages, largely due to the loss of high-speed Internet connections.<sup>37</sup> Telephone-directory publishers have also experienced problems because VoIP telephone numbers are more onerous to track than traditional telephone numbers.<sup>38</sup> The most frightening problem, however, is the difficulty in obtaining a direct connection to emergency services.<sup>39</sup> The ubiquitous nature of VoIP telephony makes it complicated to pinpoint the location of the calling party.<sup>40</sup> Therefore, a 911 call cannot quickly connect to the closest 911 call center, and if the caller cannot provide an address, then the call center may be unable to locate him.<sup>41</sup> Moreover, VoIP telephony is completely outside of the traditional telephone system within which emergency services operate.<sup>42</sup> Several VoIP carriers, however, are already implementing technical solutions.<sup>43</sup> The FCC has also begun to address the situation and has established a deadline for fixing these problems.<sup>44</sup>

Despite VoIP telephony's shortcomings, many business and residential customers have selected VoIP service; lower prices and convenience attract customers.<sup>45</sup> In fact, an estimated 5.5 million users have opted for VoIP telephone service.<sup>46</sup> VoIP telephony scholars expect

---

34. See FCC, *supra* note 12.

35. Konrad L. Trope, *Voice Over Internet Protocol: The Revolution in America's Telecommunications Infrastructure*, 22 *COMPUTER & INTERNET LAW.*, Dec. 2005, at 1, 2. VoIP telephone service costs less because VoIP is not subject to many of the regulatory costs imposed on traditional telephone service providers, including the costs of tariff filing, the costs of paying access charges to other carriers with whom they interconnect, and the costs of universal service fund contributions. David B. Bender, *Everything That Rises Must Converge: The Case for IP Telephony Regulation After Vonage v. Minnesota Public Utilities Commission*, 36 *RUTGERS L.J.* 607, 645 & n.206 (2005); DuFour, *supra* note 9, at 478 ("Compliance with these regulations alone is a large cost of doing business for [telecommunications] companies.").

36. See Trope & Royalty, *supra* note 13.

37. See Bender, *supra* note 35, at 640-41; FCC, *supra* note 12.

38. Bender, *supra* note 35, at 640; FCC, *supra* note 12.

39. Lu, *supra* note 24, at 870.

40. Bender, *supra* note 35, at 640.

41. See DuFour, *supra* note 9, at 500.

42. Charny, *supra* note 33. VoIP telephone service may not be able to connect with 911 call centers during a power outage because the outage could terminate the necessary broadband connection. DuFour, *supra* note 9, at 499-500. This problem does not exist with traditional telephone service because traditional telephone lines generate their own electricity. *Id.*

43. See DuFour, *supra* note 9, at 494; Lu, *supra* note 24, at 871.

44. See *infra* text accompanying notes 148-50.

45. Lu, *supra* note 24, at 886.

46. Charny, *supra* note 33.

the technology to comprise forty percent of all telephone service in the United States by 2009.<sup>47</sup>

### B. *The Telecommunications Act of 1996*

The Telecommunications Act of 1996<sup>48</sup> drastically changed regulation of the telecommunications industry, deregulating parts of the industry that had been closely monitored for many years and changing the way in which regulators and consumers viewed telecommunications companies generally.<sup>49</sup> Legislators had two distinct goals in promulgating the 1996 Act: to create more competition among telecommunications carriers and to deregulate many aspects of telecommunications.<sup>50</sup> Legislators were convinced that these goals would be the most appropriate way to protect consumers.<sup>51</sup> A report from the House of Representatives specifically stated that the 1996 Act was designed “to promote competition and reduce regulation [in the telecommunications industry] in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies . . . .”<sup>52</sup>

Over 100 pages long, the 1996 Act covers regulation of telephone, cable, and broadcast services.<sup>53</sup> The Act offers a number of specific rules relating to interconnection, entry of competitors into existing telecommunications markets, regulation of consumer rates and access charges between companies, and general guidance on the application of these rules to a given telecommunications carrier.<sup>54</sup> In addition, the 1996 Act directs the FCC to forbear from regulation entirely when it is not necessary to protect telecommunications carriers or consumers.<sup>55</sup> The FCC may also refrain from regulation when it finds that a lack of regulation would enhance competition between carriers or when it finds that regulation is no longer necessary because of the existence of strong competition in a particular field.<sup>56</sup>

---

47. Trope & Royalty, *supra* note 13.

48. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

49. See Jonathan Weinberg, *Internet Telephony Regulation*, in *INTERNET TELEPHONY*, *supra* note 21, at 325, 334; Seth A. Cohen, *Deregulating, Defragmenting & Interconnecting: Reconsidering Commercial Telecommunications Regulation in Relation to the Rise of Internet Telephony*, 18 J.L. & COM. 133, 133 (1998).

50. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

51. Daniel Brenner, *The 2005 Communications Act of Unintended Consequences*, 57 FED. COMM. L.J. 175, 176 (2005).

52. H.R. REP. NO. 104-204, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 10.

53. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

54. *Id.*

55. 47 U.S.C. § 160(a) (2000).

56. *Id.* § 160(b); Cohen, *supra* note 49, at 143; James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1092 (2004).

Members of the telecommunications industry and telecommunications scholars regard the many provisions of the 1996 Act as burdensome and overly complex because the Act regulates and deregulates simultaneously, giving both discretion and mandates.<sup>57</sup> The 1996 Act has resulted in more litigation than expected.<sup>58</sup> As one scholar noted, “The Act itself is complex; simultaneously detailed and incomplete. The thousands of pages of FCC rulemaking [resulting from the Act] only increase the difficulty of comprehending the enormous changes brought about by the Act.”<sup>59</sup>

One of the most pervasive features of the 1996 Act, and one of the features frequently discussed in these “thousands” of pages of rulemaking, is the use of categorical definitions and classifications to determine the amount of regulatory oversight given to a particular telecommunications provider.<sup>60</sup> For many years, this system was effective, and regulators could readily separate various telecommunications services into mutually exclusive classifications.<sup>61</sup>

Two of the most crucial classifications in the 1996 Act are “telecommunications services” and “information services.”<sup>62</sup> A “telecommunications service” is defined as a service that offers “telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>63</sup> In addition, the 1996 Act defines “telecommunications” 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 and received.”<sup>64</sup> Regulators have included traditional telephone service in this category since the Act’s codification.<sup>65</sup>

In contrast to the designation of “telecommunications services,” the 1996 Act created another classification for “information services.” The “information service” classification includes any service that of-

---

57. John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 148 (2000).

58. Speta, *supra* note 56, at 1063.

59. Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 287 (1997).

60. See Rob Frieden, *The FCC’s Name Game: How Shifting Regulatory Classifications Affect Competition*, 19 BERKELEY TECH. L.J. 1275, 1276 (2004). See generally, e.g., *In re* Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Servs. Are Exempt from Access Charges, 19 F.C.C.R. 7457, 7463-69 (2004) [hereinafter AT&T Petition] (discussing AT&T’s phone service in the context of the definitions of “information services” and “telecommunications services” found in the 1996 Act); *In re* Petition for Declaratory Ruling that Pulver.com’s Free World Dialup Is Neither Telecomms. Nor a Telecomms. Serv., 19 F.C.C.R. 3307, 3312-16 (2004) [hereinafter Pulver.com Petition] (discussing the application of the 1996 Act’s definition of “information service” to Pulver.com’s VoIP telephony service).

61. Frieden, *supra* note 60.

62. Blythe, *supra* note 10, at 166.

63. 47 U.S.C. § 153(46) (2000).

64. *Id.* § 153(43).

65. Blythe, *supra* note 10, at 166; DuFour, *supra* note 9, at 477.

fers “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, 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.”<sup>66</sup> From the outset, regulators have included Internet Service Providers in this category.<sup>67</sup>

The distinction between “telecommunications services” and “information services” has been critical since the enactment of the 1996 Act because the former is subject to stringent regulation, and the latter remains virtually free of regulation.<sup>68</sup> With this distinction, Congress sought to give the Internet, an unregulated “information service,” opportunity to grow and develop in an environment free of regulatory restraints.<sup>69</sup> Congress clarified this goal in the language of the 1996 Act itself, stating that the Act was meant to “encourage the rapid deployment of new telecommunications technologies.”<sup>70</sup>

As one commentator has noted, “When first enacted, the 1996 Act’s distinctions appeared concrete and manageable.”<sup>71</sup> Initially, the 1996 Act seemed to be successful; telephone companies provided services pursuant to the requirements of the Act, and the Internet continued to develop as a universal information and communication resource.<sup>72</sup> Congress, however, did not anticipate VoIP telephony, a hybrid technology that would not readily fit into the existing classification scheme.<sup>73</sup>

---

66. 47 U.S.C. § 153(20). The language of this statute seems to suggest that the “information services” classification requires a service provider to add additional functionality to the telecommunications service it is offering in order to make its service qualify as an “information service.” Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 *FED. COMM. L.J.* 207, 211-12 (2003); Roberts, *supra* note 57, at 174.

67. Blythe, *supra* note 10, 166-67; DuFour, *supra* note 9, at 477. Regulators originally drew the distinction between “telecommunications services” and “information services” to bolster growth in the Internet industry. Donahue, *supra* note 7, at 229-30.

68. Blythe, *supra* note 10, at 166; Joseph Gratz, Recent Developments, *Voice Over Internet Protocol*, 6 *MINN. J. L. SCI. & TECH.* 443, 446 (2004). “Telecommunications services” are subject to all of the common carrier requirements, including those listed in Title II of the Telecommunications Act of 1934. See 47 U.S.C. § 152. For example, these requirements include the following: (1) providing accommodations to disabled individuals; (2) providing service to any person upon reasonable request at a just and reasonable rate; (3) contributing to the universal service fund, which provides financing for services to rural and other less economically attractive areas; and (4) interconnecting with other service providers. *Id.* §§ 201(a), 251(a)(1), 254(d), 255(c).

69. Donahue, *supra* note 7, at 229-30.

70. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

71. Donahue, *supra* note 7, at 230.

72. Frieden, *supra* note 66, at 208-11.

73. See Brenner, *supra* note 51, at 179.

### C. *Recent Regulatory Attempts and the Current Legal Status of VoIP Telephony*

Current regulation of VoIP telephony is minimal, similar to the regulation of other Internet applications.<sup>74</sup> The FCC has thus far taken a relatively hands-off approach in an effort to provide VoIP telephony service providers with room for innovation and growth without the constraints and expense of complying with federal regulation.<sup>75</sup> The FCC has attempted, however, to regulate aspects of certain types of VoIP telephony and to leave other aspects unregulated, and the majority of these attempts have focused on the above-discussed classifications in the 1996 Act.<sup>76</sup> Congress has also attempted to create a VoIP-telephony-regulation scheme.<sup>77</sup>

The federal response to VoIP telephony, however, has not produced clear rules.<sup>78</sup> Without clear federal directives, states vary in the requirements they have imposed on VoIP telephony.<sup>79</sup> No government entity has yet provided a single regulatory framework for VoIP telephone service.<sup>80</sup>

#### 1. Steps Toward VoIP Regulation

##### a. *The Stevens Report*

The FCC's first attempt to define a regulatory framework for VoIP telephony is found in a 1998 report to Congress, commonly referred to as the "Stevens Report."<sup>81</sup> Although the Stevens Report mainly discussed the implementation of the 1996 Act provisions regarding the universal service system,<sup>82</sup> it also discussed the future of Internet-based voice communications, including VoIP telephony.<sup>83</sup> In this report, the FCC determined "that hybrid services are information services, and are not telecommunications services" within the 1996 Act's definitions.<sup>84</sup> The FCC also found that "information services" are frequently used in conjunction with "telecommunications ser-

74. DuFour, *supra* note 9, at 477.

75. See Rebecca Arbogast, *FCC's Broadband Quartet: A State-Federal Fugue or Feud?*, 2 J. TELECOMM. & HIGH TECH. L. 245, 249 (2003).

76. See DuFour, *supra* note 9, at 478; *infra* notes 116-44 and accompanying text.

77. See, e.g., Advanced Internet Communications Services Act of 2005, H.R. 214, 109th Cong.; VoIP Regulatory Freedom Act of 2004, S. 2281, 108th Cong.

78. See *infra* notes 81-181.

79. DuFour, *supra* note 9, at 478.

80. See *infra* notes 81-189 and accompanying text.

81. Peter Brown, *Voice-Over-Internet-Protocol (VoIP): At the Dawn of Regulation?*, in 25th Annual Institute on Computer & Internet Law, at 44 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. 5994, 2005), WL 823 PLI/Pat 35.

82. *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, 11504 (1998). The universal service system refers to a taxation scheme imposed on telephone service providers to establish a subsidy program for such providers that will serve consumers in rural and other areas where the connection of telephone service would be expensive. Brown, *supra* note 81.

83. *In re Federal-State Joint Bd.*, 13 F.C.C.R. at 11503.

84. *Id.* at 11529.

vices.”<sup>85</sup> It refused, however, to classify those information services that *use* telecommunications services as “telecommunications services” because such a classification would lead to *all* information services being classified as “telecommunications services.”<sup>86</sup> The FCC concluded that this approach would lead to a breakdown in the classification scheme.<sup>87</sup> The FCC stated,

A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.<sup>88</sup>

Therefore, the FCC concluded that Internet Service Providers offer “information services” not subject to regulation.<sup>89</sup>

In its discussion of VoIP telephony, however, the FCC did not clearly classify the service.<sup>90</sup> The report discussed computer-to-computer VoIP telephony but determined that only unregulated Internet Service Providers offer the service.<sup>91</sup> The FCC nevertheless conceded that it might treat a provider of phone-to-phone VoIP telephony as a “telecommunications service” if the provider satisfied four criteria:

(1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use [equipment] different from that [equipment] necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.<sup>92</sup>

In the report, the FCC also stated that phone-to-phone VoIP telephony possessed many characteristics typical of telecommunications services.<sup>93</sup> The FCC, however, declined to make “definitive pronouncements” without a “more complete record focused on individual service offerings.”<sup>94</sup>

---

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 11530.

89. *Id.* at 11541.

90. *See id.* at 11544.

91. *Id.* at 11543.

92. *Id.* at 11543-44.

93. *Id.* at 11544.

94. *Id.*

b. Vonage Holdings Corp. v. Minnesota Public  
Utilities Commission<sup>95</sup>

Jurisdiction was one of the earliest questions to arise in VoIP telephony regulation.<sup>96</sup> States were unsure which governmental body had the power to regulate VoIP technology.<sup>97</sup> Some states have decided to postpone VoIP telephony regulation until the FCC makes general determinations.<sup>98</sup> The Minnesota Public Utilities Commission (MPUC), however, decided to forge ahead with VoIP regulation in 2003, considering Vonage's provision of VoIP service in Minnesota.<sup>99</sup>

In 2003, Vonage, a VoIP telephone service provider, had 626 customers connected to its DigitalVoice service in Minnesota.<sup>100</sup> Because of the existence of this customer base, the Minnesota Department of Commerce began investigating Vonage's service and eventually filed a complaint with MPUC against Vonage in July 2003.<sup>101</sup> The complaint alleged the following: (1) Vonage did not have a certificate of authority to provide telephone service in Minnesota; (2) Vonage failed to provide 911 service and failed to pay 911 fees to the state pursuant to Minnesota law; and (3) Vonage failed to file a required tariff with MPUC.<sup>102</sup> In addressing the merits of the complaint, MPUC determined that it had jurisdiction over Vonage's service and ordered Vonage to comply with all applicable Minnesota laws.<sup>103</sup>

Vonage moved for a preliminary injunction against MPUC in the United States District Court for the District of Minnesota.<sup>104</sup> Vonage argued that federal law preempted MPUC's order and that Vonage was providing an "information service" under the 1996 Act and was therefore not subject to regulation.<sup>105</sup> The court agreed with Vonage.<sup>106</sup> The court stated, however, that DigitalVoice operated in a manner similar to the definition of a "telecommunications service,"<sup>107</sup> but nevertheless determined that Vonage "*uses* telecommunications services, rather than *provides* them."<sup>108</sup>

The court applied the four-factor test from the Stevens Report to Vonage's service and stated that DigitalVoice was not a "telecommu-

---

95. 290 F. Supp. 2d 993 (D. Minn. 2003).

96. *See id.* at 996.

97. *See* DuFour, *supra* note 9, at 478.

98. *Id.*

99. *See Vonage*, 290 F. Supp. 2d at 996.

100. *Id.* at 995.

101. *Id.*

102. *Id.* at 995-96.

103. *Id.* at 996.

104. *Id.*

105. *Id.* at 997; *see also supra* note 66 and accompanying text.

106. *Vonage*, 290 F. Supp. 2d at 999.

107. *Id.*

108. *Id.* (second emphasis added).

nications service.”<sup>109</sup> This conclusion was based on DigitalVoice’s alteration of the communication form it carried by converting the communication into digital packets.<sup>110</sup> The court instead determined that DigitalVoice was an “information service” and that Congress intended to leave these services unregulated.<sup>111</sup> Therefore, the court held that federal law preempted Minnesota law and that MPUC could not regulate VoIP telephony.<sup>112</sup>

c. *The FCC’s Attempts to Regulate VoIP Telephony Through Declaratory Rulings*

The FCC has been the most responsive and most decisive of the governmental bodies that have addressed VoIP telephony regulation.<sup>113</sup> Despite its efforts, the FCC has not definitively ruled on the status of VoIP telephony under the classification system of the 1996 Act.<sup>114</sup> Although the FCC has made no specific regulatory decision, it has issued three major orders clarifying VoIP telephony regulation in specific technological circumstances.<sup>115</sup>

i. AT&T’s Phone-to-Phone VoIP Telephony Petition

AT&T filed a petition with the FCC on October 18, 2002, seeking a declaratory ruling that the VoIP telephone services provided by AT&T were exempt from paying access charges to traditional telephone companies who carry AT&T’s VoIP service.<sup>116</sup> In this case, AT&T’s service was substantially similar to a traditional telephone call and used traditional telephone equipment; the only difference between AT&T’s VoIP calls and traditional calls was that the VoIP call traveled over an Internet backbone as opposed to the PSTN network.<sup>117</sup>

The FCC determined that AT&T’s VoIP service used the Internet backbone as a shortcut, and a telephone user may not even know that he used VoIP technology.<sup>118</sup> The FCC also applied the 1996 Act’s definitions to AT&T’s service and determined that it was a “telecommunications service” because it did not provide any enhanced functionality, as required for an “information service” classification.<sup>119</sup>

109. *Id.* at 999-1000; *see also supra* note 92 and accompanying text.

110. *Vonage*, 290 F. Supp. 2d at 1000 (citing *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, 11544 (1998)); *see also supra* text accompanying note 92.

111. *Vonage*, 290 F. Supp. 2d at 1002.

112. *Id.* at 1002-03.

113. Lu, *supra* note 24, at 874.

114. *Id.*

115. *See Soriano et al.*, *supra* note 29, at 12.

116. AT&T Petition, *supra* note 60, at 7457.

117. *See id.*

118. *See id.* at 7465, 7469.

119. *Id.*

Because of this classification, the FCC required AT&T to pay access charges to telecommunications carriers that terminated its VoIP calls.<sup>120</sup> The FCC explicitly limited its conclusion to the specific type of phone-to-phone VoIP service provided by AT&T and did not preclude the FCC from taking a “fundamentally different approach” in its forthcoming IP Enabled Services Order.<sup>121</sup>

ii. Pulver.com’s Computer-to-Computer VoIP Telephony Petition

On February 5, 2003, Pulver.com filed a petition for a declaratory ruling with the FCC regarding its VoIP telephony service.<sup>122</sup> Pulver.com sought a ruling that its Free World Dialup (FWD) service was an unregulated “information service” under the 1996 Act.<sup>123</sup> FWD administered a voice-communications service over the Internet and connected one online subscriber with another online subscriber using a high-speed Internet connection.<sup>124</sup> In contrast to traditional telephone service, FWD assigned each user a five or six digit number, not a regular phone number, to communicate with other subscribers.<sup>125</sup> Moreover, FWD required subscribers to use computers—not telephones—to communicate.<sup>126</sup>

In a February 19, 2004, ruling, the FCC analyzed FWD under the definitions in the 1996 Act.<sup>127</sup> The FCC determined that even though FWD *uses* a “telecommunications service” to provide its service, it does not *offer* one.<sup>128</sup> The FCC further stated that FWD does not provide “transmission,” as required by the “telecommunications service” definition.<sup>129</sup> Therefore, the FCC decided that it would not classify FWD as a “telecommunications service.”<sup>130</sup>

Instead, the FCC concluded that FWD allowed its subscribers to “acquire” information about other subscribers and to “store” and “process” this information—capabilities that fit within the definition of an “information service.”<sup>131</sup> As a result, the FCC reasoned that FWD was an unregulated “information service.”<sup>132</sup> The FCC again specifically chose not to extend the ruling to any other service or com-

---

120. *Id.* at 7466.

121. *Id.* at 7463.

122. Pulver.com Petition, *supra* note 60, at 3307.

123. *Id.* at 3307-08.

124. *Id.* at 3308 n.3.

125. *Id.* at 3309-10.

126. *See id.* at 3308 n.3.

127. *Id.* at 3307, 3312-16.

128. *Id.* at 3312.

129. *Id.*

130. *Id.*

131. *Id.* at 3313.

132. *Id.*

pany that originates or terminates calls on traditional telephone lines.<sup>133</sup>

### iii. Vonage's Jurisdiction Petition

When Vonage filed suit in Minnesota,<sup>134</sup> it simultaneously filed a petition with the FCC, requesting a ruling that federal law and policy preempted MPUC's regulatory action.<sup>135</sup> Vonage also requested that the FCC classify its service as an "information service" and leave it unregulated.<sup>136</sup>

In making its determination, the FCC examined Vonage's DigitalVoice service and considered the differences between that service and traditional telephone service.<sup>137</sup> The FCC concluded that DigitalVoice is a jurisdictionally mixed service.<sup>138</sup> The FCC reached this conclusion because regulators could not readily separate intrastate and interstate elements of DigitalVoice for concurrent state and federal regulation.<sup>139</sup> Because the FCC is responsible for regulating jurisdictionally mixed services, the FCC concluded that it alone had authority to regulate DigitalVoice and that it preempted state authority.<sup>140</sup>

The FCC's ruling established a three-part test to determine whether a given VoIP service should be free from state regulatory requirements: (1) the service requires use of a broadband connection; (2) the service requires VoIP-compatible, specialized equipment; and (3) the service offers a host of integrated capabilities that can simultaneously operate and allows customers "to originate and receive voice communications and access other features and capabilities, even video."<sup>141</sup>

In its ruling, the FCC established that it alone has the authority to decide whether DigitalVoice and similar services meeting the above-

---

133. *Id.* at 3308 n.3.

134. *See supra* notes 96-112.

135. *In re* Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n, 19 F.C.C.R. 22404, 22410 (2004) [hereinafter Vonage Petition].

136. *Id.*

137. *Id.* at 22406-08. These differences include the following: (1) DigitalVoice requires a broadband connection, and any broadband connection anywhere can be used; (2) DigitalVoice requires the use of specialized equipment such as adapters, VoIP telephones, or personal computers with a microphone, speakers, and DigitalVoice software; (3) DigitalVoice offers a variety of mechanisms that allow a user to decide where and when to receive voice and data communications; and (4) DigitalVoice phone numbers are part of the North American Numbering Plan, similar to a typical telephone number, but this phone number is not tied to a specific geographic location. *Id.*

138. *Id.* at 22414. A "jurisdictionally mixed service" is a service that has both intrastate and interstate elements. *Id.* at 22413.

139. *Id.* at 22413-14, 22423.

140. *Id.* at 22413-14 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986)). If parts of a service can be separated into intrastate and interstate elements, dual state and federal jurisdiction is permitted. *Id.* at 22413.

141. *Id.* at 22424.

enumerated test are subject to state telephone regulations.<sup>142</sup> Despite this clear determination, the FCC refrained from deciding whether DigitalVoice was subject to any existing federal telephone regulations.<sup>143</sup> The FCC also did not decide whether similar services are considered “telecommunications services” or “information services.”<sup>144</sup>

d. *Other Major VoIP Actions by the FCC*

The FCC has considered a number of other petitions relating to VoIP telephony.<sup>145</sup> Two of these actions, in particular, are crucial to the development of VoIP telephony regulation and to the development of the solution provided in this note. First, the FCC required VoIP telephony providers to supply 911 services to their customers.<sup>146</sup> Second, and most importantly, the FCC initiated a rulemaking proceeding to receive comment from industry leaders, consumers, and government offices on potential regulation of VoIP telephony.<sup>147</sup>

On June 3, 2005, the FCC required VoIP telephony providers to offer enhanced 911 services as a standard feature to their subscribers.<sup>148</sup> The FCC adopted “a balanced approach that takes into consideration the expectations of consumers, the need to strengthen Americans’ ability to access public safety in times of crisis, and the needs of entities offering these innovative services.”<sup>149</sup> VoIP telephony providers were given 120 days to begin transmitting all 911 calls, including transmitting a call back number and the location of the caller.<sup>150</sup>

On March 10, 2004, the FCC issued a Notice of Proposed Rulemaking on VoIP technology.<sup>151</sup> In this notice, the FCC asked for comment on whether it should classify VoIP telephony as an “information service” or a “telecommunications service,” though the FCC recognized that such classification might not be possible.<sup>152</sup> The FCC

---

142. *Id.*

143. *Id.* at 22411 n.46.

144. *Id.*

145. *See, e.g., In re Commc’ns Assistance for Law Enforcement Act & Broadband Access & Servs.*, 19 F.C.C.R. 15676, 15694-95, 15709-10 (2004) [hereinafter CALEA Order]; *In re IP-Enabled Servs. and E911 Requirements for IP-Enabled Serv. Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116 (2005), available at [http://www.hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-116A1.pdf](http://www.hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-116A1.pdf) [hereinafter E911 Requirements].

146. *See* E911 Requirements, *supra* note 145, at 2.

147. *In re IP-Enabled Servs.*, 19 F.C.C.R. 4863, 4864-68 (proposed Mar. 10, 2004).

148. *See* E911 Requirements, *supra* note 145, at 2.

149. *Id.* at 4.

150. *Id.* at 22. In the interim, the FCC also ordered VoIP providers to notify subscribers that their 911 system operates differently than traditional 911 service and required each customer to acknowledge his understanding. *Id.* at 28. The order concluded with a Notice of Proposed Rulemaking, seeking comment on what steps the FCC could take to ensure future “ubiquitous and reliable E911 service.” *Id.* at 32-35.

151. *In re IP-Enabled Servs.*, 19 F.C.C.R. at 4863-64.

152. *Id.* at 4893-94.

also asked commentators to offer general suggestions relating to VoIP regulation and to discuss the need for additional classifications for Internet-based services.<sup>153</sup> In the notice, however, the FCC stated that it intended to leave VoIP largely deregulated.<sup>154</sup> Nevertheless, some aspects of VoIP service will likely be subject to FCC regulation.<sup>155</sup> Following industry commentary, the FCC will issue a comprehensive review of all Internet-protocol technology and its regulation.<sup>156</sup> Due to the voluminous subject matter of this proceeding, it is likely that the FCC will address VoIP issues in a series of actions rather than in a single order.<sup>157</sup> It may be a long time until a final regulatory scheme is complete.<sup>158</sup>

e. *Congressional Attempts to Regulate VoIP Telephony*

Ten years ago, Congress drastically changed telecommunications regulation with the enactment of the 1996 Act. In the past two years, Congress has recognized that it is again time for another major change in telecommunications regulation.<sup>159</sup> Congress has examined two major bills related to VoIP regulation: the VoIP Regulatory Freedom Act of 2004 and the Advanced Internet Communications Services Act of 2005.<sup>160</sup> Congress did not enact either piece of legislation.<sup>161</sup> These legislative acts, however, may prove useful in evaluating a suitable course for VoIP regulation, particularly because Congress is planning a major overhaul of telecommunications law over the next two years.<sup>162</sup>

---

153. *Id.* at 4886.

154. *Id.*

155. Blythe, *supra* note 10, at 170. Areas likely to be regulated in some manner include the following: (1) access to VoIP by disabled individuals; (2) access to 911 services; (3) imposition of access charges on VoIP telephony providers; (4) payment by VoIP telephony providers into the universal service funds; (5) consumer protection; (6) economic regulation; and (7) law enforcement surveillance. *In re IP-Enabled Servs.*, 19 F.C.C.R. at 4867-68, 4904-05.

156. *See In re IP-Enabled Servs.*, 19 F.C.C.R. at 4864.

157. *See* Richard E. Wiley & Rosemary C. Harold, *Communications Law 2004: Contentious Times in a Shifting Landscape*, in 22nd Annual Institute on Telecommunications Policy and Regulation, at 333 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. 3202, 2004), WL 813 PLI/Pat 287.

158. *See id.*

159. *See* Lu, *supra* note 24, at 860-61.

160. Advanced Internet Communications Services Act of 2005, H.R. 214, 109th Cong.; VoIP Regulatory Freedom Act of 2004, S. 2281, 108th Cong.

161. *See* Clinton Howard Brannon, *Reach Out and Tax Someone: What Does the Future Hold for the Taxation and Regulation of Voice Over Internet Protocol Telephone Services?*, 57 ALA. L. REV. 173, 180 (2005). In 2004, the House of Representatives examined an earlier version of the Advanced Internet Communications Services Act of 2005. Members of Congress have introduced other bills that may also affect the regulation of VoIP telephony. *See, e.g.*, Internet and Universal Service Act of 2006, S. 2256, 109th Cong.; IP-Enabled Voice Communications and Public Safety Act of 2005, S. 1063, 109th Cong.; IP-Enabled Voice Communications and Public Safety Act of 2005, H.R. 2418, 109th Cong.

162. Roy Mark, *Congress Hangs Up on VoIP for 2004*, INTERNETNEWS.COM, Sept. 3, 2004, <http://www.internetnews.com/bus-news/article.php/3403911>.

i. VoIP Regulatory Freedom Act of 2004

Senator John Sununu introduced the VoIP Regulatory Freedom Act in the Senate on April 5, 2004.<sup>163</sup> The goal of this bill was “[t]o provide a clear and unambiguous structure for the jurisdictional and regulatory treatment for the offering or provision of voice-over-Internet-protocol applications . . . .”<sup>164</sup> While this legislation promoted sole federal responsibility for VoIP regulation and prohibited state regulation entirely,<sup>165</sup> it also limited the FCC’s authority over VoIP telephony.<sup>166</sup>

Under this legislative scheme, VoIP providers were not required to pay access charges imposed by the 1996 Act, but such providers were permitted to negotiate with traditional telephone carriers for compensation for general costs.<sup>167</sup> In addition, the VoIP Regulatory Freedom Act required providers of “connected VoIP applications” to contribute to the federal Universal Service Fund and, therefore, to provide financing for expansion of telecommunications into areas where such telecommunications services would be costly to operate.<sup>168</sup> The bill also required “connected VoIP application” providers to satisfy “information service” requirements when providing access to their services for law enforcement agencies.<sup>169</sup> Under the bill, VoIP industry leaders must also agree on how to provide service to disabled individuals, how to implement 911-service requirements, and how to make service more reliable.<sup>170</sup> Finally, this bill prohibited states from taxing VoIP providers.<sup>171</sup>

Certain provisions of this bill, however, would not apply to phone-to-phone VoIP telephony because calls using this type of service originate and terminate on the PSTN and, therefore, are classi-

---

163. S. 2281. Representative Charles Pickering introduced a similar bill in the House of Representatives on April 2, 2004. VoIP Regulatory Freedom Act of 2004, H.R. 4129, 108th Cong. This section of this note will only discuss the original draft of the VoIP Regulatory Freedom Act introduced in the Senate. See S. 2281. The bill was reported on Dec. 7, 2004, in the Senate with certain markups made by the Committee on Commerce, Science, and Transportation. S. REP. NO. 108-425, at 1 (2004). The amended form of this bill will be discussed in Part IV of this note. See *infra* text accompanying notes 346-74.

164. S. 2281.

165. *Id.* § 2(a)-(b). The bill also prohibited any federal entity from delegating responsibility for, or authority over, VoIP to the states. *Id.* § 2(c).

166. *Id.* §§ 3-4.

167. *Id.* § 4(a). The federal Universal Service Fund is a program designed to keep telephone service rates reasonable for consumers, particularly in high cost rural and disadvantaged areas. NEWTON’S TELECOM DICTIONARY, *supra* note 5, at 887.

168. S. 2281, § 4(b); NEWTON’S TELECOM DICTIONARY, *supra* note 5, at 887. A “‘connected VoIP application’ [is] a VoIP application that is capable of receiving voice communications from or sending voice communications to the [PSTN].” S. 2281, § 10(a)(2).

169. S. 2281, § 4(c).

170. *Id.* § 5(a). Also under the bill, a VoIP provider that does not offer full 911 service needs to notify its customers accordingly. *Id.* § 5(b).

171. *Id.* § 7(a).

fied under the bill as “connected VoIP applications.”<sup>172</sup> Thus, it appears that certain aspects of phone-to-phone VoIP service would remain regulated under the 1996 Act as a “telecommunications service.”<sup>173</sup> The regulatory status of phone-to-computer, computer-to-phone, and computer-to-computer VoIP telephony, collectively labeled as “VoIP applications,” may also remain uncertain under this bill.<sup>174</sup>

## ii. Advanced Internet Communications Services Act of 2005

In January 2005, Representatives Rick Boucher and Cliff Stearns proposed the Advanced Internet Communications Services Act.<sup>175</sup> This bill stated that Congress would consider all “advanced Internet communications services” to be interstate services subject to exclusive FCC regulation.<sup>176</sup> The bill did not classify VoIP telephony as a “telecommunications service” or an “information service.”<sup>177</sup> Instead, “advanced Internet communications services” would be a new classification and would include all Internet-protocol-based applications and services that originate or receive a communication in Internet-protocol format.<sup>178</sup>

The terms in this bill are not as specific as the terms in the VoIP Regulatory Freedom Act. However, Representative Boucher, a supporter of the Advanced Internet Communications Services Act, suggests that this bill was not meant to rewrite telecommunications law.<sup>179</sup> “[We] are seeking to frame the debate over advanced Internet communications regulation, including VoIP regulation, in anticipation of a larger telecommunications overhaul . . . .”<sup>180</sup> Therefore, this bill appears to be a starting point for VoIP regulation.<sup>181</sup>

## f. States’ Attempts to Regulate VoIP Telephony

State regulation of traditional telephone service providers began to emerge soon after telephone service came into existence.<sup>182</sup> States’

---

172. *Id.* § 10(a)(6)(B). The bill draws a distinction between “connected VoIP applications,” which originate or terminate on the PSTN, and “VoIP applications,” which apply to other types of VoIP telephony. *Id.* § 10.

173. This type of VoIP telephony would remain regulated as a “telecommunications service” because of the FCC’s ruling in AT&T Petition, *supra* note 60, at 7465.

174. Uncertainty may arise because certain provisions of the VoIP Regulatory Freedom Act only apply to “connected VoIP applications,” which are applications involving the PSTN or phone-to-phone VoIP telephony. *See, e.g.*, S. 2281, §§ 4(b)(2), 4(c), 5(a).

175. Advanced Internet Communications Services Act of 2005, H.R. 214, 109th Cong.

176. *Id.* §§ 2(a), 3.

177. *Id.* § 2(b).

178. *Id.* § 4(1).

179. *See* Roy Mark, *Federal Lawmakers Bid for VoIP Control*, WI-FIPLANET.COM, July 7, 2004, <http://www.wi-fiplanet.com/voip/article.php/3377611>.

180. *Id.* (quoting Rep. Boucher) (alteration in original).

181. *See id.*

182. Bender, *supra* note 35, at 612.

attempts to regulate VoIP telephony followed almost as quickly.<sup>183</sup> States have an interest in regulating VoIP telephony for the dual purpose of providing consumer protection and maintaining their universal service funds for rural and low-income telecommunications users.<sup>184</sup> Many state regulatory commissions and courts have addressed the VoIP regulatory classification problem to varying degrees.<sup>185</sup>

These regulatory decisions no longer have authority, however, because the FCC obtained jurisdiction over VoIP telephony in *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*.<sup>186</sup> States may try to challenge this ruling,<sup>187</sup> but the FCC's dominance in VoIP telephony regulation is likely to continue in order to avoid "a hodgepodge of state regulations."<sup>188</sup> It is probable that other government entities will defer to the FCC and to Congress, waiting for more regulatory guidance before further considering the possibility of state-initiated VoIP telephony regulation.<sup>189</sup>

## 2. Conclusions Regarding the Present State of VoIP Regulation

VoIP telephony is an incredible technology, and it promises to transform telephone service.<sup>190</sup> Despite its "amazing" nature, VoIP technology will be a service for the public, and, as with any public service, some degree of governmental guidance is necessary. The FCC, Congress, courts, and states have begun to study and implement VoIP regulation in accordance with the 1996 Act.<sup>191</sup> The multiple governmental bodies involved in the regulatory process have suggested numerous possibilities for a legal framework.<sup>192</sup> The much-awaited IP-Enabled Services Order will likely find a method in which

---

183. Darin Dugger, *Telekansas and the Future of Alternative Telecommunications Regulation in Kansas*, 43 U. KAN. L. REV. 687, 688 (1995).

184. Lu, *supra* note 24, at 880. Each state maintains a universal service fund similar to the federal Universal Service Fund mentioned above. *See id.*

185. Soriano et al., *supra* note 29, at 13-14. For example, in New York, Frontier Telephone of Rochester brought a complaint against US Datanet because US Datanet refused to pay access charges that should have resulted from its VoIP telephony service. *Id.* The New York Public Service Commission ruled that US Datanet should pay access charges because its service is nearly identical to traditional telephone service, which is "telecommunications" under the 1996 Act. *Id.* In addition, other states have attempted to address VoIP telephony but have stopped their efforts because of the FCC's IP-Enabled Services rulemaking proceeding, or have failed to come to any definitive decision. *Id.*

186. *See supra* notes 96-112 and accompanying text.

187. Lu, *supra* note 24, at 881.

188. *Id.*

189. *Id.*

190. *Voice Over IP: Hearing Before the S. Comm. on Commerce, Science & Technology*, 108th Cong. (2004) [hereinafter *Senate VoIP Hearing*] (statement of Kevin Werbach, Founder, Supernova Group LLC), available at <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1065>.

191. *See supra* notes 81-189 and accompanying text.

192. *See supra* notes 81-189 and accompanying text.

to harmonize all of the regulations to shield the VoIP telephone service industry from overregulation while also protecting consumers.<sup>193</sup>

### III. ANALYSIS

It is apparent from the foregoing discussion of VoIP regulation that such regulation is in disarray. State and federal officials have been reluctant to exercise regulatory control for fear that mandates may impair innovation in the VoIP industry.<sup>194</sup> Nevertheless, the FCC, courts, Congress, and states have attempted to force VoIP telephony into the 1996 Act's outdated categories created before the technology even existed.<sup>195</sup> As one telecommunications scholar noted, "the Act was obsolete when it was passed [because of these categorizations], and . . . it failed to correctly predict where the combination of global business pressures and technological advances would take the newly converging telecommunications industry."<sup>196</sup>

Because the FCC has asserted jurisdiction over VoIP telephony, one aspect of VoIP regulation is settled.<sup>197</sup> Additional regulation, however, has not been as clear because VoIP telephony does not clearly fit into the definitions of either "telecommunications services" or "information services."<sup>198</sup> Therefore, VoIP telephony should not be subject to the regulatory scheme of either classification. In addition, regulators should not treat VoIP telephony differently than traditional telephone service merely because it uses different equipment to provide essentially the same service.<sup>199</sup>

Regulators need to address this situation soon because continued uncertainty will hinder further development of VoIP telephony.<sup>200</sup> Solving this dilemma quickly is also crucial because VoIP telephony is likely to replace most traditional telephone service within the next

---

193. See Kathleen Q. Abernathy, FCC Comm'r, *The Telecommunications Act of 1996: A Case of Regulatory Obsolescence?*, Keynote Address for the Telecommunications Act of 1996: A Case of Regulatory Obsolescence Spring Symposium (Mar. 17, 2005), in 13 *COMMLAW CON-SPECTUS* 235, 240 (2005).

194. See Cohen, *supra* note 49, at 147.

195. DuFour, *supra* note 9, at 480-81; Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 *N.C. J.L. & TECH.* 227, 271 (2004); see also Shaun P. Montana, Note, *An Approach to the International Regulatory Issues of IP Telephony*, 8 *B.U. J. SCI. & TECH. L.* 682, 712 (2002). According to FCC Commissioner Michael Copps, "It's incumbent on [the FCC] to identify good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeonholes without adequate justification. It's no slam dunk that the old rules even apply." DuFour, *supra* note 9, at 481 (quoting Press Release, FCC, *Opening Remarks of Michael J. Copps*, FCC Voice Over Internet Protocol Forum (Dec. 1, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241765A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241765A1.doc)).

196. Roberts, *supra* note 57, at 148-49. Within just two years, it was obvious that technological changes were going to fall outside of the 1996 Act's structure. *Id.* at 157.

197. Vonage Petition, *supra* note 135, at 22414; see also Lu, *supra* note 24, at 882; *supra* notes 134-44 and accompanying text.

198. Donahue, *supra* note 7, at 230; Roberts, *supra* note 57, at 157.

199. See Speta, *supra* note 56, at 1134.

200. *Senate VoIP Hearing*, *supra* note 190 (statement of Kevin Werbach, Founder, Supernova Group LLC); DuFour, *supra* note 9, at 488.

decade.<sup>201</sup> Regulation may be difficult to implement because some regulators argue in favor of leaving VoIP telephony unregulated.<sup>202</sup> Complete lack of regulation, however, should not be an option because certain policy objectives may only be met by forced compliance.<sup>203</sup>

This note argues that a new regulatory approach is necessary. With this new approach, “[t]he FCC, courts, Congress, and states must strike a balance between satisfying the needs of the new industry, ensuring that longstanding public services and safety are provided, and protecting the privacy rights of the public.”<sup>204</sup> Regulators must also seek to leave the Internet as unregulated as possible so the Internet continues to develop and prosper.<sup>205</sup> Regulators, however, must be cautious in devising a scheme because VoIP telephony providers may place their technology and equipment anywhere and may route calls throughout the world.<sup>206</sup> Such action may potentially cause a major economic loss to the United States.<sup>207</sup> As former FCC Chairman Michael Powell stated, “The minute [VoIP providers] don’t like it, they’re gone.”<sup>208</sup>

#### A. *Problems with Classifying VoIP Telephony Under the 1996 Act*

From the origin of the 1996 Act until the present, government regulators have used a classification system to regulate telecommunications services.<sup>209</sup> Currently, the FCC and courts apply and interpret the definitions of “information service” and “telecommunications service” when addressing different types of VoIP telephony services, reaching various conclusions.<sup>210</sup> The classification of a service is important because particular obligations and rights attach based on each classification.<sup>211</sup>

---

201. Roberts, *supra* note 57, at 157.

202. See *infra* notes 221-23 and accompanying text.

203. DuFour, *supra* note 9, at 479-80; Frieden, *supra* note 60, at 1313 (stating that even the FCC has recognized that government oversight is necessary to ensure that access to basic telecommunications services continues to be provided to both consumers and competitors seeking interconnection with other carriers).

204. Lu, *supra* note 24, at 886. Regulators must acknowledge the conflicting concerns regarding industry growth and consumer protection by keeping telecommunications affordable, maintaining public safety and privacy, and allowing effective law enforcement to continue. *Id.* at 882; see also *infra* notes 229-78 and accompanying text.

205. See Donahue, *supra* note 7, at 229-30.

206. See Lu, *supra* note 24, at 876.

207. See *id.*

208. Ben Charny, *FCC: Broadband Top Issue in 2004*, CNET NEWS.COM, Jan. 9, 2004, [http://news.com.com/2102-1034\\_3-5138451.html](http://news.com.com/2102-1034_3-5138451.html) (quoting Michael K. Powell, Commissioner, FCC).

209. See *supra* notes 60-72 and accompanying text.

210. Compare AT&T Petition, *supra* note 60, at 7465, 7469, with Pulver.com Petition, *supra* note 60, at 3312-14. Congress gave the FCC the power to interpret these definitions because the FCC is the expert agency in telecommunications; the courts typically become involved in interpretation when reviewing an FCC decision. See Roberts, *supra* note 57, at 191-93.

211. Arbogast, *supra* note 75, at 279-80.

Many experts and commentators recognize the inadequacy of using rigid classifications to encompass various types of telecommunications.<sup>212</sup> VoIP telephony does not fit into the current scheme for several reasons.<sup>213</sup> In one respect, VoIP telephony providers are offering the same service as traditional telephone service providers, and regulators should classify VoIP telephony as a “telecommunications service.”<sup>214</sup> In another respect, regulators want to avoid imposing requirements on VoIP telephony service because it uses the Internet, and regulators traditionally have classified the Internet as an unregulated “information service.”<sup>215</sup> Deciding between these two classifications may have negative public policy consequences and may require arbitrary distinctions between functionally equivalent services.<sup>216</sup> Although VoIP telephony is more like a “telecommunications service” than an “information service” under the 1996 Act’s definitions, it does not precisely fit into either category.<sup>217</sup> Therefore, the categorical approach to regulation and the definitions of “telecommunications services” and “information services” should not apply to VoIP telephony.

1. Classifying VoIP Telephony as an “Information Service” Is Inaccurate and Would Have Negative Consequences

VoIP does not fall within the definition of an “information service.”<sup>218</sup> To qualify as an “information service,” a service must provide some change in the form or content of the communication using that service.<sup>219</sup> VoIP telephony, however, provides no change; the service merely breaks up the human voice into digital data packets and reassembles those packets at the other end of the call.<sup>220</sup> Nevertheless, regulators have classified certain types of VoIP telephony as “information services,” even though those types of VoIP do not fit within the definition.<sup>221</sup>

At least one government regulator, however, has concluded that VoIP changes the “form” of a communication because VoIP *transforms* voice into digital packets and later *converts* the packets back

---

212. See, e.g., DuFour, *supra* note 9, at 481; Frieden, *supra* note 195; Montana, *supra* note 195, at 711.

213. See *infra* notes 218-319 and accompanying text. Using the current categorical scheme is problematic because the 1996 Act’s classifications are based on location of the service, and VoIP telephony is not location-sensitive and may be routed to any area of the world. DuFour, *supra* note 9, at 479.

214. See Speta, *supra* note 56, at 1143.

215. See *id.* Recently, the FCC has determined that a “hands-off” approach to VoIP regulation, via an “information service” classification, has been effective. Lee W. McKnight & Brett Leida, *Internet Telephony Service Providers*, in *INTERNET TELEPHONY*, *supra* note 21, at 193, 213.

216. See *infra* 229-92 and accompanying text.

217. Dick, *supra* note 4, at 157, 160.

218. See 47 U.S.C. § 153(20) (2000).

219. See *id.*; Roberts, *supra* note 57, at 174.

220. See *supra* notes 12-15 and accompanying text.

221. See, e.g., Pulver.com Petition, *supra* note 60, at 3314.

into audible voice.<sup>222</sup> This “change” in form arguably makes VoIP telephony an “information service” under the 1996 Act.<sup>223</sup> The content of the communication does not change.<sup>224</sup> The Internet carries the words spoken and the caller’s tone and delivers the exact same words and tone to the recipient of the call.<sup>225</sup> Nothing changes about the information sent. Because “Congress did not limit ‘telecommunications’ to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users,” regulators should classify VoIP telephony as a “telecommunications service,” if it is to classify VoIP under the 1996 Act at all.<sup>226</sup>

In addition to the general fallacy of classifying certain types of VoIP telephony as “information services,” regulators may not achieve important public policy objectives if they classify VoIP telephony in this manner.<sup>227</sup> “Information services” are exempt from many of the requirements imposed on traditional telephone companies, which may eventually lead to unequal market power for companies and poor service for consumers.<sup>228</sup> Regulators should consider these potential problems and the others discussed below before classifying VoIP telephony as an “information service.”

a. *“Information Services” Do Not Contribute to Universal Service Funds*

VoIP telephony providers are not required to contribute to universal service funds and are not required to help expand telecommunications into areas where services would be costly to operate or where residents may be unable to afford telecommunications services.<sup>229</sup> Without universal service funds, telecommunications providers would likely concentrate their businesses in more profitable urban areas.<sup>230</sup> Despite this problem, only service providers classified as “telecommunications services” are required to contribute to the funds.<sup>231</sup>

Several lawmakers would prefer to classify VoIP telephony as a “telecommunications service” to secure the continued viability of universal service funds and to ensure quality telecommunications ser-

---

222. Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n, 290 F. Supp. 2d 993, 1000 (D. Minn. 2003).

223. See, e.g., *id.*

224. See Frieden, *supra* note 195, at 274.

225. See *id.*

226. Bender, *supra* note 35, at 612 (quoting *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, 11503 (1998)).

227. DuFour, *supra* note 9, at 480.

228. See Frieden, *supra* note 66, at 220-21; Speta, *supra* note 56, at 1144.

229. DuFour, *supra* note 9, at 494; see also NEWTON’S TELECOM DICTIONARY, *supra* note 5, at 887.

230. Donahue, *supra* note 7, at 238.

231. 47 U.S.C. § 254(d) (2000).

vices.<sup>232</sup> One commentator has noted that VoIP providers should have no difficulty expanding service into rural areas because the cost of such expansion is actually much lower than for wire-based service.<sup>233</sup> Opponents of regulation argue that VoIP telephony providers have an economic interest in solving these problems internally because the providers would prefer to have as many customers as possible.<sup>234</sup> Those favoring regulation, however, believe that VoIP providers will not be motivated to provide service to rural and other high-cost areas when the cost exceeds the potential profit.<sup>235</sup> The concern for universal access remains a pressing issue. A continued non-regulatory approach may contradict regulators' commitment to making telecommunications service available to all Americans because VoIP providers may not offer universal access without a government mandate.<sup>236</sup>

b. *"Information Services" Are Not Subject to Disability Requirements*

Some pro-regulation groups have expressed concern that VoIP telephony providers will not adequately supply access to disabled individuals without governmental mandates.<sup>237</sup> The 1996 Act requires that "telecommunications services" offer accessible service to persons with disabilities.<sup>238</sup> "Information services" are not subject to the same requirement.<sup>239</sup>

Opponents of regulation contend that VoIP telephony providers are already taking steps to provide disabled persons with the necessary services required to access VoIP technology.<sup>240</sup> These opponents also note that videophone technology, which would aid the hearing-impaired, is less expensive with VoIP telephony.<sup>241</sup> They suggest that videophone technology is more efficient with VoIP service because VoIP transfers several types of communications simultaneously through the same medium.<sup>242</sup> In addition, they argue that a voice communication can be transmitted into e-mail form almost instantaneously, providing an additional benefit to disabled individuals.<sup>243</sup>

---

232. See Donahue, *supra* note 7, at 235.

233. DuFour, *supra* note 9, at 496-97.

234. See *id.* at 507.

235. Brown, *supra* note 81, at 50-51.

236. Lu, *supra* note 24, at 886.

237. See, e.g., DuFour, *supra* note 9, at 499; Kiser & Collins, *supra* note 30, at 31.

238. 47 U.S.C. § 255 (2000).

239. See *id.*

240. Kiser & Collins, *supra* note 30, at 31.

241. DuFour, *supra* note 9, at 498-99.

242. See *id.* at 499.

243. *Id.*

Nevertheless, the assistive technologies used by those with hearing impairments may not be compatible with VoIP technology.<sup>244</sup> Entirely new technologies may be required.<sup>245</sup> Whether VoIP telephony will actually provide disability access to all consumers, even when the costs rise, remains questionable. It is unclear whether VoIP telephony providers would satisfy this objective without governmental oversight.

c. *“Information Services” Are Not Required to Aid Law Enforcement in Call Interception*

Law enforcement is also concerned with regulation of VoIP telephony, particularly during a time of heightened national security.<sup>246</sup> In 1994, Congress enacted the Communications Assistance for Law Enforcement Act (CALEA)<sup>247</sup> to assist law enforcement officials in performing communications surveillance and to open up the traditional telephone network for other law enforcement purposes.<sup>248</sup> CALEA requires “telecommunications carriers” to make their equipment, facilities, and services capable of intercepting communications pursuant to lawful authorization.<sup>249</sup> CALEA specifically excludes “information services” from these requirements.<sup>250</sup>

CALEA regulates any VoIP telephony that involves the traditional telephone network.<sup>251</sup> VoIP providers, whose services do not involve the traditional telephone network, argue that CALEA requirements should continue to be inapplicable to their services because interception of VoIP telephony will be nearly impossible.<sup>252</sup> Interception is difficult, they reason, because VoIP technology routes calls to take the shortest open route between two callers.<sup>253</sup> The path is never certain, unlike traditional wired telephone service.<sup>254</sup> These exempt providers also argue against compliance with CALEA because they would have to route calls over a specific path to make VoIP calls traceable.<sup>255</sup> They also assert that VoIP telephony would lose its most important traits—quick, cheap, and reliable call routing—if it had to comply with these requirements.<sup>256</sup> Pro-regulation groups,

---

244. Kiser & Collins, *supra* note 30, at 31.

245. *Id.*

246. See Joshua E. Adrian, *VoIP on Tap: Whether the FCC Should Apply Wiretapping Standards to Voice Over Internet Protocol*, 57 ADMIN. L. REV. 647, 666 (2005).

247. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in scattered sections of titles 18 and 47 U.S.C.).

248. See *id.*; DuFour, *supra* note 9, at 503-04.

249. 47 U.S.C. § 1002(a) (2000).

250. *Id.* § 1002(b)(2).

251. DuFour, *supra* note 9, at 504.

252. Lu, *supra* note 24, at 872-73.

253. *Id.*

254. *Id.*

255. See Adrian, *supra* note 246, at 664; Lu, *supra* note 24, at 885.

256. See Adrian, *supra* note 246, at 664; Lu, *supra* note 24, at 885.

however, stress that CALEA's regulations are more necessary than ever in this era of increased national security and contend that the burden on VoIP providers to comply with CALEA is negligible when compared with the need for safety.<sup>257</sup>

In an effort to balance the competing interests of national security with the need to keep VoIP telephony efficient and cost-effective, the FCC issued a Notice of Proposed Rulemaking and Declaratory Ruling regarding CALEA.<sup>258</sup> Therein, the FCC made tentative determinations with respect to CALEA's applicability to VoIP telephony.<sup>259</sup> The FCC created two new classifications—managed and non-managed VoIP.<sup>260</sup> Managed VoIP refers to services in which the provider controls the users' communication and manages set-up and connection.<sup>261</sup> In addition, managed VoIP includes services that may "replace a substantial portion of local exchange service so as to bring these services within the scope of CALEA . . . ."<sup>262</sup> In contrast, non-managed VoIP only provides software to its users.<sup>263</sup> Because of software service limitations, the FCC stated that non-managed VoIP qualified for CALEA's "information services" exception.<sup>264</sup> Many interested parties have begun to provide positive and negative comments regarding the use of these distinctions in VoIP telephony regulation.<sup>265</sup> Future application of CALEA's requirements to VoIP telephony remains uncertain despite numerous suggestions.<sup>266</sup>

---

257. See *Senate VoIP Hearing*, *supra* note 190 (statement of Kevin Werbach, Founder, Supernova Group LLC); Kiser & Collins, *supra* note 30, at 32-33.

258. See CALEA Order, *supra* note 145, at 15677.

259. *Id.*; Adrian, *supra* note 246, at 661.

260. CALEA Order, *supra* note 145, at 15694.

261. *Id.* Vonage provides a "managed VoIP service" because the user sets up an account, and Vonage handles that user's connection with others. See *supra* notes 109-12 and accompanying text.

262. See CALEA Order, *supra* note 145, at 15701.

263. See *id.* at 15694. "Non-managed" VoIP telephony includes services similar to Pulver.com, which provides only voice-communication software to their users. See *supra* notes 124-26 and accompanying text.

264. CALEA Order, *supra* note 145, at 15709-10.

265. See Adrian, *supra* note 246, at 664-65. Some commentators suggest that the FCC should continue to classify VoIP as an "information service" to maintain its deregulatory approach regarding Internet-based services and that the FCC use its discretion to classify VoIP a "telecommunications carrier" solely for the purposes of CALEA. *Id.* at 665.

266. See DuFour, *supra* note 9, at 505 (stating that CALEA is the only option until Congress enacts new legislation that assists law enforcement). On a related note, several telecommunications scholars have expressed concern that wiretapping and law-enforcement interception of VoIP telephone calls may threaten the privacy of protected telephone calls. See, e.g., Bender, *supra* note 35, at 641-43; DuFour, *supra* note 9, at 504. Privacy issues may arise because it is difficult for interception technology to differentiate between specific voice and data packets transferred by VoIP technology. Lu, *supra* note 24, at 883, 885. Moreover, any individual may access VoIP telephone calls and invade the privacy of these calls by decrypting the voice and data packets sent between callers. Bender, *supra* note 35, at 642. Despite such privacy concerns, many security officials argue that security requirements far outweigh the possibility of privacy invasion. See Trope & Royalty, *supra* note 13, at 11.

d. *Classifying VoIP Telephony as an "Information Service" May Create a New Monopoly*

Many commentators and regulators believe that VoIP telephony fosters competition in the telecommunications industry by offering the public a new option for its voice-communication requirements.<sup>267</sup> These individuals stress that the goals of the 1996 Act were to promote competition in telecommunications and reduce the amount of regulation imposed on the industry.<sup>268</sup> Therefore, they argue, regulators should leave VoIP telephony unregulated because of the enhanced competition it offers.<sup>269</sup>

Indeed, VoIP telephony may help destroy the monopoly that some traditional telephone service providers, like the Bell companies, allegedly still enjoy.<sup>270</sup> Some commentators, however, argue that it is equally plausible that an unregulated service like VoIP telephony will create a new monopoly.<sup>271</sup> VoIP telephony's classification as an "information service" would shift the competitive balance among telecommunications service providers in favor of VoIP telephone companies because VoIP providers are not subject to many of the costs attendant to regulation.<sup>272</sup> If this regulatory dichotomy is permitted to continue, unfair competitive practices and other antitrust problems will result.<sup>273</sup>

Competitive neutrality is necessary to ensure that the telecommunications industry provides consumers with efficient and affordable services.<sup>274</sup> VoIP providers will not be motivated to offer quality ser-

---

267. See, e.g., *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, 11624 (1998) (separate statement of FCC Commissioner Michael K. Powell); *Senate VoIP Hearing*, *supra* note 190 (statement of Kevin Werbach, Founder, Supernova Group LLC); Abernathy, *supra* note 193.

268. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); H.R. REP. NO. 104-204, at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11.

269. Abernathy, *supra* note 193. As previously noted, the FCC may forbear from regulation when it determines that regulation is no longer necessary because of strong competition in a field. 47 U.S.C. § 160(a)-(b) (2000); Cohen, *supra* note 49, at 143.

270. See *Senate VoIP Hearing*, *supra* note 190 (statement of Kevin Werbach, Founder, Supernova Group LLC). Some argue that the Bell monopoly continues because government regulators permit Bell companies to acquire competitors. See, e.g., Press Release, Jon Yarian, Dep't of Justice Clears the Way for Bell Monopoly: COMPTTEL Disappointed with Hasty Approval of Anti-Competitive Mergers (Oct. 27, 2005), available at <http://comptelascent.org/news/recent-news/102705.html>. In fact, on October 27, 2005, the U.S. Department of Justice gave the Bell companies permission to acquire AT&T and MCI—two of Bell's few existing competitors. *Id.*

271. Bender, *supra* note 35, at 647; see also Frieden, *supra* note 66, at 241 ("[C]ontinuing the effort to segment telecommunications services, cable services and information services, at least in the way Congress and the FCC have gone about it, increases the problem of discrimination among providers in competition with each other and, consequently, could have the effect of deterring competition." (quoting Steve Kelley, *Liberating Our Digital Future: How the 1996 Telecommunications Act Definitions Are Hobbling Change*, 27 WM. MITCHELL L. REV. 2137, 2161 (2001))).

272. See Frieden, *supra* note 195, at 265.

273. Bender, *supra* note 35, at 649.

274. See Speta, *supra* note 56, at 1144.

vice if no rules or regulations *require* the provision of quality service.<sup>275</sup> Moreover, if regulators treat different types of VoIP telephony differently, then a lack of regulatory parity may lead companies to tailor their services to fit within the parameters of unregulated VoIP telephony.<sup>276</sup> Providers offering unregulated types of VoIP telephony would not have to expend financial resources to comply with regulations and, therefore, could offer a more cost-effective service to the public.<sup>277</sup> Only those providers offering unregulated VoIP could function effectively in the marketplace, and competition in telecommunications would decrease, directly contradicting the anti-monopoly goals of telecommunications regulation. The FCC and Congress considered regulation necessary for earlier telecommunications monopolies, and, similarly, regulation would solve the impending VoIP telephony monopoly crisis before it begins.<sup>278</sup>

## 2. VoIP Telephony Is the Functional Equivalent of Traditional Telephone Service and Should Be Classified Accordingly

In the declaratory ruling that classified Pulver.com's FWD service, the FCC concluded that FWD's VoIP telephone service was an unregulated "information service."<sup>279</sup> Nevertheless, users of a service like FWD are making telephone calls exactly as they would if using traditional telephone service, which is a "telecommunications service."<sup>280</sup> The only difference between FWD and the service provided by a traditional telephone carrier is that FWD sends a call over the Internet while a traditional carrier sends a call over wire-based facilities.<sup>281</sup> The distinction between VoIP telephony and traditional telephone service becomes increasingly blurred with further technological advancement of VoIP service; the two services are now functional equivalents.<sup>282</sup>

Proponents of regulation argue that the services are equivalent and that the "information service" classification gives VoIP telephony providers an unfair cost advantage, allowing VoIP providers to evade regulatory-compliance costs, access charges, and interconnection fees.<sup>283</sup> Pro-regulation groups claim that this cost advantage is unwarranted because VoIP telephony and traditional telephone service are now equivalent.<sup>284</sup> These groups maintain that "if it looks like a duck,

---

275. See Brown, *supra* note 81, at 50-51.

276. See Speta, *supra* note 56, at 1142-43.

277. Frieden, *supra* note 66, at 220.

278. See Bender, *supra* note 35, at 647.

279. Pulver.com Petition, *supra* note 60, at 3313.

280. Frieden, *supra* note 195, at 274.

281. See Donahue, *supra* note 7, at 232.

282. *Id.* at 230.

283. See Frieden, *supra* note 66, at 220-21; Speta, *supra* note 56, at 1144.

284. Frieden, *supra* note 66, at 220-21.

walks like a duck, quacks like a duck, it must be a duck,” and it should be regulated accordingly.<sup>285</sup> Traditional telephone service providers and other proponents of regulation ask one question: If we have to expend resources to comply with regulatory requirements, why are VoIP telephony providers, who offer virtually the same services, exempt from the requirements?<sup>286</sup>

In the past, the FCC has used a similar functional equivalency analysis in determining the level of regulation to which a service should be subject.<sup>287</sup> Under this analysis, the type of regulation imposed on certain services depends on “whether the services under consideration differ in any material functional respect.”<sup>288</sup> Consumers, no doubt, consider VoIP telephony an equal alternative to traditional telephone service, and the two services provide consumers with the ability to make a telephone call with no functional difference.<sup>289</sup>

Because VoIP telephony provides the same service as traditional telephony, regulators should manage the two types of services in the same manner.<sup>290</sup> To achieve fairness, regulators should not “ignore the telecommunication[s] services aspect of a convergent, blended, and hybrid service that clearly [provides] telecommunications . . . .”<sup>291</sup> Therefore, *if* regulators decide to classify VoIP telephony under the 1996 Act, then they should classify it as a “telecommunications service.”<sup>292</sup>

---

285. Donahue, *supra* note 7, at 231 (quoting Leonard J. Kennedy & Lori A. Zallaps, *If It Ain't Broke . . . The FCC and Internet Regulation*, 7 *COMMLAW CONCEPTUS* 17, 17 (1999)). Technological innovation in VoIP service has made it the functional equivalent of traditional telephone service. See Donahue, *supra* note 7, at 232. Former FCC Chairman Michael K. Powell responded to this argument, advocating a continued unregulated approach to VoIP telephony: “I say maybe the ugly duck is a swan, . . . and you might want to leave it alone.” Stephan Labaton & Matt Richtel, *Battle Brews on Regulation of Internet-Based Telephone Service*, N.Y. *TIMES*, July 28, 2004, at C4.

286. As one commentator has noted, “it is also problematic if the provider of a service that looks and feels to the user just like conventional telephony is subject to regulation far different from that imposed on conventional telephony providers.” Weinberg, *supra* note 49, at 338.

287. *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 794 (D.C. Cir. 1982).

288. *Id.*

289. Donahue, *supra* note 7, at 232. As former FCC Commissioner Kathleen Q. Abernathy acknowledged, “In a world where different platforms are used to provide functionally equivalent services, regulators must harmonize distinct regulatory frameworks.” Kathleen Q. Abernathy, FCC Comm’r, Overview of the Road to Convergence: New Realities Collide with Old Rules, Keynote Address at the Journey to Convergence: Challenges and Opportunities—Symposium on Digital Migration (Jan. 22, 2003), in 12 *COMMLAW CONCEPTUS* 133, 133 (2004).

290. See Donahue, *supra* note 7, at 232. If VoIP telephony is to be classified under a definition in the 1996 Act, then it should be classified as a “telecommunications service.” See *supra* notes 280-86 and accompanying text.

291. Frieden, *supra* note 66, at 241.

292. See, e.g., AT&T Petition, *supra* note 60, at 7465-66, 7469; *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, 11544-45 (1998).

### 3. Classifying VoIP Telephony as a “Telecommunications Service” Is More Accurate but Inappropriate

Although one could argue that VoIP telephony fits within the definition of a “telecommunications service,” classifying it as such may not be the most effective solution. VoIP telephony is still developing, and the technology may be improved further.<sup>293</sup> Allowing technology the opportunity to be innovative has long been a goal of regulators; that is why the “information services” classification exists.<sup>294</sup> If VoIP telephony is required to comply with “telecommunications service” regulations, then the cost of the service will rise, eliminating consumer choices and contravening the competitive goals of the 1996 Act.<sup>295</sup>

Because of these possible rising costs, some commentators argue, burdening the service with regulation this soon would harm consumers, and those consumers would eventually pay the costs of regulatory compliance.<sup>296</sup> As former FCC Chairman Michael Powell stated, “[i]f innovative new IP services were all thrown into the bucket of telecommunications carriers, we would drop a mountain of regulations, and their attendant costs, on these services and perhaps stifle innovation and competition in direct contravention of the Act.”<sup>297</sup> The burden of regulation may be too substantial for new VoIP telephony providers.<sup>298</sup> In that respect, regulators should not classify VoIP telephony as a “telecommunications service.”

#### B. *The 1996 Act’s Provisions Should Not Control the VoIP Debate*

As discussed above, VoIP telephony exhibits features of both an “information service” and a “telecommunications service.”<sup>299</sup> Similar to an “information service,” VoIP telephony changes the human voice into digital data to transmit it to the end user.<sup>300</sup> In contrast, VoIP telephony behaves like a “telecommunications service” insofar as it delivers a voice communication exactly as the caller spoke it.<sup>301</sup> In the middle of this classification debate, regulators attempt to strike a balance between taking a hands-off approach and striving to treat comparable services similarly.<sup>302</sup> A telephone company should not escape

---

293. See DuFour, *supra* note 9, at 479.

294. Donahue, *supra* note 7, at 229-30.

295. *Id.* at 231.

296. DuFour, *supra* note 9, at 498.

297. *In re Federal-State Joint Bd.*, 13 F.C.C.R. at 11623 (separate statement of Commissioner Michael K. Powell).

298. See *id.*

299. See *supra* text accompanying notes 279-92.

300. See *supra* notes 12-15 and accompanying text.

301. See Frieden, *supra* note 195, at 274.

302. See *supra* notes 279-92 and accompanying text.

regulation merely because it employs the Internet as a conduit for communications instead of a circuit of wires.<sup>303</sup>

This note proposes that VoIP is neither an “information service” nor a “telecommunications service” because it does not fit precisely into either category.<sup>304</sup> Regulators cannot coherently apply either definition to VoIP telephony because this service contains attributes of both classifications.<sup>305</sup> While important policy objectives accompany the “telecommunications service” classification,<sup>306</sup> “[a]pplying the full legacy regulatory regime to VoIP . . . simply to ensure that particular social policy objectives are met, would be a colossal case of the tail wagging the dog.”<sup>307</sup> It is also unfair, however, to classify VoIP as an “information service” and thereby relieve VoIP providers from the obligations imposed on their competitors.<sup>308</sup>

Regulators, however, should not leave VoIP telephony regulation in its current state. Many opportunities for arbitrary regulation exist because of the inequality of regulations for “telecommunications services” and “information services.”<sup>309</sup> The more asymmetry that exists in telecommunications regulation, the more likely that someone may use these disparate regulations to circumvent the costs of compliance.<sup>310</sup> To avoid regulation, VoIP telephony providers need only operate their services in a manner that fits within the definition of an “information service.”<sup>311</sup>

Because of the conflicting nature of the above policies and because VoIP telephony is a service with facets of both classifications, “[i]t no longer makes sense to place services into distinct regulatory silos depending on the identity of the provider.”<sup>312</sup> Hybrid technologies were not foreseen when the 1996 Act was drafted and, therefore, do not fit into its regulatory scheme.<sup>313</sup> The policy and regulatory distinctions made in the 1996 Act may have made sense ten years ago, but now such distinctions are an albatross around the necks of regulators who are compelled to use existing statutes to address a situation never contemplated by the statutes.<sup>314</sup> There is no purpose in regula-

---

303. See Frieden, *supra* note 195, at 256.

304. Roberts, *supra* note 57, at 157; see also *supra* notes 299-303.

305. Donahue, *supra* note 7, at 230; see also *supra* notes 219-28, 279-82, 300-01 and accompanying text.

306. See *supra* notes 229-78 and accompanying text.

307. *Senate VoIP Hearing*, *supra* note 190 (statement of Kevin Werbach, Founder, Supernova Group LLC).

308. See Frieden, *supra* note 195, at 257.

309. See *id.*

310. See *id.* at 265.

311. Frieden, *supra* note 66, at 220.

312. Abernathy, *supra* note 289.

313. Donahue, *supra* note 7, at 230.

314. Frieden, *supra* note 195, at 257.

tors searching for answers in an outdated act, particularly when they are addressing such an unpredictable industry.<sup>315</sup>

Regulators should cease differential treatment of functionally equivalent services.<sup>316</sup> The FCC, courts, Congress, and states should acknowledge that VoIP telephony does not fit into the existing dichotomy.<sup>317</sup> Moreover, they should acknowledge that VoIP telephony will never fit into either classification because VoIP service involves a convergence of “telecommunications services” and “information services.”<sup>318</sup> Convergence is the future of telecommunications, and, therefore, regulators will not be able to address future regulatory issues by using existing definitions.<sup>319</sup> It is time for a change in telecommunications regulation.

#### IV. A SOLUTION

The United States is in the midst of the most substantial regulatory disaster ever in the telecommunications industry. Because of Congress’s lack of foresight regarding the future of telecommunications, VoIP telephony’s future is uncertain.<sup>320</sup> The growing quality of VoIP telephony and the substitution of VoIP telephony for traditional telephone service render regulation necessary.<sup>321</sup> Regulators must find a manner in which to revamp telecommunications regulation to address this new technology.<sup>322</sup>

Individual reforms will not resolve the problem, and “[r]ather than apply an incremental approach, regulatory reform should consist of a change in the underlying conceptions of the regulatory model.”<sup>323</sup> Therefore, Congress should draft a new act to address VoIP telephony regulation. To successfully create new telecommunications legislation for VoIP telephony, Congress must decide what purpose the new legislation should accomplish and consider suggestions from those experts in the telecommunications field.<sup>324</sup> Congress should use the VoIP Regulatory Freedom Act as a starting point for this new piece of legislation.<sup>325</sup> With certain amendments, the VoIP Regulatory Free-

---

315. See Donahue, *supra* note 7, at 230.

316. Frieden, *supra* note 195, at 266.

317. See Frieden, *supra* note 66, at 211-12.

318. *Id.*

319. DuFour, *supra* note 9, at 480.

320. See Brenner, *supra* note 51, at 177.

321. Blythe, *supra* note 10, at 181.

322. Speta, *supra* note 56, at 1155-56 (quoting *Senate VoIP Hearing*, *supra* note 190 (statement of FCC Chairman Michael K. Powell)). As former FCC Chairman Powell stated, “the days are numbered on the way we’re doing this under the current statute. I do believe there is going to have to be a statute in the future that recognizes these dramatic technical changes and gets us out of the buckets of the [1996] Act.” *Id.*

323. Cohen, *supra* note 49, at 148-49.

324. See *infra* text accompanying notes 328-45.

325. See *infra* notes 353-74 and accompanying text.

dom Act would successfully solve the problem of VoIP telephony regulation.<sup>326</sup> Significant changes are on the horizon in the telecommunications industry, and material changes in telecommunications regulation must follow.<sup>327</sup>

#### A. *Goals of a New Act*

As former FCC Commissioner Kathleen Q. Abernathy succinctly stated, “Rather than reflexively extending our legacy regulations to VoIP providers, we need to take this opportunity to step back and ascertain whether those rules still make sense . . . .”<sup>328</sup> To accomplish this goal, regulators should remember the failures of the 1996 Act’s classification scheme and should consider whether the regulatory proposals made by Congress, telecommunications scholars and practitioners, and other regulatory entities adequately address these failures. Regulators must not hinder technological innovation by applying old regulations to new services.<sup>329</sup>

Because of the limited nature of the classification structure, regulators should take an entirely new approach to VoIP telephony regulation.<sup>330</sup> In this process, however, regulators must remember what occurred the last time Congress attempted to predict the future of the telecommunications industry.<sup>331</sup> A new act should not address technologies in narrow terms and rigid classifications, but it should instead focus on broad application of regulations.<sup>332</sup>

A new act would end futile battles over whether two services using differing technologies are providing the same service.<sup>333</sup> Equivalent services should be regulated in an equivalent manner to ensure regulatory fairness to all providers of telecommunications services.<sup>334</sup> “Regulatory parity is . . . an important touchstone in ensuring that the market is served by the most efficient providers and efficient technologies . . . .”<sup>335</sup> To achieve such regulatory parity, a new act should also clarify the role of the states vis-à-vis the federal government.<sup>336</sup>

---

326. See *infra* notes 353-74 and accompanying text.

327. See Lu, *supra* note 24, at 883.

328. Abernathy, *supra* note 289, at 136.

329. *Id.* at 137.

330. See DuFour, *supra* note 9, at 480 (discussing his conclusion—if VoIP telephony does not fit within the regulatory framework, then future technologies will not fit either).

331. Brenner, *supra* note 51, at 180.

332. Abernathy, *supra* note 193, at 240.

333. Speta, *supra* note 56, at 1134.

334. *Id.* at 1138.

335. *Id.*

336. Abernathy, *supra* note 193, at 242.

When creating a new act, Congress should also be cautious to avoid over-regulation that would burden VoIP telephony providers.<sup>337</sup> Commentators suggest that telecommunications regulation should be reformed to eliminate the high costs of entering the marketplace.<sup>338</sup> Satisfying this goal requires diligence when deciding which regulations should apply to VoIP telephony. “[W]hen it comes to nascent services such as VoIP, we should employ the regulatory equivalent of strict scrutiny: We should make sure that our rules are narrowly tailored to the governmental interests at stake.”<sup>339</sup> If regulation is used merely to ensure efficient competition and to protect consumers, then VoIP telephony will further develop free of weighty governmental restraint.<sup>340</sup> Moreover, regulators will satisfy their goals of enhancing competition and protecting consumers while decreasing the financial burdens of regulatory compliance.<sup>341</sup>

Finally, any regulatory action taken regarding VoIP telephony should be taken on a federal level because VoIP telephone service knows no borders.<sup>342</sup> A unified federal strategy is logical because of the ubiquitous nature of VoIP telephony.<sup>343</sup> Action by Congress may provide the regulatory certainty and equal treatment necessary for VoIP telephony providers to become equal and efficient competitors in the marketplace.<sup>344</sup> Congress must first lay a foundation for more specific interpretation by the FCC.<sup>345</sup> With certain changes, the VoIP Regulatory Freedom Act offers a solution to the VoIP telephony regulation quandary.

#### B. *A Revision of the VoIP Regulatory Freedom Act*

As discussed above, the VoIP Regulatory Freedom Act was introduced in the 108th Congress, in both the House of Representatives and the Senate.<sup>346</sup> This bill was Congress’s first major attempt to regulate VoIP telephony.<sup>347</sup> Prior to the close of the 108th Congress, Senator Sununu and others revised the bill for the Senate Commerce Committee.<sup>348</sup> A number of these revisions addressed states’ rights in

---

337. *See id.* at 240.

338. *See, e.g.,* Speta, *supra* note 56, at 1130-31.

339. Abernathy, *supra* note 289, at 136.

340. *See* DuFour, *supra* note 9, at 507.

341. *Id.*

342. *Id.* at 501.

343. Abernathy, *supra* note 289, at 136.

344. DuFour, *supra* note 9, at 507.

345. *See* Abernathy, *supra* note 193, at 242; DuFour, *supra* note 9, at 507.

346. VoIP Regulatory Freedom Act of 2004, H.R. 4129, 108th Cong.; VoIP Regulatory Freedom Act of 2004, S. 2281, 108th Cong.

347. *See* S. 2281; Brown, *supra* note 81, at 52.

348. S. REP. NO. 108-425 (2004).

regulating VoIP telephony.<sup>349</sup> As amended, the bill passed the committee by a vote of 13-9, but many of its basic provisions had changed.<sup>350</sup> Although no one has reintroduced the bill in the 109th Congress, telecommunications scholars are confident that Congress will address the issue of VoIP telephony regulation again.<sup>351</sup> When it does confront the issue, Congress should make certain changes to the original bill, include some of the amendments passed in the committee, and add several new provisions.<sup>352</sup>

In its original form, the VoIP Regulatory Freedom Act encouraged exclusive federal responsibility for VoIP regulation and prohibited state regulation entirely.<sup>353</sup> After the committee's changes, the legislation gave states the ability to participate in VoIP telephony regulation.<sup>354</sup> The revised bill allowed states to impose taxes and fees as they found necessary to fund telecommunications programs, including universal service and 911 service, and to provide consumer protection.<sup>355</sup> This approach is a step in the right direction; states are already regulating other telecommunications carriers and, therefore, have the unique experience necessary to regulate *all* telecommunications carriers.<sup>356</sup> Allowing states to regulate VoIP telephony will create regulatory parity and fairness between carriers of traditional telephone service and carriers of VoIP telephone service.<sup>357</sup>

In addition, the bill, as revised by the committee, provided for the enforcement of CALEA on VoIP telephony providers and, as a result, ensured interception access for law-enforcement officials.<sup>358</sup> Due to the increased significance of national security, CALEA's regulations are more necessary than ever.<sup>359</sup> As noted in Part III, the FCC has already issued a Notice of Proposed Rulemaking and Declaratory Ruling regarding CALEA's application to VoIP telephony, but, cur-

---

349. *See id.* at 3, 5-6. Some of the revisions to the bill included the following: (1) placing a moratorium on state regulation, as opposed to banning it entirely; (2) permitting states to collect fees from VoIP telephony providers to support state 911 systems; (3) allowing states to enforce consumer protection laws against VoIP telephony providers; (4) permitting the enforcement of CALEA against VoIP telephony providers; (5) permitting states to tax VoIP telephone service as necessary; and (6) granting states the freedom to require VoIP providers to contribute to state universal service funds as well as the federal universal service program. *Id.*

350. *See id.* at 7.

351. *See, e.g.,* Brown, *supra* note 81, at 52.

352. *See infra* notes 353-74 and accompanying text.

353. VoIP Regulatory Freedom Act of 2004, S. 2281, 108th Cong. § 2(a)-(b). The bill also prohibited any federal entity from delegating responsibility for, or authority over, VoIP to states. *Id.* § 2(c).

354. *See* S. REP. NO. 108-425, at 3.

355. *Id.*

356. *See VoIP Services: Will the Technology Disrupt the Industry or Will Regulation Disrupt the Technology?*, Hearing Before the Subcomm. on Telecomm. and the Internet of the H. Comm. on Energy and Commerce, 108th Cong. 84 (2004) (statement of Robert Nelson, Commissioner, Michigan Public Service Commission).

357. *See id.*

358. S. REP. NO. 108-425, at 6.

359. Kiser & Collins, *supra* note 30, at 32-33.

rently, its application is uncertain.<sup>360</sup> The revision of the VoIP Regulatory Freedom Act acknowledging the applicability of CALEA to VoIP telephony provides more certainty in VoIP regulation.<sup>361</sup> Moreover, application of CALEA to VoIP telephony would create more regulatory parity because phone-to-phone VoIP telephony is already subject to CALEA's requirements and, under the revised bill, all other types of VoIP telephony would be subject as well, satisfying VoIP-regulation commentators.<sup>362</sup>

The bill, in its original form, only required the FCC to collect universal service contributions for federal programs.<sup>363</sup> The alterations made by the committee fixed this problem, and the amended bill permits states to collect universal service fees for their own funds.<sup>364</sup> Nevertheless, another problem exists in the universal service section of the original bill that was not changed by revision: The original bill permitted the FCC to exempt certain VoIP telephony applications from universal service requirements.<sup>365</sup> No VoIP telephony provider should be exempt from this requirement, and the solution is to further revise the bill to eliminate the subsection allowing exemptions and to require every provider to contribute a flat-fee to universal service.

The original draft of the bill also called for voluntary efforts on the part of VoIP industry leaders to produce plans on how to provide service to disabled individuals and how to provide 911 service to all consumers.<sup>366</sup> The original bill also required the FCC to appoint an organization to develop guidelines and requirements for these plans.<sup>367</sup> Under the language of the original bill, no guidelines or mandates were actually required. VoIP industry leaders could decide to do nothing to promote disability access or to offer 911 service when provision of such service is not cost-effective. Lawmakers, therefore, should strengthen this section of the VoIP Regulatory Freedom Act to guarantee these aspects of telecommunications services to all Americans. In the revised form of the bill, the committee's amendments *required* the FCC to establish a transitional period in which VoIP providers must begin to offer 911 service "comparable to [the service] provided by other telecommunications carriers."<sup>368</sup> Specific technical

---

360. CALEA Order, *supra* note 145, at 15677; *see also* DuFour, *supra* note 9, at 505; *supra* notes 258-65.

361. S. REP. NO. 108-425, at 6. In its original form, however, the VoIP Regulatory Freedom Act only required VoIP telephony providers to produce general plans for how to provide access to law enforcement agencies. VoIP Regulatory Freedom Act of 2004, S. 2281, 108th Cong. § 4(c).

362. *See* DuFour, *supra* note 9, at 504-05.

363. S. 2281 § 4(b).

364. S. REP. NO. 108-425, at 3.

365. S. 2281 § 4(b)(2).

366. *Id.* § 5(a).

367. *Id.*

368. S. REP. NO. 108-425, at 5.

requirements written into the bill are unnecessary to achieve reliable 911 service for consumers. Simply using the word “require” in the text will ensure that VoIP telephony providers offer it to consumers.<sup>369</sup>

Finally, several provisions in the bill differentiate between “VoIP Applications” and “connected VoIP applications.”<sup>370</sup> The definition of a “VoIP Application” specifically excludes “an application that is used for voice communications that both originate and terminate on the [PSTN],” which encompasses applications providing phone-to-phone VoIP telephony.<sup>371</sup> The definition of “connected VoIP application” only encompasses VoIP applications that send or receive communications from the PSTN—including phone-to-phone VoIP telephony.<sup>372</sup> This divided approach wholly contradicts the concept of regulatory parity because regulators should address all functionally similar services in the same manner.<sup>373</sup> Moreover, exempting “connected VoIP applications” from several provisions in this bill creates a classification quandary similar to the one created by the 1996 Act.<sup>374</sup> Congress should remove this distinction from the purview of the bill and should regulate *all* VoIP telephony providers similarly under the VoIP Regulatory Freedom Act.

## V. CONCLUSION

Regulatory ambiguities and inconsistencies are inevitable, particularly in the field of telecommunications regulation.<sup>375</sup> Regulatory ambiguities and inconsistencies are not only inevitable but also rampant in the field of VoIP telephony regulation. Such regulation is in disarray, and Congress must develop a new approach to effectively govern this new technology.

Together, the FCC, Congress, courts, and states have begun the process of studying and implementing VoIP regulation. This consolidated effort, however, has led to inconsistent treatment of functionally equivalent services. Congress took a definitive step toward consistent treatment by considering the VoIP Regulatory Freedom Act, but many revisions are required to ensure that this Act is fair and equal for all VoIP telephony providers. The recommendations described above are merely a beginning point for what should be done to effectively regulate VoIP technology. The enactment of an amended form

---

369. *See id.*

370. *See* S. 2281.

371. *Id.* § 10(a)(6)(B).

372. *Id.* § 10(a)(2).

373. *See supra* notes 279-92 and accompanying text.

374. *See supra* notes 81-193 and accompanying text.

375. Roberts, *supra* note 57, at 202.

2006]            *The Need for Regulatory Parity in VoIP Telephony*            623

of the VoIP Regulatory Freedom Act will create regulatory certainty and consistency.

At present, “the only certainty is change.”<sup>376</sup> In the year ahead, the FCC should provide the clarification necessary in the VoIP industry, and the bill discussed above should provide a definitive regulatory framework for all types of VoIP telephony while still satisfying regulatory goals. With regulations that meet the VoIP industry’s expectations and that meet consumer’s requirements, VoIP will reach its potential as a truly “amazing” technology.

---

376. DuFour, *supra* note 9, at 480.

