# Modernizing the Communications Act

## COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (VON) submits these comments in response to the Questions for Stakeholder Comment, contained in "Modernizing the Communications Act" White Paper, released January 8, 2014, by the Committee on Energy and Commerce. For 17 years, VON (www.von.org) has worked to advance federal and state regulatory policies that enable Americans to take advantage of the promise and potential of IP (Internet Protocol)-enabled communications. VON's members – including AT&T, Broadvox, the Cloud Communications Alliance, Google, Microsoft/Skype, Nextiva, RingCentral, and Vonage/Vocalocity – are developing and delivering voice, data, video and other communications applications over the Internet. In these comments VON explains how regulation of IP communications has developed, how the market and consumers have fared under the current framework, and makes recommendations relating to questions two and five of the Questions for Stakeholder Comment.

**Development of IP Communications Regulation**

The history of Internet communications regulation arguably begins in March 1996 when a small trade association of long distance resellers, called America's Carriers Telecommunication Association (ACTA), filed a petition asking the FCC to stop the sale of software that was used to enable voice communications between computers over the public Internet, or in some cases from computers to telephones. ACTA also asked the FCC to begin a rulemaking to define permissible communications over the Internet. ACTA argued that it was

not in the public interest to permit long distance service to be given away and suggested that the software providers should be subject to the same regulations as telecommunications providers.

Comments were filed in response to the ACTA petition but the FCC never issued an order in that proceeding. Basically, not much else happened on the issue for the next seven years. Regulators asked questions, but Internet telephony, as it was known at the time, was still a curiosity; used mostly by hobbyists.

However, during that time the decreasing cost of personal computers and the increasing availability of broadband technologies, naturally led to the growing use of Internet communications. Companies such as Free World Dial-up and ITXC (a wholesale Voice over IP provider) were challenging traditional telecom business models by using the Internet to provide free or low cost international communications services, and a company called Vonage began offering a home voice service over the customer's high speed Internet connection that for the first time allowed residential customers to manage their communications services – providing features and capabilities previously only available to business users; and at much lower prices than were available from traditional telephone companies.

The relative quiet ended in July 2003, when the Minnesota Department of Commerce filed a complaint with the Minnesota Public Utilities Commission asserting that Vonage was providing a telephone exchange service and subject to state law and regulations as a telephone company, including the requirements to get a certificate of operating authority, file tariffs and provide 911. In September 2003, the Minnesota commission issued an order asserting jurisdiction over Vonage, and telling it to comply with state telephone regulations. That order was subsequently reversed by a federal court and that reversal upheld on appeal. But more

importantly, Vonage, while the matter was under appeal, also filed a petition for declaratory ruling with the FCC asking it to preempt the Minnesota PUC order, arguing that its service should be classified as an information service and thus not subject to state regulation; or, in the alternative, that regardless of the regulatory classification its service could not be separated into distinct interstate and intrastate communications.

The FCC agreed with Vonage that it was impractical to separate the service into interstate and intrastate communication, relying in part on the fact that the service was nomadic – that is the service could be accessed from a broadband connection anywhere in the world, and that permitting Minnesota to regulate the service would thwart a federal policy of promoting advanced communications services, noting that multiple state regulatory regimes would likely violate the Commerce Clause. The FCC did not address whether the service should be classified as an information or telecommunications service; that issue remains unresolved today. While the issue was not specifically before the FCC, the Commission did note in its *Vonage* decision that it was likely also to preempt state regulation of other entities, such as cable companies, that provided integrated communications capabilities over the Internet.

Also in 2004, the Commission issued what is now referred to as the *Pulver Order*. In that decision, the FCC specifically declared that Pulver's Free World Dialup (FWD) – which was a directory service that facilitated free, computer-to-computer Internet voice communications between FWD subscribers, using unique numerical identifiers (and not telephone numbers) was an information service and not a telecommunications service. Information services are generally not subject to state regulation and limited, if any, FCC regulation. The *Pulver Order* is important today because it is the basis for the regulatory scheme for companies that offer

Internet-based computer-to-computer voice services that do not interconnect with the public telephone network.

Finally, in 2004, the FCC released a Notice Proposed Rulemaking asking hundreds of questions about the proper scope of federal regulation of IP-enabled services. In summary, the NPRM broached the question of whether Voice over IP (VoIP) or other IP-based services should be classified as information or telecommunications services, or otherwise subject to some or all of the regulations that applied to telecommunications carriers.

Today, the FCC does not classify interconnected VoIP (which is the broadband-based service that can be used, among other ways, as a replacement for basic telephone services) as either telecommunication services or as information services. Information services are generally subject to no state regulation, and limited, if any, FCC regulation. Interstate telecommunications services, in contrast, are subject to significant regulation contained in Title II of the Communications Act. While VoIP services remain unclassified, during the past nine years the FCC has imposed regulatory requirements on interconnected (and in some cases, non-interconnected) VoIP providers, using its Title I or ancillary authority to broadly promote consumer protection and public safety, or pursuant to specific statutory mandates (e.g., 2010 CVAA). These obligations include providing access to E911, complying with CALEA, contributing to the Federal Universal Service Fund, allowing states to impose state universal service contribution obligations on intrastate VoIP revenues, making the service accessible to persons with disabilities, paying FCC regulatory fees, requiring interconnected VoIP providers to port telephone numbers to other communications providers, requiring FCC approval before discontinuing interconnected VoIP service, and requiring interconnected VoIP providers to file reports of network outages with the FCC.

In light of the federal regulatory regime applicable to interconnected VoIP providers and the precedent of the FCC's 2004 Vonage decision, the states have primarily adopted a hands-off approach to regulation of VoIP. In fact, to date, almost 30 states have passed legislation that would prohibit utility-like regulation of IP-enabled services, including VoIP. Those laws have allowed providers to offer ubiquitous communications services to Americans throughout the country, unhampered by geographic boundaries and the hodgepodge of hundreds of state regulations – many of which were developed for a monopoly telephone system. VoIP providers, however, remain subject to compliance with state and federal consumer protection laws, ensuring that consumers have recourse against bad actors.

**Current State of VoIP Market**

Under this focused regulatory regime, the VoIP market has flourished, growing at a compound annual rate of 17 percent, with more than 40 million users of interconnected VoIP, and hundreds of millions more using one-way and non-interconnected VoIP service. The market for VoIP in the United States is competitive, innovative and growing. Competition among VoIP providers (there are estimates of more than 500 operating in the United States) creates incentives to keep prices low and to continue developing new features, and entirely original products. For example, VoIP providers are testing high-quality audio encoding that would improve sound fidelity of phone calls – known as HD voice. New IP communications applications – for voice, IM, data and video - are developing for use on smart phones, tablets and in gaming and other interactive software. Many of these are used in consumer markets; however, businesses are increasingly using these tools to enhance the customer service experience. Imposing significant new state or federal regulatory responsibilities on VoIP providers could endanger this growth by increasing the cost of providing VoIP services, and slowing technical innovation.

**Recommendations**

Exclusive federal jurisdiction and limited regulation of IP communications have promoted a competitive marketplace that nurtures innovation. Given the risk that unnecessary regulation can raise costs, slow adoption, and stymie innovative activity, Congress and the FCC should avoid the strained process of applying legacy laws and regulations to IP communications services. Rather, the promotion of public safety and consumer protection should remain the primary focus of regulations. A presumption against regulating beyond such limited and principled confines correctly places the burden on the Commission and commenters to demonstrate the need for new regulations. In addition, any regulation pursued must be technically feasible. Imposing requirements on IP services that cannot be technically achieved at reasonable cost will not provide consumers with meaningful solutions. Finally, whatever changes to the Act, if any, the Subcommittee chooses to make, there needs to be flexibility for the dynamic changes in technology and the communications markets.

**Conclusion**

VON looks forward to working with subcommittee staff as they consider options for updating the Communications Act. Please contact the undersigned if you have any questions.

Respectfully submitted

VOICE ON THE NET COALITION

Glenn S. Richards
Executive Director
2300 N Street, NW
Washington, D.C. 20037
(202) 663-8215
glenn.richards@pillsburylaw.com

January 31, 2014