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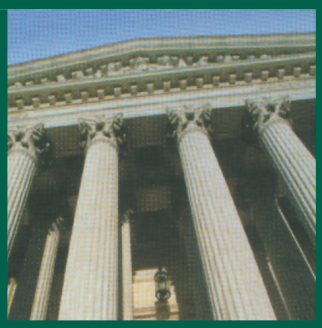
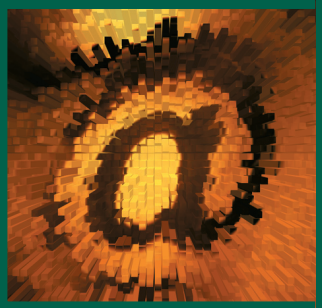
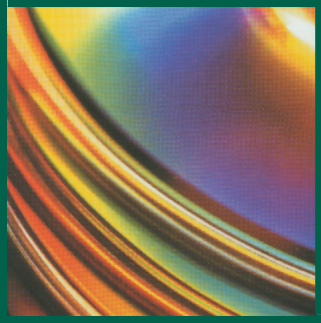
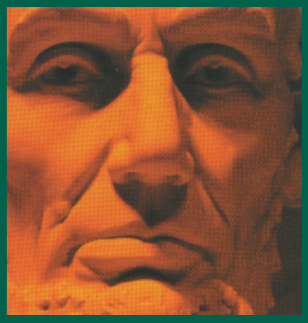


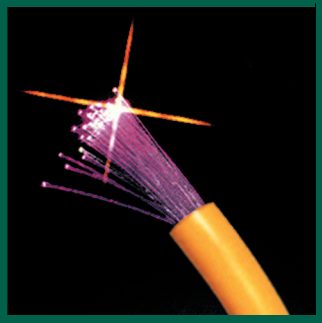
VoIP at the Crossroads 2005

February 4, 2005









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VoIP AT THE CROSSROADS 2005

AN UPDATED ROADMAP OF CURRENT GOVERNMENTAL ACTIVITIES REGARDING VOICE-OVER-THE-INTERNET SERVICES*

FEBRUARY 2005

Over the course of the last year, the world has been introduced to Voice-over-the-Internet Protocol, or VoIP. To the uninitiated, VoIP involves the placement of voice calls over packet-switched networks utilizing Internet Protocol (TCP-IP). This IP-based technology has the potential to revolutionize and even replace traditional circuit-switched telephone service. After years of stops-and-starts, the technological hurdles to VoIP are finally being overcome.

Last year, virtually every segment of the telecommunications industry announced plans for the aggressive deployment of VoIP-based solutions, from traditional phone companies to cable companies to new emerging VoIP providers. The interest in and attention to VoIP in the newspapers and on Wall Street are increasingly reflected in the regulatory and legislative fora. In particular, the regulatory status and related obligations of these services are hotly debated and have shifted to the forefront of telecom issues. Key regulatory and legal determinations likely to be made in 2005 may facilitate or impede nascent efforts to deploy VoIP solutions.

VoIP issues are a clear priority for the Federal Communications Commission ("FCC"). The FCC last year initiated a comprehensive Notice of Proposed Rulemaking ("NPRM") addressing the appropriate regulatory framework for IP-enabled services, including VoIP offerings. The FCC also acted upon several carrier-specific petitions seeking clarification as to the regulatory classification, jurisdictional nature, and specific regulatory obligations of various types or subsets of VoIP services. In the upcoming year, the Commission is likely to act in the comprehensive VoIP docket as well as respond to a number of additional carrier-specific requests. Further, the FCC has pending a number of broader rulemaking proceedings that will likely address how VoIP offerings fit into various aspects of the legacy telephone regulatory regime.

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The action on VoIP is not just at the FCC. Members of Congress and state public service commissions are increasingly vocal about their interest in this new service and how it should be regulated. Awareness of VoIP is also growing in international fora, as is concern about the ramifications of this new technology on existing international regulatory regimes. Any formal actions on VoIP taken by these entities will also have significant, long-term effects on VoIP and the telecommunications industry as a whole.

This updated Roadmap is designed to be a general guide to all that is going on in the great VoIP debate. The attached exposition and summary chart identify and review the nature, scope and anticipated timing of VoIP-related proceedings and other significant activities at the FCC, in Congress, in the states, and internationally. The summary includes VoIP-specific proceedings, as well as broader subject matter dockets and inquiries that could impact how VoIP is regulated or the obligations of VoIP providers. Given the significance of many of these VoIP-related matters to a broad cross-section of the telecommunications industry, it is essential for VoIP providers, more traditional voice telecommunications companies, equipment manufacturers and other parties interested in VoIP to understand and stay abreast of all of these many moving parts.

*****

Wiley Rein & Fielding hopes that this updated Roadmap will serve as a useful guide for navigating the multi-faceted VoIP debate, understanding the inter-relationships of the various proceedings, and identifying for your organization the many opportunities for participating in this important dialogue. Should you have any questions or require additional information about any VoIP-related matters, please contact:

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*First published as *VoIP at the Crossroads*, February 2004

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TABLE OF CONTENTS

I.	**Executive Summary**	**1**
II.	**VoIP-Specific Proceedings at The Federal Communications Commission**	**4**
III.	**Other Relevant FCC Proceedings**	**10**
IV.	**VoIP Activities in Congress**	**13**
V.	**VoIP Activities in the States**	**15**
VI.	**VoIP Activities Outside the United States**	**17**
VII.	**VoIP Federal Regulatory and Policy Developments Summary Chart**	**19**
VIII.	**Contact Information**	**21**

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I. EXECUTIVE SUMMARY

The Federal Communications Commission

The FCC has been the focal point for much of the VoIP debate thus far. In 2004, the FCC made significant progress in clarifying the current regulatory and jurisdictional status of a number of VoIP services and related regulatory obligations, and building a factual record with which to adopt a comprehensive regulatory framework for all VoIP services going forward. The FCC has also acted on a number of carrier-specific VoIP petitions that provide further clarification to the industry. In particular, the FCC has initiated or acted upon the following petitions/proceedings:

> ***IP-enabled Notice of Proposed Rulemaking.*** This comprehensive NPRM is a top-to-bottom examination of IP-enabled and VoIP services.
>
> ***Pulver.com Petition.*** The FCC granted a declaratory ruling that pulver.com's Free World Dialup service, a computer-to-computer VoIP offering, is an unregulated interstate information service.
>
> ***AT&T Declaratory Ruling Petition.*** The FCC denied AT&T's request that its phone-to-phone IP telephony services should be exempt from access charges primarily because of the lack of enhanced functionality or net protocol conversion in AT&T's service.
>
> ***Vonage Preemption Petition.*** The FCC preempted a Minnesota Public Utilities Commission order, which had directed Vonage to comply with state telephony regulations. The FCC found Vonage's service to be an interstate service subject only to federal regulation.
>
> ***SBC Internet Services Numbering Waiver Petition.*** The FCC granted an SBC IP affiliate's request for direct access to telephone numbers to facilitate the commercial rollout of VoIP services. Direct access to numbering resources was available only to telecommunications carriers.

The primary focus of the FCC's efforts in 2005 will likely be the conclusion of the IP-enabled proceeding, as well as action on a number of additional carrier-specific petitions, including:

> ***Level 3 Forbearance Petition.*** Level 3 requests that the FCC forbear from imposing access charges on computer-to-phone and phone-to-phone VoIP services. FCC action is required by March 2005.
>
> ***SBC Forbearance Petition.*** SBC requests that the FCC forbear from applying Title II common carrier requirements on IP-based networks and services. FCC action is required by May 2005.

While the Commission considers these VoIP-specific proceedings, it is also in a position to rule on a number of major dockets that could have significant collateral effects on VoIP deployment. Most of these broader subject matter proceedings do not address VoIP more than tangentially. However, these decisions will likely have profound and lasting ramifications on the development

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of VoIP as well as on the future of traditional telecommunications services with which VoIP providers compete. These proceedings include the following:

Universal Service. As the FCC examines whether to revise its universal service contribution methodology, a key question will be whether VoIP providers will be required to contribute and, if so, at what amount.

E911. Although VoIP technology currently limits the ability of these offerings to provide comparable E911 access, the FCC is looking at whether mandatory E911 compliance should be extended to VoIP services.

Intercarrier Compensation. The FCC is expected in early 2005 to seek further comment on intercarrier compensation proposals, and the potential shift to a "bill-and-keep" or unified compensation approach. The need to rationalize and reform the current mechanisms by which carriers are compensated for access to their networks will necessarily impact VoIP providers' costs of doing business as well as their ability to effectively and efficiently interconnect with legacy networks.

Disability Access. The Commission has not yet acted on a 1999 Notice of Inquiry asking whether VoIP services should be subject to the mandatory disability access requirements of Section 255. Disability access has become a hot button issue in VoIP debates.

CALEA. The FCC has tentatively concluded that broadband Internet access services and managed VoIP services (as opposed to peer-to-peer VoIP services) are subject to CALEA. The obligation to ensure CALEA-compliant law enforcement access to VoIP providers' networks and services could pose significant financial and technological hurdles.

The Congress

VoIP has also emerged at the forefront of telecommunications issues in Congress. Questions regarding the regulatory treatment of this new technology are increasingly being raised in telecommunications-related hearings, and 2004 witnessed the introduction of VoIP-specific legislative proposals for the first time. VoIP-specific legislation has recently been reintroduced in this Congress. VoIP-specific provisions may also crop up on broader telecommunications bills, such as anticipated efforts to rewrite the Telecommunications Act of 1996. Either way, it is anticipated that the FCC will receive increased expressions of interest from Capitol Hill as the agency continues its examination of VoIP issues.

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The States

Many states have also initiated proceedings to address the regulatory status of VoIP. In 2005, it is expected that states will continue to explore this issue, examining the full implications of the FCC's Vonage preemption decision, and the extent to which they can regulate different flavors of VoIP services. To date, the states have typically taken one of three approaches:

> ***Hands-off Regulatory Treatment.*** *Florida* has largely exempted VoIP services from regulation.
>
> ***Regulate VoIP as a Telecommunications Carrier.*** *Minnesota* and *New York* found VoIP to be subject to state telecommunications regulation to some degree. Federal courts have subsequently blocked both state actions, and the Minnesota decision was also preempted by the FCC. A number of state commissions have sought judicial review of the FCC's decision.
>
> ***Initiate General Proceedings/Wait and See.*** *Pennsylvania*, *Utah*, *Ohio*, *Alabama*, and *California* have all opened general proceedings to study the extent of their jurisdiction over VoIP.

Outside the United States

Finally, the United States is not alone in its interest in VoIP and the regulatory questions surrounding it. Foreign regulators and international regulatory bodies are also struggling with the appropriate regulatory framework for VoIP services. Most of these efforts are still at a preliminary stage, although there is growing concern about the effect increased deployment of VoIP will have on global regulatory regimes, such as international settlement and accounting rates. Further, certain technological developments being embraced abroad – such as ENUM and Internet Protocol Version 6 – may encourage VoIP deployment.

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II. VoIP-SPECIFIC PROCEEDINGS AT THE FEDERAL COMMUNICATIONS COMMISSION

The FCC began its active consideration of VoIP issues with a public forum in December 2003 featuring state PUC commissioners, industry leaders, and specialized VoIP providers. The majority of the forum focused on the regulatory classification of VoIP and the effect that such classification will have on various public policy goals, such as universal service, emergency access, and disability access. Concurrent with this forum, Chairman Powell announced the establishment of a VoIP Working Group to spearhead ongoing VoIP efforts at the FCC.

Each of the FCC Commissioners has stressed the continued need for expedient federal action to provide regulatory certainty and to foster the development of VoIP services. In particular, outgoing Chairman Powell has indicated a strong preference for leaving VoIP unregulated unless a clear showing is made that regulation is needed with respect to "rules designed to ensure law enforcement access, universal service, disability access, and emergency 911 services can and should be preserved in the new architecture." Notably, Chairman Powell has also emphasized that VoIP should not be forced into the current regulatory regime. In a January 2004 speech to the National Press Club, the Chairman noted: "We cannot contort the character of the Internet to suit our familiar notions of regulation. [To do that would be to] dumb down the genius of the net to match the limited vision of a regulator." Chairman Powell has proven to be a champion of the dynamic and fast-changing environment of the Internet, seeking to limit "to a minimum the labyrinth of regulations and fees that apply to the Internet."

Commissioner Kevin Martin has also been supportive of the Commission's efforts to further investigate VoIP issues and the FCC's actions to date, and has publicly praised efforts "to provide a clearer regulatory framework" for VoIP services. He suggests that as "VoIP services move toward becoming a substitute for traditional telephone services, we need to carefully consider and address any questions and concerns," particularly with respect to 911 access and law enforcement. He further believes that the Commission must strive to "treat similar services in a similar fashion."

Commissioner Kathleen Abernathy has suggested that the discourse should be focused on EoIP (or Everything over Internet Protocol), rather than VoIP, to underscore the fundamental differences between IP-based services and traditional voice services. Commissioner Abernathy, a consistent supporter of a hands-off regulatory approach for nascent services, proposed a number of "overarching predispositions" when looking at VoIP: an understanding that VoIP services are predominately federal; a skepticism with regard to economic regulation of VoIP services; and a commitment to ensure that VoIP services meet critical social policy objectives. Commissioner Abernathy has also pushed the Commission to act on service-specific VoIP petitions to provide clarity to the industry as to the current rules even while the FCC moves forward on the future regulatory framework for VoIP.

While Commissioner Jonathan Adelstein and Commissioner Michael Copps have been generally supportive of the Commission's efforts to examine VoIP issues comprehensively, they have both expressed some concern that the FCC is not fully conscious of the consequences of its classification decisions. They have also been critical of the "piecemeal" approach to FCC

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decision-making, and the lack of clear pronouncements on universal service and intercarrier compensation issues. In particular, Commissioner Copps dissented from the Commission's decision granting the pulver.com petition and has voiced apprehension that the FCC entered into the IP-enabled NPRM with preconceived conclusions. Commissioner Adelstein expressed concerns regarding the appropriate state role in regulating VoIP. Both emphasize that the FCC's social policy objectives must be guaranteed in a VoIP environment before wholesale classification changes are implemented.

A. The Regulatory Basics of VoIP

The FCC's first pronouncements on VoIP issues can be traced back to the Commission's *Report to Congress* in 1998 ("*Report*" or "*1998 Report to Congress*"). In the *Report*, the Commission identified and described three general types of VoIP services:

1) *Computer-to-computer VoIP services*. These services do not connect to the public switched telephone network (PSTN); rather, they typically allow two computer users to contact each other over a broadband connection (for example, pulver.com's Free World Dialup service).

2) *Computer-to-phone (hybrid) VoIP services*. These offerings are either initiated or terminated over a broadband connection through computer software or specialized equipment (for example, Vonage's DigitalVoice offerings).

3) *Phone-to-phone VoIP services*. The FCC defined phone-to-phone VoIP by setting out four characteristics of such offerings: (1) the provider must hold itself out as providing voice telephony or facsimile transmission service, (2) the provider must not require the customer to use customer premises equipment ("CPE") different from that CPE necessary to place an ordinary touch tone call or facsimile transmission over the PSTN, (3) the provider must allow the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and (4) the provider must transmit customer information without net change in form or content (for example, international calling cards).

In the *1998 Report to Congress*, the FCC also made tentative determinations as to the proper regulatory classification for such services. Under the Communications Act, the FCC has two general classifications for services: "telecommunications services," which fall under Title II of the Act and are subject to a comprehensive regulatory regime; and "information services," which fall under Title I of the Act and are largely free from FCC regulation. In the *Report*, the FCC suggested that computer-to-computer VoIP services were information services, while phone-to-phone VoIP services were telecommunications services. The FCC did not address the proper classification for hybrid VoIP services. The FCC suggested that it would revisit those tentative conclusions in a subsequent proceeding – which began with the IP-enabled services NPRM last winter.

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The statutory classification issue for VoIP issues is affected and informed by the FCC's continued efforts with respect to the regulatory classification of broadband services. In 2002, the FCC determined that cable modem service is an information service, not a telecommunications or cable service. The U.S. Court of Appeals for the Ninth Circuit in *Brand X* rejected the FCC's classification, finding that the service is an information service with a telecommunications component. The FCC has subsequently appealed that decision to the U.S. Supreme Court, which will hear oral argument in that case in the Spring 2005. The timing of the court's actions may impact the FCC's ability to conclude the IP-enabled proceeding in an expedited manner.

B. The IP-Enabled Services Proceeding

On February 12, the FCC adopted a comprehensive NPRM addressing all IP-enabled services, which includes VoIP offerings. The Commission's review of IP-enabled services is a top-to-bottom examination of VoIP services and VoIP-related issues. It is important to note at the forefront that the FCC made no tentative determinations in the NPRM as to any of the fundamental issues at stake. The FCC did, however, acknowledge several key (and potentially conflicting) objectives that will steer the debate. Specifically, the Commission recognized the need to guarantee and implement the FCC's vital social objectives even as services migrate to Internet platforms. The agency also stressed the need to allow Internet-based services to develop subject to minimal regulation. That tension, or perceived tension, will compel the Commission and relevant stakeholders to attempt to balance those dual goals.

The FCC asked the industry to describe and assess the different types of available VoIP services, and to determine for each type of service what the proper legal and regulatory framework should be going forward. The most fundamental inquiry is to determine the proper regulatory classification of each type of service. That threshold question will give shape to the nature and extent of regulation that will apply to the different flavors of VoIP offerings. The Commission also asked for comment on a broad range of policy issues and objectives and how those objectives should be extended to or applied to VoIP offerings. Among the issues under consideration are universal service, intercarrier compensation, public safety, and disability access. The Commission did not address law enforcement access issues in the comprehensive NPRM, deferring consideration of those issues to a separate CALEA proceeding. Within the IP-enabled NPRM, the agency also sought input as to whether economic regulations and other common carrier-type obligations should be applied to different types of VoIP services. In addition, the role of state commissions, and their respective jurisdiction over VoIP services, will be a factor in that analysis. The comment cycle for the IP-enabled docket has closed, and a decision is expected sometime this year.

C. VoIP-Specific Petitions

The FCC's early reluctance to establish a regulatory scheme for nascent VoIP services, coupled with the desire to frame these regulatory issues in a beneficial light, led a number of VoIP providers to file petitions with the FCC regarding the proper regulatory classification of

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particular VoIP services. The following chart gives a quick snapshot of those petitions, their current status, and the underlying technologies implicated by the requests:

Petition	Status	Phone-to-Phone	Computer-to-Phone	Computer-to-Computer
pulver.com	Granted			X
AT&T	Denied	X		
Vonage	Granted		X	X
Level 3	Pending	X	X	
SBC	Pending		X	X
SBC Internet	Granted		X	X

The FCC acted on three of these petitions in 2004, and an additional one in early 2005.

pulver.com Petition. pulver.com asked the FCC for a declaratory ruling that its Free World Dialup service, a computer-to-computer VoIP offering, is neither telecommunications nor a telecommunications service. Free World Dialup does not allow customers to contact persons on the PSTN, and does not assign customers a traditional telephone number. The service requires customers to use special computer software and/or specialized equipment to access this peer-to-peer application. There is no charge for this service. The FCC granted pulver.com's petition in February 2004, finding that Free World Dialup is neither telecommunications nor a telecommunications service. The FCC further concluded that pulver.com's service is an unregulated information service under Title I of the Act. Lastly, the FCC ruled that the service is an interstate service subject to federal jurisdiction, suggesting that state efforts to regulate the service would be preempted. Importantly, the FCC's order is explicitly limited to the Free World Dialup offering and does not extend to other pulver.com offerings or other computer-to-computer VoIP services.

AT&T Declaratory Ruling Petition. In October 2002, AT&T filed a request for declaratory ruling that AT&T's phone-to-phone IP telephony services are exempt from access charges. AT&T's service in question uses IP-based transport to connect two users on the traditional circuit-based networks (phone-to-phone VoIP). Based upon its interpretation of the *1998 Report to Congress*, AT&T argued that access charges cannot be assessed against its VoIP offering until the FCC affirmatively rules as such. The FCC denied AT&T's petition in April 2004, concluding that under current FCC rules, AT&T's service is a telecommunication service subject to interstate access charges. The significant characteristics of the service for the agency were AT&T's use of ordinary

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telephone equipment, PSTN-to-PSTN only communications, and the lack of enhanced functionality to the end user. The FCC suggested that action was necessary on this petition to provide clarity to the industry on current FCC rules, but that this decision did not preclude the FCC from adopting a different approach going forward for VoIP services in other ongoing intercarrier compensation or VoIP proceedings.

Vonage Preemption Petition. Vonage Holdings Corporation filed a petition for declaratory ruling in September 2003 seeking preemption of an order of the Minnesota Public Utilities Commission ("PUC"), which directed Vonage to comply with Minnesota laws and regulations governing telephone service providers. The service at issue, Vonage's DigitalVoice, does not allow calls to be initiated with a traditional telephone over the PSTN. Rather, DigitalVoice is accessible only over a high-speed Internet connection with Vonage-specific equipment. However, Vonage's service allows its customers to call other Vonage customers as well as non-customers connected to the traditional PSTN (thus, this is a computer-to-computer and a computer-to-phone VoIP offering). Subsequent to the filing of the petition, a U.S. District Court vacated the PUC's decision, finding that Vonage's service was an information service. The FCC then granted Vonage's petition and preempted the Minnesota PUC's attempt to apply Minnesota's traditional "telephone company" regulations on Vonage's DigitalVoice VoIP service. The Commission determined that Vonage's service was interstate in nature, and that the FCC, not state commissions, has the authority to determine whether certain regulation will apply to VoIP services. In addition, the FCC found that the preemptive effect of its decision applies to services that have the same capabilities as DigitalVoice, including those offered by cable companies. However, the Commission did not foreclose state authority over VoIP services with respect to general taxation, advertising, marketing, and consumer protection issues. A number of state commissions, including both the California and Minnesota PUCs, have sought judicial review of the FCC's determination, claiming that the Commission's order exceeds its statutory jurisdiction.

SBC Internet Services Numbering Waiver. SBC Internet Services, Inc. (SBCIS) filed a petition for a limited waiver of the FCC's rules in July 2004 seeking direct access to numbering resources to provide IP-enabled services on a commercial basis. As an information service provider, SBCIS must act through an intermediary telecommunications carrier in order to acquire telephone numbers for its end-user customers. Concluding that the waiver will permit SBCIS to "expedite the implementation of IP-enabled services … and enable SBCIS to deploy innovative new services," the FCC granted the waiver request in February 2005, subject to some conditions, including compliance with the FCC's numbering utilization and optimization requirements. The Commission indicated that this waiver would remain in place until the FCC adopts final IP-enabled numbering rules.

In addition, two additional carrier-specific petitions are pending before the Commission.

Level 3 Forbearance Petition. In December 2003, Level 3 Communications LLC asked the FCC to "forbear from enforcing its governing statute and rules to the extent that they could be interpreted to permit LECs to impose interstate or intrastate access charges on

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IP-PSTN traffic and on certain PSTN-PSTN traffic." This requested relief applies to all similarly situated VoIP services (computer-to-phone and phone-to-phone VoIP offerings). Level 3 suggests that its requested relief is only an interim measure until the unified intercarrier compensation proceeding is completed. ISP-bound traffic would not be impacted, nor would intraLATA traffic that is governed by interconnection agreements. The Commission has extended its deadline to act on this petition until March 2005.

SBC Forbearance Petition. SBC's February 2004 forbearance petition requests that the FCC find that the Title II common carrier requirements do not apply to IP-based networks and services. SBC defined IP-based services to include both computer-to-computer and computer-to-phone VoIP offerings. The FCC has extended its deadline to act on this petition until May 2005. In addition, SBC filed a petition for declaratory ruling that IP-based services are exclusively interstate information services; that declaratory ruling request was folded into the comprehensive VoIP docket.

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III. OTHER RELEVANT FCC PROCEEDINGS

Beyond VoIP-specific dockets, the FCC currently has pending a number of major rulemaking proceedings on substantive issues of general applicability across a variety of services. While several of these inquire specifically about how VoIP fits into the legacy regulatory regime, all of these proceedings and issues have the potential to significantly impact the future development of VoIP services. The substantive and procedural interplay between the VoIP NPRM and these issue-specific proceedings will be a key development to follow.

Universal Service. Under the Communications Act, all telecommunications service providers are required to contribute to the FCC's universal service program – at an amount averaging approximately nine percent of interstate revenues. Information service providers are not required to contribute. The FCC is currently considering fundamental changes to its universal service contribution methodology. In December 2002, the Commission adopted a series of interim measures to reform the current revenue-based mechanism. At that time, the FCC also issued a NPRM introducing four potential replacement contribution methodologies that are under consideration: a modified revenue-based approach, a number-based approach, and two different connection-based approaches. Within that NPRM and other associated broadband-specific proceedings, the FCC is considering the obligation of broadband providers (both DSL and cable modem services) to contribute to the universal service fund. While VoIP services are not squarely at issue in this proceeding, the Commission may address the obligation of VoIP providers to contribute to the universal service fund within these proceedings, relying in large part on the regulatory classification of VoIP services. Some VoIP providers contend that they already contribute to the universal service fund because their underlying access providers pass through their own universal service obligation. Among the questions facing the FCC: whether VoIP providers can be required to contribute? If so, should they contribute the same amount as traditional telephony providers? Would the exclusion of VoIP providers jeopardize the sufficiency of the USF? Could the exclusion of VoIP providers from the obligation to contribute to the USF create an unfair competitive advantage for VoIP providers?

E911. E911 issues were the subject of the FCC's first VoIP Solutions Summit last March, and have continued to attract significant attention from regulators and the industry. Many VoIP providers do not currently provide traditional E911 access to their customers due to limitations on VoIP technology with respect to providing the necessary callback and location data. A group of VoIP providers represented by the VON Coalition, including AT&T, Vonage, pulver.com, Level 3 and others, entered into a voluntary agreement last December to provide limited E911 access within a set schedule. The FCC will need to consider if mandatory E911 compliance should be extended to VoIP services, and if such compliance is technically feasible. In 2003, the FCC asked for further comment on how the growth of VoIP offerings affects the ability of PBX manufacturers and providers to provide public safety access. In the short-term, the ability to provide reliable and comparable E911 access may be a more significant marketing/consumer issue than a regulatory one.

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Intercarrier Compensation. The current intercarrier compensation obligations of some phone-to-phone VoIP providers were clarified in the order denying AT&T's Declaratory Ruling Petition. Such obligations may be further developed through FCC action on either the Level 3 Petition or the IP-enabled NPRM. In general, the requirement for VoIP service providers to compensate other carriers for use of their networks (either by access charge, reciprocal compensation, or some other means) remains an open question. The outcome of the FCC's intercarrier compensation reform efforts may greatly impact VoIP providers' costs to provide service, as well as their ability to effectively and efficiently interconnect with legacy networks. In April 2001, the FCC issued a NPRM contemplating a unified regime for intercarrier compensation. The focus of that proceeding has been the adoption of a "bill and keep" approach under which carriers would no longer pay access charges for use of other carrier's networks. In 2004, the Intercarrier Compensation Forum (ICF), a group representing a cross-section of the industry, provided one industry proposal to reform intercarrier compensation; additionally, a number of alternative approaches were also offered last year by state regulators, rural carriers, and wireless providers. The final ICF plan has garnered the most attention and is the most controversial, as many of the original ICF members dropped out prior to release of the final plan. Some VoIP providers also have been critical of the lack of specifics as to VoIP interconnection and intercarrier compensation obligations in the current proposals. The Commission is expected to seek further comment and to refresh the record in the intercarrier compensation docket in the first quarter of 2005.

Disability Access. The FCC held a VoIP Solutions Summit on disability access issues in May 2004. Section 255 of the Act requires the FCC to ensure that telecommunications relay services are available to disabled persons to the extent possible. To that end, the Commission requires manufacturers of telecommunications equipment and providers of telecommunications services to guarantee that their services are accessible and available to the disabled community. Notably, Section 255 provides for access to telecommunications transmission services, as opposed to the traditional "telecommunications" and "information services." The FCC has read telecommunications transmission services broadly to include IP-based offerings, but has not specifically found that VoIP services are subject to Section 255. In a 1999 Notice of Inquiry, the FCC sought comment on the need to provide the disabled community with access to VoIP and IP-based services. The Commission has not acted upon that NOI, but did seek to refresh the record in that docket as part of the IP-enabled NPRM. Many providers contend that mandatory requirements are unnecessary because carriers have pledged voluntarily to provide access for the disabled. Nonetheless, disability access has been a hot button issue at the FCC's 2003 VoIP forum and other VoIP-specific industry events.

CALEA. The Communications Assistance for Law Enforcement Act ("CALEA") requires telecommunications carriers to ensure that their networks allow for law enforcement agencies to intercept telephone calls. If mandated, CALEA compliance for VoIP providers could prove to be an expensive and technologically challenging undertaking. Some have suggested that VoIP providers' voluntary compliance is sufficient. While the DOJ, FBI, and other executive agencies filed a petition in early

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2004 to establish CALEA policies in a "comprehensive, technology neutral manner rather than in a piecemeal fashion," the agencies asked the FCC to "address a variety of issues including what broadband services and service providers should be subject to CALEA." The FCC subsequently sought comment on that petition, and opened a separate proceeding to study the issue. The Commission tentatively concluded that broadband Internet access services and managed VoIP services should be CALEA compliant. Further, CALEA obligations would not extend to non-managed, or peer-to-peer, VoIP services, *e.g.* pulver.com's Free World Dialup. Importantly, the definition of telecommunications carrier in the CALEA statute varies from that in the Communications Act, therefore, a finding that a service is a telecommunications service subject to CALEA obligations may not mean the service is also a telecommunications service under the Communications Act.

Access to Broadband Platforms. BellSouth, Qwest, and Verizon have each filed a petition for forbearance asking that broadband/DSL services and networks are free from Title II common carrier regulation and Computer Inquiry access requirements. Some VoIP providers have been critical of these petitions and their potential impact on unaffiliated ISPs' future access to broadband consumers. For his part, FCC Chairman Powell has announced the need to preserve "Net Freedoms" for broadband consumers, including the (1) freedom to access to content of their choice; (2) the freedom to use applications of their choice; (3) the freedom to attach personal devices of choice; and (4) the freedom to obtain service plan information. Chairman Powell argues that "if we secure a reasonable balance between the needs of network providers and internet freedom, consumers will reap the benefits of broadband *without intrusive regulation.*"

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IV. VoIP ACTIVITIES IN CONGRESS

Consistent with the FCC's recent focus, VoIP issues have also received serious attention on Capitol Hill in recent months. A number of stand-alone VoIP legislative proposals were introduced last year, and those same, or similar, proposals are expected to be discussed again in 2005. VoIP-related issues are further expected to play a significant role in efforts to revisit and/or rewrite the Telecommunications Act of 1996. In addition, both direct and indirect congressional advocacy and influence will play a key role in steering the development of VoIP regulatory policies at the FCC.

A. Committee Hearings

In 2004, both the House of Representatives and the Senate held a series of hearings to address VoIP issues, serving both as a mechanism by which to introduce the issue to members as well as a vehicle to assess specific legislative proposals. More substantive consideration of VoIP issues and legislative proposals is expected this term. It is too soon to tell the extent to which the new leadership of both the Senate Commerce and House Energy and Commerce Committees will impact Congress' consideration of telecom and VoIP policy.

B. Stand-Alone VoIP Legislation

Two significant VoIP proposals were introduced last term. One of these has already been reintroduced. Both are likely to inform, if not serve as the framework for, any future VoIP-specific legislation:

First, Senator John Sununu and Rep. Charles Pickering introduced companion legislation, the VoIP Regulatory Freedom Act of 2004, which would establish that regulatory authority over VoIP services is expressly limited to the federal government. The bill would allow the FCC to determine the need for specific regulatory requirements for those VoIP providers connected to the PSTN with respect to intercarrier compensation, universal service, disability access, and public safety/E911 access. The Senate Commerce Committee approved a substantially revised version of this proposal, carving out a greater role for states to regulate VoIP, and limiting the period of exclusive federal jurisdiction to a three-year moratorium. Specifically, that bill would preserve state authority to regulate VoIP with respect to general business marketing and consumer protection laws and regulations. Senator Byron Dorgan also added an amendment to permit state commissions to establish intrastate universal service and intercarrier compensation obligations for VoIP providers. Senator Conrad Burns added a further amendment addressing the 911/E911 obligations of VoIP providers. Although this bill was not ultimately enacted, Senator Sununu has announced his intent to reintroduce the legislation in its original form sometime this year.

Second, Reps. Cliff Stearns and Rick Boucher introduced VoIP legislation last term, the Advanced Internet Communications Services Act of 2004. This proposal would avoid the

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current debate over whether VoIP services fall within the definition of information or telecommunications services through the adoption of a third classification, "advanced Internet communications service." The bill would also assert exclusive federal jurisdiction over VoIP services, while limiting the FCC's ability to regulate VoIP services. The bill does, however, provide the FCC with authority to regulate public safety access and disability access to VoIP services, as well as address the obligation of VoIP providers to contribute to universal service and compensate legacy carriers for use of their networks. Reps. Stearns and Boucher have recently reintroduced their proposal.

The primary focus of these legislative proposals has been to address the jurisdictional nature of VoIP services, and it remains unclear if the FCC's action on the Vonage petition will obviate the need or desire for these legislative proposals.

C. Communications Act Rewrite

Both Houses of Congress have indicated a desire to revisit, if not rewrite, the Telecommunications Act of 1996 in light of the rapid growth of wireless and Internet-based technologies, as well as additional developments with respect to competitive options and the manner in which consumers access telecommunications and video services. It is likely that part of any such review will be an assessment of the ability of the current statutory "silo" structure to provide adequately for VoIP services. Today, as discussed above, different types of providers are regulated under separate statutory titles, *i.e.*, information services under Title I, telecommunications services under Title II, and cable services under Title VI. Congress will need to consider if VoIP services fit within the current structure, or should be shifted into a distinct IP-enabled/broadband statutory title. More fundamentally, Congress will need to consider if the "silo" approach should be rejected in favor of a service-based or layered regulatory model. FCC Chairman Powell has suggested that there "ought to be a legal category that recognizes [VoIP's] nature and capabilities, its costs characteristics, its jurisdictional nature." Based upon the multi-year deliberation over the Telecommunications Act of 1996, it is highly unlikely that any significant action in this area will be taken in 2005. Nonetheless, telecom and VoIP policy will likely move to the forefront of issues receiving substantial congressional consideration this term.

D. Advocacy

Direct and indirect pressure from Capitol Hill is likely to intensify as the Commission continues its examination of VoIP issues. Prior to the FCC's initiation of the IP-enabled docket, a number of prominent senators provided the first wave of congressional input. Among them, Senator George Allen voiced support for a "national framework … free of unnecessary or unreasonable regulatory costs or burdens." Senator John McCain and John Ensign agreed, focusing on the need for regulatory certainty. More recently, a large contingent of congressmen issued a letter to Chairman Powell urging expedited action on VoIP jurisdictional issues. Further congressional advocacy efforts are expected in 2005 as the FCC moves closer to resolution of major VoIP-related issues.

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V. VoIP ACTIVITIES IN THE STATES

The debate over VoIP regulation extends beyond Washington as many state commissions have initiated proceedings to address the regulatory status of VoIP. No consensus, however, has developed as to how states should, or can, regulate VoIP services. The recent action by the FCC regarding the interstate nature of at least some VoIP services adds further complications to state consideration of VoIP policy. The threshold questions in many states remain jurisdictional: do states have the authority to regulate VoIP? If so, how broad is that authority? The full impact of the FCC's Vonage Order is not yet known, and the breadth and significance of that order vis-à-vis state regulation will likely unfold in the coming months. It is also important to note that several state commissions have sought judicial review of the Vonage Order, arguing that the FCC had exceeded its authority in preempting state regulation of Vonage's VoIP service.

Those states that have initiated proceedings to determine the appropriate regulatory obligations of VoIP services have generally adopted one of three basic approaches:

1. ***Hands-Off Regulatory Treatment.*** *Florida* passed legislation largely exempting VoIP services from regulation, but that legislation did not address the applicability of access charges to VoIP offerings.

2. ***Regulate VoIP as a Telecommunications Carrier.*** In 2003, the *Minnesota* PUC ruled that Vonage's VoIP offering is a "telecommunication service" and accordingly required Vonage to comply with all state telecom regulations, including compliance with E911 access requirements. A U.S. District Court subsequently vacated the PUC's decision, ruling that Vonage's offering is an "information service;" this ruling was upheld by the U.S. Court of Appeals for the Eighth Circuit relying upon the FCC's Vonage Order. The Vonage Order preempted Minnesota's application of state telecom rules to Vonage's service. In May 2004, the New York PSC similarly declared that Vonage is a telephone company under state law, and required Vonage to acquire a certificate to operate in the state. That determination was also subsequently blocked temporarily by a federal court, with further court proceedings expected in early 2005. In June 2004, the Washington state commission also ruled that companies using local telephone network are telecommunications companies subject to state regulation. Notably, even in these states that assert jurisdiction over VoIP offerings, a common carrier-light approach has been applied, focusing on consumer protection issues and avoiding the imposition of economic regulations.

3. ***Initiate General Proceedings/Wait to Regulate VoIP.*** A number of states have opened general proceedings and/or held hearings to study the extent of their jurisdiction over VoIP and to assess the need for regulation of these services. Among these are *Pennsylvania, Utah,* and *Alabama. California* had been one of the most aggressive state commissions in asserting jurisdiction over VoIP service providers. The California PUC initiated a general proceeding to further study VoIP issues in 2004. In its initiating order, the PUC tentatively concluded that VoIP that is interconnected with the PSTN is a "public utility telecommunications

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service." *Colorado* also opened, and subsequently closed, a docket examining VoIP issues, citing the pending FCC action.

NARUC Input on FCC Policy. The National Association of Regulatory Utility Commissioners ("NARUC") has been critical of the FCC's "piecemeal" approach to VoIP issues, in particular the FCC's Vonage jurisdictional decision that failed to address intrastate intercarrier compensation and universal service issues. That said, NARUC has demonstrated a willingness to work with the FCC on evaluating "traditional jurisdictional principles" with respect to VoIP services, while stressing the ongoing vital role of state commissions over consumer protection and other issues. A number of individual state commissions have also filed comments and been active in the Vonage and general VoIP proceedings.

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VI. VoIP ACTIVITIES OUTSIDE THE UNITED STATES

The FCC's focused attention on VoIP mirrors the increasing interest in VoIP regulatory issues by foreign regulators and international regulatory bodies. Most overseas fora are in the same preliminary study of VoIP issues. As a result, any final pronouncement from the United States on the regulatory treatment of VoIP has the potential to be the basis for such regulations overseas. The following summarizes noteworthy VoIP-related activities abroad:

European Commission Ruling. The European Commission ("EC") has taken the position that Internet voice services do not constitute voice telephony unless: (1) they are offered commercially and separately to the public as voice services; (2) they are provided to and from PSTN termination points; and (3) they are offered in real time at the same level of speech quality and reliability as offered by the PSTN. In June 2004, the EC released a staff working document on VoIP that addresses many of the same issues as the FCC's general IP-enabled Notice, and also examines the ability of VoIP to fit within the EC's July 2003 electronic communications framework. The EC is expected to issue final guidelines in the near future, yet these guidelines are advisory, not binding, on EC member countries. Moreover, the European Regulators Group (ERG), comprised of the regulatory heads of EC member countries, have signaled their desire for a common regulatory framework for VoIP services to be considered in early 2005. The group has stressed the need for a coordinated regulatory approach amongst European nations and regulators. Their initial short-term focus has been on emergency access and numbering resource issues.

International and Regional Organizations. The International Telecommunication Union ("ITU") has studied IP telephony, without making any definitive rulings. The Inter-American Telecommunication Commission ("CITEL") has also commissioned a study on the current status and regulatory implications of IP telephony in the Americas.

Noteworthy Actions by Other Countries. In April 2004, the Canadian regulator (CRTC) provided its preliminary views on the regulatory framework applicable to VoIP services, including the view that computer-to-phone or phone-to-phone VoIP services "are the same as circuit-switched voice service," and the existing telecom regulatory framework should apply to these services. In contrast, the United Kingdom regulator (Ofcom) has adopted a largely hands-off approach to VoIP regulation in its interim guidance on VoIP services. Ofcom's initial view is that "it is not desirable for all voice services to be required to offer the same features as traditional telephone services, and we should instead enable consumers to make informed choices." Ofcom seeks to ensure that consumers have adequate information as to any potential limitations of VoIP services, and let the market and consumers choose accordingly. Ofcom is expected to issue its final guidance after the EC provides clarity on a number of key legal issues presented in its June 2004 notice. A number of other countries, including Australia, have sought public comment and input on the need for specific reforms to telecommunications regulations in light of VoIP developments.

VoIP's Impact on the International Settlements Process. VoIP remains illegal in a number of developing countries, many of which are simply reluctant to allow cheaper

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VoIP services to cut into revenues attributable to international settlement and accounting rates. In March 2004, the FCC reformed its international settlement rules in recognition of additional competition in U.S.-international telephone market. In doing so, the FCC noted a number of alternative and/or least-cost means to deliver traffic, and suggested that VoIP, and other non-traditional delivery means "may have a role in foreign carriers lowering their settlement rates." The FCC further found that "the use of non-traditional arrangements increasingly will become a factor in a rapidly changing global telecommunications market."

ENUM. The ITU has set forth interim procedures for trials of ENUM, the protocol that allows the Internet and telephony platforms to be linked through the mapping of standard telephone numbers and Internet addresses. Under these procedures, the ITU has approved over twenty delegations of domain names corresponding to telephone country codes. Trials are currently underway in a number of countries, including China, Germany, Japan, Sweden and the United Kingdom; Austria has announced the first commercial rollout of ENUM services. Additionally, the European Telecommunications Standards Institute has set forth guidelines for the interoperability of European ENUM trials. In the United States, ENUM trials are not yet underway but are being studied. A draft ENUM recommendation is also under consideration at the ITU. By linking IP addresses and traditional phone numbers, ENUM promises to expand the reach and scope of VoIP-enabled devices and applications.

Internet Protocol Version 6. Internet Protocol Version 6 ("IPv6") has been developed by the Internet Engineering Task Force to replace the current Internet protocol, which has been in place for over twenty years. Proponents suggest that IPv6 will reduce Internet operation expenses, improve security, and foster new Internet-based applications. The wide deployment of IPv6 could spur even greater investment in Internet-enabled devices and applications, providing a broader platform with which to provide VoIP services. Until recently, IPv6 has garnered greater attention abroad then it has in the United States. This has particularly been true in Asia, where governments and companies have been aggressively promoting and adopting IPv6. In addition, the European Union has developed plans and programs to facilitate IPv6 deployment. Here, in the United States, the Commerce Department last year initiated an inquiry into the issues associated with IPv6, particularly focusing on transition and implementation issues as well as the security aspects of the technology. The Commerce Department conducted an open meeting on IPv6 development issues in July 2004, and is expected to issue a report to the President in the near future. The Department of Defense has also announced its intent to transition its facilities and services to IPv6 by 2008, and Microsoft has announced plans to integrate IPv6 into its Longhorn operating system under development.

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VII. VoIP FEDERAL REGULATORY AND POLICY DEVELOPMENTS SUMMARY CHART

Attached please find a summary chart identifying and reviewing selected federal proceedings and their impact on VoIP.

FCC Proceeding	Impact on VoIP	Status
IP-Enabled Services Rulemaking (2/04)	This comprehensive NPRM appears to be a top-to-bottom examination of IP-enabled services, including VoIP-related issues. Among other things, the NPRM inquires about the different types of VoIP services, the proper regulatory classification for each type of offering, and the associated regulatory obligations.	Comment cycle is complete.
pulver.com Petition (2/03)	pulver.com requested a ruling that its computer-based IP telephony offering (Free World Dialup) is not a telecommunications or telecommunications service. pulver.com's service is offered for free, does not use traditional phone numbers, and does not allow its users to connect to the PSTN. The FCC granted the petition finding that the service was an unregulated interstate information service.	Granted February 2004.
AT&T Declaratory Ruling Petition (10/02)	AT&T requested a ruling that its phone-to-phone IP telephony services are exempt from access charges. ILECs contend that AT&T's service is a telecommunications service subject to access charges. The FCC denied the petition primarily because of the lack of enhanced functionality or net protocol conversion in AT&T's service.	Denied April 2004.
Vonage Preemption Petition (9/03)	Vonage sought preemption of a Minnesota Public Utilities Commission order finding that Vonage's broadband VoIP offering is a telecommunications service and directing the company to comply with state telephony regulations. This petition raises broader questions about whether VoIP services (particularly computer-to-computer and computer-to-phone offerings like Vonage's) are interstate or intrastate in nature and thus whether they are subject to state jurisdiction. The FCC granted the petition, finding Vonage's service to be an interstate service subject only to federal regulation.	Granted November 2004.
Level 3 Forbearance Petition (12/03)	Level 3 requests that the FCC forbear from imposing access charge requirements on all computer-to-phone and phone-to-phone VoIP services (not just Level 3's offerings).	FCC action required by March 2005.

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SBC Forbearance Petition and Declaratory Ruling Request (2/04)	In its forbearance petition, SBC requests that the FCC forbear from imposing Title II requirements on these services. In its declaratory ruling request, SBC seeks a ruling that IP-based telephony services (computer-to-computer and computer-to-phone offerings) are information services and exclusively interstate in nature.	FCC action on Forbearance Petition required by May 2005. The Declaratory Ruling request was integrated into the IP-enabled services proceeding.
SBC Internet Services Numbering Waiver Petition (7/04)	The FCC granted a SBC Internet Services (SBCIS) waiver petition thereby providing SBCIS with direct access to numbering resources to facilitate the rollout of commercial VoIP services, subject to compliance with the FCC's numbering requirements. The waiver will remain in force until the FCC adopts final numbering rules for IP-enabled services.	Granted February 2005.
Universal Service Contribution Methodology (12/02)	This NPRM considers whether comprehensive changes to the FCC's universal service contribution methodology are necessary. In particular, the FCC asked whether a transition from the current revenue-based methodology to a number-based or connection-based approach is warranted. As the FCC examines whether to revise its universal service methodology, a key question will be whether VoIP providers will be required to contribute and, if so, at what amount.	Comment cycle complete; awaiting action.
E911 Access (11/03)	In November 2003, the FCC issued an Order extending E911 obligations to additional services and providers, but deferred to the states the implementation of E911 regulations and rules for multi-line telephone systems (*e.g.*, PBXs). Concurrently, the FCC issued a NPRM seeking further information about current E911 functionalities for multi-line telephone systems and specifically inquired about IP telephony.	FCC sought to refresh the record with respect to state action on multi-line telephone systems in Dec. 2004. Comments due Feb. 28.
Intercarrier Compensation (4/01)	The FCC's 2001 NPRM in this proceeding sought comment on fundamental reform of all intercarrier compensation mechanisms, with particular interest in moving to some form of bill-and-keep alternative. Under a bill-and-keep approach, carriers would not be obligated to compensate other carriers for use of their networks (*i.e.*, eliminating access charges). The Intercarrier Compensation Forum plan, as well as competing proposals, have been offered in 2004. Action on intercarrier compensation reform will impact VoIP providers' cost of service and interconnection options.	Additional NPRM to refresh the record and consider industry-backed proposals is expected in first quarter 2005.
Disability Access NOI (9/99)	Part of a broader proceeding implementing Section 255 of the Act and ensuring disabled persons' access to telecommunications services, this wide ranging Notice of Inquiry asks whether VoIP services should be subject to the mandatory access requirements of Section 255.	Comment cycle complete; awaiting action. FCC refreshed record in IP-enabled services docket.
CALEA Proceeding (9/04)	DOJ, FBI and other executive agencies filed a petition for rulemaking with the FCC to establish the CALEA obligations of broadband and VoIP providers. In its subsequent NPRM, the FCC tentatively concluded that broadband Internet and managed VoIP services are subject to CALEA obligations.	Comment cycle complete.

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VIII. CONTACT INFORMATION

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