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## FCC Preempts State Regulation of Internet Calling Services

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Today the Federal Communications Commission (“FCC”) preempted state regulation of Internet calling services that utilize broadband connections (like cable modems or DSL) to communicate with the traditional telephone network.

The FCC concluded that Vonage’s “digital voice” service is inherently interstate, and therefore not subject to state regulation. Accordingly, the FCC preempted state regulation of Vonage’s calling service, and found that state commissions may not impose traditional telephony regulation, including 911 regulations, on Vonage’s service. The FCC made clear that its decision applies not only to Vonage, but to similar services provided by others, including cable operators and local exchange carriers.

Although the FCC preempted state commission regulation, the Commission declined to address important regulatory issues. Specifically, the FCC declined to classify Vonage’s digital voice service as either a “telecommunications service” or an “information service.”

To the extent that Vonage-like services are classified as “telecommunications services,” traditional access charge and universal service regulations will apply. To the extent these services are “information services,” they will be exempted from the access charge and universal service regimes. Thus, in some sense, the FCC decision today creates at least as many questions as it answers.

The FCC’s ruling resolves a September 2003 petition for declaratory ruling filed by Vonage Holdings Corp., which is one of the largest VoIP

calling providers in the nation. Preemption of state regulation should encourage the rapid deployment Vonage-like calling services, however, as noted, the ultimate regulatory classification of these services remains in play.

Separately, the FCC’s ruling will likely be a key focal point in pending litigation between Vonage and the Minnesota Public Utilities Commission, which is scheduled for oral argument before the Eighth Circuit Court of Appeals on November 17.

### 2004 – The Year of VoIP

Without question, 2004 has been and continues to be the year of VoIP at the FCC. Today’s announcement by the FCC is the third VoIP-related declaratory ruling issued this year.

This past February, the FCC found that pulver.com’s Free World Dial-up service is a computer-to-computer “information service,” that is not subject to traditional telecommunications regulation.<sup>1</sup>

In reaching this conclusion, the FCC relied on the fact that Free World Dial-up is not a “telecommunications service” because it:

- is free,

<sup>1</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (Feb. 19, 2004)

- requires use of non-traditional equipment to make calls (e.g., SIP phones or soft phones),
- does not involve calls to the regular telephone network, and
- utilizes directory numbers created by pulver.com, rather than traditional telephone numbers.

By contrast, in April, the FCC separately determined that an AT&T service that in part utilizes IP transmission facilities is a traditional telephone service subject to traditional telephone regulation.<sup>2</sup>

Although the AT&T service uses some IP transport, the Commission determined that in all other respects the service was indistinguishable from a traditional “1+” long distance call. Specifically, the FCC noted that the AT&T service:

- is accessible by ordinary telephones with no enhanced functionality,
- originates and terminates on the regular telephone network,
- does not result “net protocol conversion” (i.e., they start and end as traditional calls), and
- provides no enhanced functionality as a result of the IP technology.

### **2005 – Big Money VoIP Issues To Take Center Stage**

Next up, the Commission will have to address a request by Level(3) to forbear from

applying access charges to VoIP services, to the extent that such charges in fact apply to VoIP services. By statute, the Commission is obligated to resolve the Level(3) forbearance petition by late March 2005, or the petition will be deemed granted by operation of law.

The issues presented in the Level(3) petition have become particularly important, as carriers, such as SBC, have begun filing lawsuits against VoIP providers, alleging that interstate access charges are applicable to VoIP calls. In addition, the Level(3) petition implicates a number of issues that will be centerpieces of Commission action in 2005.

For example, in 2005 the FCC will spend substantial time and energy to address broader intercarrier compensation and universal service reform. The existing systems are widely recognized as broken, and VoIP deployment is further disrupting these legacy regimes. As VoIP deployment accelerates, so will the need for regulatory reform.

All told, 2004 has been a year of significant clarification of VoIP regulation. In 2005, the FCC is expected to address associated big money issues, including intercarrier compensation and universal service.

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<sup>2</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361 (rel. April 21, 2004).

