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VOIP: Welcome to the Dark Side?

*from the February 2005 issue of Business Communications Review, pp. 10-12**by Martha Buyer, an attorney whose practice is limited to telecommunications law, where she represents end users and landlords. She maintains offices in East Aurora, NY and Boulder, CO, and is a vice president of the Society of Telecommunications Consultants.*

Just before Thanksgiving, I received a call from a family friend, who, in an effort to economize on her many calls to her elderly mother living overseas, decided to try her carrier's voice over IP (VOIP) service offering. The carrier, which she was using for local and long distance services, quickly sent by overnight mail a black box that was supposed to enable the VOIP connection.

Mary was unable to install the black box herself, but asked for assistance from a helpful and technically savvy neighbor. The neighbor, and later Mary's electrical engineer son-in-law, both failed to install the router successfully. While they worked at it, Mary noticed, to her dismay, that her home security system was no longer functioning.

When she called the security company, she was told that a service call with a minimum charge of \$150 would be required in order to re-activate her system. The savings she had relied upon to justify making the change to VOIP were rapidly slipping away. Ultimately, when the installation of the device was abandoned as a result of multiple failures and problems, Mary decided to call her carrier, to restore her original phone configuration.

When she picked up the phone, she had no dial tone with which to place the call. In desperation, she called her

carrier using a wireless phone and was told that while she could return to her old phone configuration, she couldn't have dial tone restored for up to 15 business days. Under any circumstances, this is a long time, but for a senior citizen to be without dial tone (including 911 access) was not an acceptable option. As such, Mary was forced to switch carriers and get a new phone number, because the carrier that she'd been with for years refused to relinquish its hold of her old number, nor expedite matters to assist in restoration of service.

Within 24 hours after Mary contacted another service provider, her dial tone had been restored, albeit at a new number. Not surprisingly, once she had dial tone back, the security system again worked. Things were back to normal, but only after an incredible amount of aggravation and a disappointing lack of service response provided by the longtime carrier.

Regulatory Issues

Given the huge amount of attention that VOIP has been receiving, Mary's problem made me wonder whether VOIP services make sense at this time. Further complicating the various technical issues is the current level of regulatory uncertainty over this technology, and how those unresolved matters will play out for end users—whether residential users like Mary or enterprises of whatever size. VOIP technology creates new regulatory issues, including:

911/E-911 and CALEA—Because of the nature of VOIP, certain functionalities, including location information for 911 and E-911 applications, as well as lawful-wiretap obligations under the Communications Assistance for Law Enforcement Act (CALEA) are not currently met with all VOIP technologies. Leading VOIP vendors are working to address these issues, but for now, there could be vulnerabilities.

Additional fees that may be assessed on calls which terminate on landlines and wireless phones in other countries—These fees, which fluctuate freely based upon international conditions, exchange rates and other factors, are often unpredictable, making price

projections difficult. If a VOIP candidate's traffic has many terminations on overseas-based wireless phones, some contingency must be made for these fees, which recently have been seen as high as \$1 per minute. A financial hit like this may eliminate the anticipated savings of a VOIP migration in a big hurry.

In addition to these regulatory concerns, unexpected problems and costs may be generated because of ancillary services, such as security systems, that may be piggybacked on the traditional "phone line." As my friend discovered, disconnecting a telco phone line may affect services besides POTS, and rectifying the problem may incur costs that eliminate the savings you had expected to gain from VOIP.

Regulatory Uncertainty

Most legal battles over VOIP focus on two issues: Whether this service offering will be regulated at the state or federal level, and to what extent the service will be subject to the taxes, fees and surcharges that traditional voice offerings have historically carried.

Much of the debate has centered on two terms: "telecommunications services" and "information services" (see "FCC VOIP Policy: Follow the Money," p. 66 in the print edition of this issue). *Information services*, which were originally defined as "data," have been largely exempt from regulation, whereas *telecommunications services*, which were originally defined as voice services, have been heavily regulated. In a converged environment where voice is just another data application, the distinction becomes murkier.

A little history may be useful here. In April 2004, in response to state-level battles in California, Minnesota and New York, as well as actions anticipated in other states, Senator John Sununu sponsored S.2281, the VOIP Regulatory Freedom Act of 2004. The Senate Committee on Commerce, Science and Transportation held two hearings that addressed appropriate federal and state regulatory treatment of VOIP.

The Senate bill reserves the right of the federal government to regulate VOIP services for a period of three years. It also requires the FCC to develop rules to ensure that all VOIP providers become compliant with 911 services, as best as technically feasible.

The bill also provides states with the right to regulate (and thus assess fees for) their own state Universal Service Funds, 911 services and inter-carrier compensation rates. However, the bill explicitly precludes state and local regulation of VOIP for that three-year period.

Given that state courts and public service commissions have already been deeply involved in VOIP issues, this proposed federal power-grab makes those who regulate on the state level less than pleased. The states argue that they are in a better position to monitor public safety and consumer issues than is the federal government or its agencies. Thus far, courts have sided with the feds.

Two amendments were added to the original bill by the committee, possibly in an effort to assuage state regulators, but the ultimate outcome of S.2281 remains uncertain. The first of these amendments preserves the ability of states to require VOIP applications to provide both 911 and E-911 services; the second clarifies that the bill does not exempt VOIP application providers from requirements imposed by a state commission on all providers of telecommunications services to pay "appropriate compensation for the transmission of a VOIP application over the facilities and equipment of another provider." However, these amendments may not be enough to resolve the regulatory and jurisdictional issues which the anticipated technology implementation has raised.

Meanwhile, as all of this was going on in Congress, the FCC was working on its own path. In November 2004, the FCC issued a Memorandum Opinion and Order ([Opinion and Order as a Microsoft Word document](#)) preempting an earlier action by the Minnesota Public Utilities Commission

which had sought to create a distinction between *intrastate* and *interstate* VOIP communications.

Arguing that making such a distinction created unresolvable conflict with existing federal rules and regulations, the FCC declared in November that it alone had the responsibility to decide whether “specific regulations apply to digital voice and other IP-enabled services having the same capabilities.”

The order goes on to state that “comparable regulations of other states must likewise yield to important federal objectives.” Most crucially, the Order stated clearly that “to the extent that other VOIP services are not the same as Vonage’s but share similar basic characteristics, we believe it highly unlikely that the commission would fail to preempt state regulation of those services to the same extent.”

The most recent court decision on the matter came down December 28, 2004, from the Eighth U.S. Circuit, and was the result of an appeal from the Minnesota decision. According to one leading expert, this newest decision represents a change in focus away from the distinction between “information services” and “telecommunications services,” to whether the VOIP service provided is *interstate*, and thus subject to federal regulation, rather than *intrastate*, which would place it under the purview of the state regulators.

In 2005, the 9th U.S. Circuit is slated to decide a similar case out of California, and the outcome is anyone’s guess.

Universal Service

The related issue of the federal Universal Service Fund is among the most critical issues raised. Questions about the funding and distribution of the USF funds affect both the entities that have paid into the fund, and the fund’s recipients (see “[You Can Do Something About The Growing Universal Service Burden](#),” *BCR*, July 2004).

Specifically, the federal USF is the single largest source of funding for rural local exchange carriers (RLECs), whose operations rely on subsidies to provide telecommunications services to otherwise under-served areas. The Universal Service Fee is calculated quarterly by the FCC, and carriers of long distance services are able to pass the fee along to their customers, as a surcharge. The amount is based upon the cost of voice calls made during a month.

During the first quarter of 2005, the USF is 10.7 percent, although it can change quarterly. For a large enterprise, that amount represents a significant expense.

Conclusion

Many issues have to be addressed before VOIP implementation becomes the “no-brainer” that, on initial review, it once appeared to be. Whether Senator Sununu’s bill will meet with modifications in the new Congress has yet to be determined, but the issues that it addresses are surely ripe for consideration.

Nonetheless, the technology is evolving at the speed of broadband, and with ongoing legal battles, the regulatory framework will have to race to keep up with the rapidly evolving technology.

This leads to the possibility of a rewrite of The Telecommunications Act of 1996 which, although once well-suited to available technology, no longer is close to accomplishing its goals.

However, this is another topic for another day. It’s just important to recognize that particularly in the VOIP marketplace, the laws and regulations that exist no longer match the technologies that they were designed to regulate.

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