

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03M-220T

IN THE MATTER OF THE INVESTIGATION INTO VOICE OVER INTERNET PROTOCOL
(VOIP) SERVICES.

ORDER CLOSING DOCKET

Mailed Date: January 2, 2004
Adopted Date: December 17, 2003

I. BY THE COMMISSION

A. Statement

1. At our April 16, 2003, Weekly Meeting, we directed Commission Staff (Staff) to conduct an investigation into Voice Over Internet Protocol (VoIP) services. VoIP is a means of using packet switching techniques, the same basic techniques used by internet backbone carriers and providers, to offer voice services traditionally provided by "switched-voice" technology, either analog or digital.

2. We opened this docket to assist Staff in its efforts to obtain information regarding VoIP from entities regulated by the Commission. *See* Decision No. C03-0559. Staff has now completed its investigation regarding VoIP, and no further action is now contemplated in this docket.

3. We note that the Federal Communications Commission (FCC) has asserted jurisdiction over the internet and related services, and has opened a docket to address issues raised by VoIP. (Staff will continue to monitor the FCC proceedings and comments made by parties to the FCC's docket.) Because of the legal uncertainty of whether a state may regulate VoIP services, as well as the host of

policy issues involved with VoIP, we believe the most prudent course is to take no action with respect to VoIP pending FCC action.

4. Because the purposes of this proceeding have been accomplished, we now enter our order closing this docket.

II. ORDER

A. The Commission Orders That:

1. Docket No. 03M-220T is closed.
2. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 17, 2003.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CHAIRMAN GREGORY E. SOPKIN
SPECIALLY CONCURRING.

**III. CHAIRMAN GREGORY E.
SOPKIN SPECIALLY
CONCURRING:**

G:\ORDER\C04-0004_03M-220T.doc

1. There are a host of reasons why state regulators should not enter the Voice over Internet Protocol (VoIP) fray, at least until national policy issues are addressed by the Federal Communications Commission (FCC). The FCC is addressing whether and how VoIP should be regulated with regard to intercarrier compensation, 911 service, security issues, and payment of various subsidies.¹ In my opinion, the nascent VoIP industry should not be subjected to death-by-regulation, which could well occur by having 51 state commissions imposing idiosyncratic, inconsistent, and costly obligations. I welcome FCC direction as to whether and how VoIP should be regulated.

2. There are both legal and policy implications presented by VoIP. Before a state may regulate VoIP, the service must be considered intrastate² – which seems dubious given that Internet protocol packets often traverse several states before reaching their destination, even in an otherwise “local” call. Recently, a federal judge in Minnesota³ struck down a state agency’s attempt to regulate VoIP just like traditional telephone service, holding that federal law preempts

¹ See FCC WC Docket Nos. 03-211, 02-361, and 03-35.

² See *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, (2d Cir. 1968) (“[Q]uestions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and ... the states are precluded from acting in this area”). Courts have allowed state causes of action in the interstate communications context for, *inter alia*, fraud and deceptive trade practices, *In re Long Distance Telecomms. Litigation*, 831 F.2d 627 (6th Cir. 1987), and interference with contract and unfair competition, *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511 (D. Utah 1994), because these actions did not challenge practices expressly and exclusively regulated in 47 U.S.C. § 201.

³ See *Vonage Holdings Corp. v. Minnesota Public Utils. Com’n*, 2003 WL 22567645 (D. Minn., Oct 16, 2003). The court employed a four-part FCC test to determine whether Internet protocol telephony is a “telecommunications service” (subject to more regulation than an “information service”), and held that two of the four prongs failed because: (1) use of VoIP service requires customer premises equipment different than what a person connected to the PSTN uses to make a touch-tone call; and (2) a net change in form and content occurs when a VoIP customer places a call.

state regulation because VoIP is an “information service.”⁴ Even if the Minnesota court’s opinion is eventually reversed, the FCC may rule that VoIP is interstate in nature, and then the FCC likely would itself forebear from imposing much regulation upon the service. Indeed, FCC Chairman Michael Powell recently opined that state and federal agencies should not regulate VoIP unless there is an absolutely compelling justification for doing so.⁵

3. The policy implications of VoIP are dramatic. The main reason telephone companies such as Vonage, Qwest Corporation (Qwest), and AT&T Communications of the Mountain States, Inc., are turning *en masse* to VoIP is to avoid costly taxes and subsidies, and regulation that is often irrational. Avoiding payment of subsidies and taxes is no small matter. If one lives in the Denver metro area, these charges make up over one-third of the telephone bill. The basic local service charge is about \$15, but even if no other services (like caller ID or voice mail) are ordered, the ending tab is around \$25. The first \$15 goes to the service provider, the remaining \$10 to subsidies and taxes. The subsidies support 911 services, assist low-income persons, and enable phone service for the hearing/speech disabled. But a large part of the subsidies are used to reduce the bills of customers in high cost areas. There are some areas in Colorado where the cost to serve each customer would be hundreds of dollars per month were it not for state subsidy (about \$70 million) and federal subsidy (our state fraction of \$5 billion)

⁴ “Information service” is defined by the Telecommunications Act as “the offering of 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.” 47 U.S.C. § 153(20). “Telecommunications,” however, is defined by the Act 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.” *Id.* § 153(43).

⁵ See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241775A1.doc.

support. High cost customers pay rates comparable to metro area customers notwithstanding the cost differential.

4. Currently, use of VoIP technology not only enables companies to avoid the \$10 of taxes and subsidies, it also allows avoidance of costs that are reflected in the first \$15 charge. This is because the customer's local provider often must pay another phone company a variable charge when a customer makes a local call. Even more important, use of VoIP avoids intrastate and interstate *toll* charges that ordinarily must be paid to phone companies when a call crosses certain geographic boundaries.⁶ The end result is a massive arbitrage opportunity: a VoIP provider can offer phone service at a much cheaper rate than traditional phone companies burdened by taxes, subsidies, and intercarrier charges.

5. Companies using VoIP avoid traditional costs because the Internet is essentially unregulated. A voice data packet is indistinguishable from a text data packet, and there is no travel charge or regulation involving transmission of data packets. This is true even though VoIP often uses telephone wires to commence and terminate a call.

6. Despite the efforts of some states, it is my view that VoIP should not be regulated like traditional telephone service.⁷ Existing regulations – including rate caps, tariff filings, and service quality obligations – were promulgated to police the behavior of monopoly telephone

⁶ These access charges are not cost-based and a *de facto* subsidy to the extent there are variable (per minute) charges to recover what are fixed costs of the network.

⁷ This is my initial policy, not legal, viewpoint. Should a docket arise in the future involving VoIP, I will consider all legal and policy argument. The within docket did not involve any party litigation or argument on these issues.

providers. It makes no sense to impose price or service quality controls on fledgling competitors who will get few customers if they offer high prices or bad service quality.

7. We should not doom a nascent competitive industry via regulatory overkill. If there is an attempt at heavy-handed regulation, those companies who obey – by paying taxes, subsidies, and intercarrier charges – will quickly be undercut by a netherworld of entrepreneurs who do not. Companies who do not obey will locate in more friendly states or, failing that, other countries.⁸

8. One should not approach regulation of the Internet – that job-producing, life-enhancing giant – lightly. Indeed, it is United States policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁹ The unintended effects of state regulation of VoIP on the Internet are unknown, and counsel extreme caution. Further, as a practical matter, since few advocate big government intercepting our transmissions, the Internet most likely will remain unfettered. This makes regulating VoIP, even if one wants to, difficult.¹⁰

9. In my view, we should treat VoIP not as a problem, but a new opportunity for regulators to look at changing how the use of wireline infrastructure is compensated – through subsidies, intercarrier charges, and regulated rates. These traditional regulatory devices distort the market and

⁸ This, by the way, is the same reason why regulation of spam will probably fail – so long as the Internet is unregulated, data packet transmissions from the underworld will flow to the e-mail inbox.

⁹ 47 U.S.C. § 230(b).

¹⁰ To be sure, there may be ways to regulate VoIP – via restricting allocation of telephone numbers through the North American Numbering Plan Administrator, for example. But, as always is the case, very smart people (*see* pulver.com or skype.com) will find ways around such regulation. I do not say there should be no regulation because there will be those who flout it; I say there should be minimal, rational regulation (as determined by the FCC) so there will be little incentive to flout it. And that regulatory model should apply to all modes of telephony to the extent feasible, lest we – the regulator – pick the winners and losers.

cause inefficiency, lack of competition, and net consumer harm. Instead of trying to impose anachronistic rules on new innovative technologies, we should reform anti-free-market state regulations to allow traditional companies to compete with new entrants on a more level playing field. This serves yet another purpose: new entrants will not have much incentive to avoid playing by the rules if the rules are less costly. If we do nothing, it is only a matter of time before a great exodus from traditional telephone service occurs, endangering the existing telephone network.¹¹

10. One final word on this subject: now that this commission has backed off on regulating VoIP – at least until the FCC acts – VoIP providers should seek free market solutions to intercarrier compensation and 911 service issues. When a VoIP call touches the Publicly Switched Telephone Network, there should be compensation to the network owner – at a rate agreed to by willing market participants. Resolving the 911-service issue is even more important. VoIP providers should not have to worry that agreeing to contract with a Basic Emergency Service Provider (in Colorado, Qwest) to offer customary 911 services will somehow suck it into regulation, at least in this state. I strongly encourage VoIP providers to work out 911-

¹¹ The amount of time before this occurs is uncertain. A broadband connection is required to use VoIP, and broadband penetration is only about 20 percent. However, the people who spend the most on telephone service – those who make a lot of intrastate toll calls, for example – have the most incentive to obtain broadband to enable use of VoIP. It is these people who now largely support the traditional wireline infrastructure, so their exodus will have the most impact.

service and intercarrier compensation agreements, to show that they are good corporate citizens. And to show that traditional regulation is not necessary.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioner