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State Revanchism: Can the Latest Efforts to Regulate Voice over Internet Protocal be Stopped?

*By Gregory E. Sopkin**

> *Revanchism* (from French *revanche,* "revenge") is a term used since the 1870s to describe a political manifestation of the will to reverse territorial losses incurred by a country, often following a war.… Extreme revanchist ideologues often represent a hawkish stance, suggesting that desired objectives can be reclaimed in the positive outcome of another war. Revanchism is linked with irredentism, the conception that a part of the cultural and ethnic nation remains "unredeemed" outside the borders of its appropriate nation-state.
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> - Wikipedia

The last "war" fought over Voice over Internet Protocol ("VoIP") occurred in 2003-2004, when the Minnesota Public Utilities Commission decided that Vonage's VoIP telephony service seemed a lot like traditional circuit-switched service (it "quacked like a duck"), and so was subject to state agency regulation.[1] A federal district court in Minnesota disagreed, holding that federal law preempts state regulation, because VoIP is an "information service." [2] In 2004, the FCC weighed in with its own *Vonage Order,* declaring that VoIP providers do not need to abide by a Byzantine set of regulations by fifty-one state commissions.[3] Two years later, the Eighth Circuit Court of Appeals upheld the district court's decision.[4] State agencies lost, and VoIP providers won—or so it seemed.

In 2004, as Chairman of the Colorado Public Utilities Commission, I wrote: "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)."[5] Four years later, the FCC has done little to define the jurisdictional limits of state regulatory authority over VoIP, notwithstanding its commencement of the *IP-Enabled Services* docket in 2004.[6] Regulators abhor a regulatory vacuum. So naturally state agencies have begun to retest the jurisdictional waters.

This is entirely expected. State regulators view themselves as consumer protectors. When rogue telephone providers come in and sell their services without agency oversight, consumers can be harmed. Usually left out of the analysis is whether state agency oversight is necessary in a competitive marketplace, or could harm consumers because intrusive regulation acts as a barrier to entry, meaning many carriers will choose not to do business in the state. Absent a natural monopoly, less competition means less choices, higher prices, and worse service.

Two recent decisions by state utility commissions highlight the spectrum of regulatory burden. The most intrusive imposition is represented by a Missouri Public Service Commission (MPSC) decision, effective December 31, 2007, finding that Comcast IP Phone, LLC[7] "is offering and providing local exchange and interexchange telecommunications services without a certificate of convenience and necessity" (CPCN) in violation of Missouri law.[8] The Commission distinguished the Vonage court and FCC cases, *supra*, as applicable to only "nomadic" (*i.e.,* portable) VoIP service, not "fixed" VoIP service like cable telephony. But, as more fully described below, many of the bases for state preemption in the FCC's *Vonage* decision are not dependent on portability.

The MPSC's decision that a CPCN is required opens the state regulatory floodgates. The requirement of a CPCN is what distinguishes regulated "public utilities" from unregulated companies, and the distinction is rather important, as regulated utilities must comply with various state statutes as well as hundreds of telecommunications "rules" adopted by state agencies (public utility commissions). For a telephone utility, these statutes and rules can dictate product prices and offerings, service quality, market entry and exit, record keeping, filing of reports, payment of various fees and high cost funds, service deposits, and service disconnection, among others. In Colorado, the PUC's telecommunications rules are over 200 pages long—and this, after an attempt to reduce overly burdensome requirements.

A much lighter regulatory imposition is represented by a Kansas Corporation Commission (KCC) decision dated January 9, 2008, which held that a rational construction of Kansas law compels "requiring interconnected VoIP providers to contribute to the KUSF" (Kansas Universal Service Fund).[9] The decision mentions two other states—Nebraska and New Mexico—that have required VoIP carriers to contribute to their respective state high cost funds. Notably, the KCC decision limited its determination exclusively to the issue of whether interconnected VoIP carriers must contribute to the KUSF, and stated that the KCC is not treating them as a "traditional telephone company." In other words, while the KCC wants VoIP providers to pay into the KUSF, the agency is not subjecting them to the full panoply of regulations applicable to traditional incumbent local exchange carriers.

The KCC has a legitimate policy argument that because "interconnected" VoIP providers make use of the loop, switches, and other telecommunications facilities in high cost areas they should have some responsibility to pay into a state high cost fund.[10] Wireless carriers as a rule pay into state high cost funds for this reason. But wireless carriers are largely exempt from *other* state regulation by virtue of § 332(c)(3)(A) of the Telecommunications Act of 1996, which provides:

> STATE PREEMPTION. -- … *[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial

* *Gregory E. Sopkin is Counsel at Squire, Sanders & Dempsey, and former Chairman of the Colorado Public Utilities Commission.*

> mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[11]

There have been various cases from several courts interpreting the provisions § 332(c)(3)(A) of the Act, regarding rate regulation of a CMRS in various scenarios.[12] What is clear from these cases is that states can impose a charge on wireless companies for state high cost funds, but cannot explicitly or implicitly regulate rates or entry of these carriers.

The MPSC has no good reason to subject "fixed" VoIP providers to traditional regulation. The MPSC could have merely required high cost fund pay-in like the KCC, and left it at that. Instead, MPSC did what the Minnesota Public Utilities Commission (MPUC) tried four years ago, attempting to distinguish the MPUC case as applicable only to "nomadic" VoIP providers, not fixed VoIP providers.

Until four years ago, the FCC's tendency was to preempt state regulation of VoIP services. Since then, there has been some backtracking, with no clear rules set forth on state jurisdiction. With the MPSC decision, the FCC needs to revisit the issue with an eye toward federalization. Ultimately, the federalization—and consequent eventual economic deregulation —of telecommunications services would be as beneficial as it was of the airline, trucking, and railroad industries. Because of the convergence of voice and data, and the trend toward telecommunications' facility decentralization and intelligence at the edges, both Congress and the FCC have the power today to take away state authority over service rates, entry, service quality, and other regulatory mechanisms for *all* types of telecommunications. Nonetheless, as discussed below, states should always have some authority over limited telecommunications issues related to public safety, fraud, interconnection of bottleneck facilities, and certain state fees like state high cost funds. But the full-throated "mother may I" regulation imposed by regulatory agencies surely must come to an end, and the first iteration should be VoIP, whether nomadic or fixed.

Now, as a member of the Federalist Society, I generally believe that decision-making should be made at the lowest level governmental unit appropriate to the issue. However, even the National Association of Regulatory Utility Commissions—(no states' rights slouch)—adopted a resolution that "NARUC is open to the possibility that, as markets evolve and local products and services take on more national and international characteristics, traditional jurisdictional principles may need to be re-evaluated." The time is now to do just that for VoIP. The FCC or Congress should get off the fence, declare all VoIP service to be informational and interstate in nature, and therefore not subject to state agency authority (with limited exceptions described below). Below I address the authority of the FCC and Congress and the policy reasons to do so.

I. VoIP Federalization Tools

Over the years, there has been a gradual shift from state to federal authority over telecommunications companies and their services. A seismic shift clearly occurred when the FCC ruled that state utility commissions have no jurisdiction over Vonage's VoIP services. But the transition started long before 2004.

A brief summary: In 1966 in its Computer I decision,[13] the FCC decided that regulation should not be imposed on data processing services. In 1980, in its Computer II inquiry,[14] the FCC adopted a new regulatory scheme that distinguished between the common carrier offering of "basic" transmission services and the offering of "enhanced" services. The FCC held that "basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." The FCC found that basic services should be regulated as a common carrier service under Title II of the Telecommunications Act, but that enhanced services should not be regulated under the Act.

Fast forward to 1996. In the Telecommunications Act of 1996, new regulatory classifications were born. If a product meets the definition of "telecommunications service," it is heavily regulated as a common carriage service under Title II; if it is classified as an "information service," it is subject to Title I and hence lighter regulation, if any. Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[15] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[16] An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications... 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."[17]

One commentator rightly labeled this taxonomic structure an exercise in "metaphysics."[18] Given the relative infancy of the Internet in 1996, apparently no one thought of how to treat a service—transmission of Internet Protocol packets—that is structurally indistinguishable from both data transmission and an ordinary telephone call. Thus, trying to classify the various VoIP manifestations is a mind-bending experience.

But that has not stopped the FCC. The two classifications—telecommunications versus information—were put to the test in three FCC cases, all decided in 2004.

The first case involved IP to IP communications; that is, where both sides of the call use either a specialized IP converter phone or a "soft phone" through a computer. In 2004, the FCC held that Pulver.Com's Free World Dialup IP to IP VoIP

service ("FWP") is an unregulated information service subject to FCC jurisdiction.[19] Applying the statutory classifications, the Commission reasoned that FWD is not "telecommunications" because its "heart" is transmission, and Pulver does not offer or provide any transmission; rather, FWD members must bring their own broadband transmission to interact with the FWD server. Further, information provided by FWD is not "information of the user's choosing, without change in the form or content," because FWD provides new information about whether other FWD members are present, IP addresses, and a voicemail or email response. Finally, the FCC held that FWD is an "information service" because it offers a number of "computing capabilities," including, among other things, storing member information and processing the Session Internet Protocol (SIP) invite.

The most interesting aspect of the FCC's *Pulver Order* is the length it went to ensure that there would be no state jurisdiction over IP to IP service. While the FCC stated there were two bases for such preemption, by my count it is more like seven:

1. Asserting federal jurisdiction (*i.e.,* preemption) over FWD is consistent with—and supported by—the states' already-limited role with regard to information services, for which the Commission has asserted a national policy of nonregulation.

2. Passage of the 1996 Act increases substantially the likelihood that any state attempt to impose economic regulation of FWD would conflict with federal policy, because in that Act Congress expressed its preference that a competitive free market for the Internet be preserved.

3. "[D]eclaring FWD to be an unregulated information service … will encourage more consumers to demand broadband service, which also is consistent with the Act."

4. FWD clearly cannot appropriately be characterized as a purely intrastate information service, because FWD customers hail from fifty states and 170 countries, and their physical locations can continually change.

5. The end-to-end analysis has little relevance in determining the jurisdictional nature of FWD, because a member's location in making a call is portable. The only purpose in trying to determine the caller's location would be for the sake of regulation itself, rather than any policy purpose.

6. Even if some form of an end-to-end analysis were deemed applicable to FWD, FWD would still be an interstate information service under the Commission's "mixed use" doctrine, because it is impossible or impracticable to attempt to separate FWD into interstate and intrastate components, and more than a *de minimus* amount of FWD's offering is interstate.

7. State regulation of VoIP may well violate the Commerce Clause, which denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Even if not a per se violation, courts have inquired whether the burden imposed on interstate commerce by state regulation "would be clearly excessive in relation to the putative local benefits," and the FCC "cannot envision how state economic regulation of the FWD service … could benefit the public."

Arguably the first three and the seventh of these reasons for state preemption apply to all VoIP telecommunications services, not just "nomadic" VoIP. As even traditional carriers continue to migrate to IP-based transmission based on cost efficiencies, the former, purely intrastate call may now bounce across two or more states before reaching its destination. Also, as a result of cell phones and VoIP, area codes are quickly becoming irrelevant to physical location. At some point down the road, the FCC could assert that state economic regulation of all modes of telephony is no longer justifiable based on its interstate character and the Commerce Clause.

Granted, the FCC did in April 2004 deny AT&T's petition for declaratory ruling that its "phone-to-phone" IP telephony services are exempt from access charges that apply to circuit-switched calls.[20] The issue in this second 2004 VoIP case was the classification of a call that both originates and ends with no specialized receiver—just an ordinary telephone—but that undergoes a conversion from analog signal to Internet Protocol and back again during the call. The FCC found that AT&T must pay terminating access charges because its phone-to-phone IP service must be categorized as "telecommunications." AT&T offers "telecommunications" because it provides "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." And its offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to the public." Users of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services, such as access to stored files. More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act. The FCC noted that end-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service, and the decision to use its Internet backbone to route certain calls was made internally by AT&T.[21]

However, the FCC's AT&T ruling is explicitly limited to an interexchange service that:

1. Uses ordinary customer premises equipment ("CPE") with no enhanced functionality;

2. Originates and terminates on the public switched telephone network ("PSTN"); and

3. Undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology."[22]

The use of the conjunctive "and" in the Commission's three-prong test invites companies to fiddle with their services to avoid Title II—and state—regulation. Not surprisingly,

many incumbent local exchange companies are offering a VoIP product and, more importantly, utilizing IP technology for their traditional telephony services. These events make eventual federalization of all services more likely.

More importantly, the third prong—that the service undergoes no net protocol conversion and provides no enhanced functionality to end users from use of IP technology—does not apply to fixed cable VoIP services. Cable telephony converts analog sound to IP packets, then converts the packets to traditional telephone protocol, before handing off the call to the PSTN. Customers *can* utilize advanced services in connection with the IP service, including email messages, reviewing call logs, and otherwise performing functions that traditional telephony does not provide. This net protocol conversion and enhanced functionality renders the FCC's AT&T decision inapposite.[23]

The third FCC decision on VoIP concerned Vonage's IP to phone service. With its DigitalVoice service, Vonage's customers can utilize specialized equipment (again, an IP phone or soft phone) to originate calls on the Internet, which are routed over Vonage's servers to the destination, which could be another Vonage customer or a customer using the Public Switched Transmission Network (PSTN). Vonage customers can also receive calls from a PSTN customer over Vonage's servers. Although Vonage customers receive a NANP number, a call to the number is not tied to a physical location, so the customer can be reached anywhere in the world.

In its *Vonage Order,* the FCC preempted an order of the Minnesota Public Utilities Commission regulating Vonage's service. Like the FWD decision, the *Vonage Order* gave a plethora of bases for preemption:

1. The FCC has exclusive jurisdiction over all interstate and foreign communication. The nature of Vonage's DigitalVoice service "precludes any suggestion that the service could be characterized as a purely intrastate service" because "Vonage has over 275,000 subscribers located throughout the United States, each with the ability to communicate with anyone in the world from anywhere in the world."

2. State commission regulation would necessarily conflict with the FCC's valid exercise of authority: Commission preemption of state regulation is permissible with DigitalVoice because (a) the matter to be regulated has both interstate and intrastate aspects; (b) preemption is necessary to protect a valid federal regulatory objective; and (c) state regulation would negate the exercise by the FCC of its own lawful authority, because regulation of the interstate aspects of the matter cannot be "unbundled" from regulation of the intrastate aspects.

3. State regulation of DigitalVoice directly conflicts with the FCC's pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations. State entry and certification requirements must contain detailed information, can take months to decide, and can result in denial of certificate. Similarly, tariffs and price lists are lengthy documents subject to specific filing and notice requirements, and the state commission could require cost justification information or order a change to a tariff rate, term or condition.

4. There is no practical way to sever DigitalVoice into interstate and intrastate communications to enable state regulation to apply only to intrastate calling functionalities without also reaching interstate aspects of the service: Vonage has no service-driven reason to know users' locations, and to require Vonage to attempt to incorporate geographic "end-point" identification capabilities into its service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose. Further, using proxies to determine geographic location (such as NPA NXX or residence address) would deem a call to be local even though the caller could be out of state, and would diminish the advantages of the Internet's ubiquitous and open nature, all for regulatory purposes.

5. State regulation is inconsistent with policies and goals of 1996 Act: Congress, in Section 230 of the 1996 Act, stated that "[i]t is the policy of the United States 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." In interpreting the phrase "unfettered by Federal or State regulation," the FCC "cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations such as Minnesota's on DigitalVoice and still meet [its] responsibility to realize Congress's objective." Further, section 706 of the Act directs the FCC and state commissions to encourage the deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market" and removing "barriers to infrastructure investment." Since DigitalVoice services are capable of being accessed only via broadband, and broadband is an advanced service, it would conflict with the goals of the Act to have multiple disparate attempts to impose economic regulation on DigitalVoice.

6. State commission regulation of DigitalVoice likely violates the Commerce Clause. Under such jurisprudence, the Clause is violated if: (a) a state law has the "practical effect" of regulating commerce occurring wholly outside that state's borders; (b) the burdens imposed on interstate commerce by state regulation would be "clearly excessive in relation to the putative local benefits"; or (c) there is state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment. Minnesota's order likely violates the Commerce Clause for all three reasons.

Perhaps the most telling aspect of the FCC's *Vonage* order is that it preempted state commission regulation without even finding that DigitalVoice is an information service. (The FCC deferred that analysis to its IP-Enabled Services Proceeding.) That is, even if the FCC later finds the IP-to-phone service to be "telecommunications" under the 1996 Act, states are still preempted from regulating it. Another telling aspect is the FCC's exhaustive list of reasons to preempt state decisions in footnote 66 of the *Vonage Order:*

> [F]ederal law and policy preempt state action in several circumstances: (1) where compliance with both federal and state law is in effect physically impossible ...; (2) when there is outright or actual conflict between federal and state law ...; (3) where

> the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress ...; (4) when Congress expresses a clear intent to preempt state law; (5) where there is implicit in federal law a barrier to state regulation; and (6) where Congress has legislated comprehensively, thus occupying an entire field of regulation. Additionally, the Supreme Court has held that preemption may result not only from action taken by Congress but also from a federal agency action that is within the scope of the agency's congressionally delegated authority.

Moreover, the FCC opined that, "*to the extent that other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this order*" (emphasis added). On appeal to the Eighth Circuit, however, the FCC argued that the issue of preemption of cable VoIP was not yet ripe for judicial review, and the court agreed.[24] The FCC to date has not made good on its prediction.

Based on its actions and statements in 2004, the FCC was not shy about taking away plenary telecommunications regulatory authority from states, or at least state commissions. This FCC tendency was bolstered by the *Brand X* decision, in which the Supreme Court upheld the FCC's decision that cable modem service, which includes both telecommunications and information service elements, is an information service, thus not subject to state regulation.[25]

Since 2004, however, the FCC has backed off on its move toward federalization. In 2006, the FCC, in addressing VoIP providers' responsibility to contribute to the universal service fund, stated that "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider."[26] Many fixed VoIP providers can so track customer calls. Thus, the implication is that these providers may be fully regulated by state commissions.

This 2006 *dicta* is inconsistent with the FCC's 2004 VoIP decisions, and flatly contradicts its 2004 *Vonage Order* prediction that cable VoIP services would be preempted from state regulation to a comparable extent as Vonage's DigitalVoice service. While the mixed-use rationale may not be applicable to fixed VoIP service in which calls can be jurisdictionally tracked, as noted above, there are others justifying preemption. Not the least of these are the burden on VoIP carriers (and interstate commerce) of attempting to comply with fifty-one different sets of state utility agency rules, and the disincentive for customers to subscribe to broadband capable service offered with cable VoIP packages.

If the FCC continues to be unwilling to firewall VoIP services from entry and economic regulation, Congress should step in. Industry players agree that the Telecommunications Act of 1996 is already a dinosaur that needs to be rewritten, for the simple reason that IP-based communications does not slip easily into existing taxonomic categories--information or telecommunications. Congress has the power to invoke the Interstate Commerce Clause to preclude state regulation of rates and entry of all VoIP services, just as it did with wireless regulation with 47 U.S.C. § 332(c)(3)(A), *supra*.[27]

Legislation at the state level is also feasible, as several states have largely deregulated state agency authority over VoIP services. At the very least, legislation should preclude agencies from rate and entry regulation, and I would add service quality (other than 911) to the *verboten* list.

II. Why Preemption of VoIP Regulation is Necessary

If the MPSC's gambit to fully regulate fixed VoIP proves successful, the unfairness of regulatory asymmetry will be apparent: Why should Vonage not be regulated simply because its service is portable, whereas cable telephony is not? After all, while Vonage customers can port their telephone number to any location where broadband service is available, most of its customers use the service primarily in one location, their home or business address. Why should Vonage have less regulatory expenses in terms of payment into state high cost funds or fees than cable service?

The more fundamental objection of state regulation of VoIP is the utter lack of a reasonable basis to do so. Public utility commissions were created to regulate monopoly providers—electric, gas, and telecommunications companies that were granted the right to exclusively serve geographic areas in exchange for their rates and service quality being regulated. This concept has been abolished *de jure* for telecommunications by the Telecommunications Act of 1996, at least for non-rural providers. The only reason left to regulate is a demonstrably uncompetitive telecommunications market, which would be hard to show in non-rural regions. Indeed, VoIP providers, whether cable or Vonage-like, only *add* to competition in areas where an incumbent local exchange carrier already exists. These ILECs are default providers of last resort, fully regulated, and will remain so in the near term. So long as consumers have this default choice, there is no reason to regulate would-be competitors who seek to compete on price, service quality, advanced services, or a combination of these. To the extent a VoIP provider cannot compete, its business model will fail, and consumers can go back to their ILEC or switch to another competitor.

Regulation also reduces competition—which is why larger companies often support it. One of the biggest complaints I heard as a commissioner was the lack of telephone provider competition for residential services. Why would a state want to decrease available carriers by subjecting them to state agency barriers to entry, as well as burdensome operating regulations? There is little reason to do so other than state agency revanchism (an attempt to reverse the loss of authority imposed by the Vonage decisions) and irredentism (VoIP can be redeemed only through state oversight).

I emphasize that my advocacy for loss of state authority over VoIP services is confined to *traditional* powers exercised by state commissions, including retail rate and entry regulation, tariffing, service quality rules, and unbundling. There will almost certainly be no loss of state authority of after-the-fact *enforcement*—meaning, injunctive and fining authority for slamming, cramming, fraud, misleading advertising, improper commercial or billing practices, and public health and safety issues. (The FCC noted this continuing responsibility of states in its Vonage decision.) These enforcement issues can be handled

by attorneys general or state commissions. Also, it appears from the Vonage decision that state commissions may be able to regulate 911 cost, availability, and service quality, so long as it is not tied to certification requirements. Assuming the FCC does one day complete its IP-Enabled Services rulemaking, states most likely will be given explicit authority to impose state high cost fund charges on VoIP services.

These high cost fund charges are necessary because few other than hard-line economists or think tanks advocate a flash cut to a subsidy-free world. Rural LECs who depend on intrastate toll rates for two-thirds of their revenues and universal subsidies for a significant part of the remainder would need a massive increase in retail rates to cope with a loss of those revenues. Without subsidies, the monthly charge for basic service would be hundreds of dollars per month for many rural exchanges across the nation. Economists can offer opinions as to the desirability of these subsidies, but economists do not run the state or federal legislatures. People like Ted Stevens do. So states will continue to impose high cost funds on all interconnected carriers.

States will also remain involved in telecommunications safety issues, *i.e.,* 911 services, low-income telephony support, and wholesale interconnection requirements. It is certainly true that the FCC has vast resources that dwarf those of most state commissions. However, it is equally true that state commissions have greater expertise of local conditions; that is, the cost to serve each local exchange; reasonable wholesale rates for intrastate bottleneck facilities; the 911 system, including E-911 charges, public safety answering points, and emergency service providers; and the needs of the low-income and disabled communities.

A national expert on telecommunications, University of Colorado law professor Phil Weiser, has said much more on the cooperative federalism subject than perhaps any other. He posits in a recent paper that "the FCC should only insist on uniformity where there are substantial and clear efficiencies from eliminating diverse approaches, where a single approach is clearly optimal over others, or where there is a clear showing that the costs of diversity outweigh the benefits of state experimentation and implementation."[28] This is entirely reasonable.

To take one example, the issue of how best to collect and distribute high cost and universal service monies can greatly benefit from state experimentation. A number of proposals have been made: means testing (*i.e.,* should the urban poor support high cost vacation home phones in Aspen?); vouchers (by which the high-cost recipient can spend the money on his local ILEC, a wireless provider, or broadband provider to obtain VoIP); and reverse auctions (under which one or more winning bidders collect high cost monies in return for low cost service). Each of these ideas, taken separately or together as various hybrids, has merits and pitfalls. To say that the FCC would necessarily arrive at the best solution to this intractable issue is to ignore the history of grandiose federal programs. Airline regulation, welfare, food stamps, health care: the list of programs fraught with inefficiency, fraud, and incompetence is endless. The cost of the FCC or Congress getting it wrong is massive and, after the creation of reliance interests, hard to reverse. The cost of a state getting it wrong is much lower and more temporary. (As an aside, I would admit that California's propensity to get everything wrong has affected both its neighboring states and whole industries, but other states have benefited from this by learning what not to do.)

CONCLUSION

The FCC or Congress should insist on uniformity, meaning preemption, with regard to state agency economic and traditional telephony regulation of VoIP services. Whether nomadic or fixed, all VoIP services require high-speed broadband capability, and are the type of advanced services for which Congress has expressed a desire for national uniformity and encouragement. They also represent competition in the residential market, which should lead to better prices, choices, and service quality.

The decidedly anti-federalist notion that state public utility commissions must be preempted or legislatively precluded from regulating VoIP services like any other telephone service is not because commissions have ill intentions or are inept. It is precisely the opposite: commissions and their staff are rather adept at executing their well-intentioned regulations on those classified as "public utilities." But such a designation is anachronistic for non-monopolistic and competitive advanced services, like nomadic, fixed, and wireless types of VoIP service.

Endnotes

1 *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003) (order finding jurisdiction and requiring compliance).

2 Vonage Holdings Corp. v. Minnesota Public Utilities Commission, 290 F. Supp.2d 993 (D. Minn. 2003).

3 *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket No, 03211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

4 Minn. Public Utility Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).

5 Available at http://www.dora.state.co.us/puc/DocketsDecisions/decisions/2004/C04-0004_03M-220T.doc.

6 WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

7 Full disclosure: I have done work for Comcast in the State of Colorado as outside counsel. This article has not been requested or commissioned by Comcast, and my position that VoIP should largely be deregulated was the same when I was a PUC commissioner in 2004. *See* http://www.dora.state.co.us/puc/DocketsDecisions/ decisions/2004/C04-0004_03M-220T.doc.

8 *See* Staff of the PSC v. Comcast IP Phone, LLC, Case No. TC-2007-0111.

9 *In the Matter of the Investigation to Address Obligations of VoIP Providers with Respect to the KUSF,* Docket No. 07-GIMT-432-GIT, ¶ 26.

10 By this I am not suggesting that states have the legal right to impose fees or charges at will on VoIP providers. To the extent states can do so, they should explicitly and legislatively limit state agency oversight to payment of such fees/charges, public safety, and interconnection.

11 47 U.S.C. § 332(c)(3)(A) (emphasis added).

12 *See* Sprint Spectrum, L.P. v. State Corporation Comm'n of Kansas, 149 F.3d 1058 (10th Cir. 1998) (addressing § 332(c)(3)(a) in the context of whether a state could require a CMRS to contribute to USF); Cellular

Telecommunications Industry Association v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (court found that § 332(c)(3)(A) did not preempt Texas law requiring CMRS providers in state to contribute to two state-run universal service programs); Digital Communications Network, Inc. v. AT&T Wireless Services, 63 F.Supp.2d 1194 (C.D. Cal. 1999) (where court determined that § 332(c)(3)(A) prevented state commission from asserting jurisdiction over a dispute between telecommunications providers regarding whether one provider was required to make its "one rate" plan available to reseller at wholesale rates); Bastien v. AT&T Wireless, 205 F.3d 983 (7th Cir. 2000) (involves a suit alleging *AT&T* misled plaintiff about his cellular telephone service and an analysis of § 332(c)(3)(A) and the Savings Clause); Texas Office of PUC v. FCC, 265 F.3d 313 (5th Cir. 2001) (in addressing whether a subscriber line charge price cap violated §§ 254(b)(1) and 254(i), the court held that the FCC's interpretation that §§ 254(b)(1) and 254(i) are merely aspirational is permissible under the *Chevron* analysis); Texas Office of Public Utility Counsel, et al.v. Federal Communications Commission, 183 F.3d 393 (5th Cir. 1999) (addressing CMRS contributions to the Federal USF and ETC designations).

13 Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Final Decision and Order. 28 F.C.C.2d 267 (197I).

14 Amendment of Section 64.702 of the Commission's Rules and Regulation (Second Computer Inquiry), 77 F.C.C.2d 384 (1980).

15 47 U.S.C. § 153(43).

16 47 U.S.C. § 153(46).

17 47 U.S.C. § 153(20).

18 *'The Metaphysics of VoIP,"* Randolph J. May, C\LF article at http://news.com.com/2010-7352-5134896.html (January 5. 2004).

19 *Pu1ver.Com Free World Dialup,* Memorandum Opinion and Order, 19 FCC Red 3307 (rel. Feb. 19, 2004) ("*Pulver Order*").

20 *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges,* 19 FCC Rcd 7457 (rel. April 21, 2004).

21 *Id.* at *9.*

22 *Id.* at 1-2.

23 *See* Southwestern Bell Telephone, L.P. v. Missouri PSC, 461 F. Supp.2d 1055 (E.D. Mo. 2006) ("Net protocol conversion is a determinative indicator of whether a service is an enhanced or information service").

24 Minn. Public Utilities Commission v. FCC, *supra*, 483 F.3d at 582-83.

25 NCTA v. Brand X Internet Services, 545 U.S. 967 (2005).

26 *In re* Universal Service Contribution Methodology, 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006).

27 While the Supreme Court in *United States v. Lopez* held that Congress exceeded it authority when it passed the Gun-Free School Zone Act because the Act could not be sustained as a regulation of an activity that substantially affects interstate commerce, no one can seriously doubt that inconsistent and burdensome regulation of 51 different state commissions substantially affects interstate commerce. 514 U.S. 549 (1995).

28 Philip J. Weiser, C*ooperative Federalism and its Challenges,* 2003 Mich. St. DCL L. Rev. 727, 729 (2003).