

S. 2281 GOES TOO FAR

BILL GOES BEYOND WHAT DEPARTMENTS OF DEFENSE¹, JUSTICE, AND HOMELAND SECURITY AS WELL AS CONSUMER GROUPS OR EVEN INDUSTRY SEEK

Local government looks forward to the future made possible and benefits to capture with IP enabled services. S. 2281, however, goes beyond that which is necessary to promote VoIP and could jeopardize the future of universal service, E911, national security and the viability of service to many rural and inner city areas. As reflected in recent filings at the FCC [IP Enabled Services docket, FCC 04-36], the Department of Defense, Department of Justice (“DOJ”), Department of Homeland Security (“DHS”), consumer groups and many communications providers, S. 2281 goes too far.

Below is a list of the major components of S 2281 and excerpts from the various filings at the FCC, which reflect that the bill goes too far.

S. 2281 GOES BEYOND INDUSTRY NEEDS IN ESTABLISHING EXCLUSIVE FEDERAL JURISDICTION.

S 2281 (Section 2) would reserve and severely limit jurisdiction over VoIP to the Federal Communications Commission.

DOJ, DHS, state and local government commenters disagree with such an approach. To the contrary all agree that there must continue to be regulatory interactions by federal, state and local government with VoIP providers. Absent such authority, VoIP providers’ compliance with the goals of national security/emergency preparedness (NS/EP), CALEA and E911, ADA are jeopardized.

- DHS states at p.8: “In times of emergency and network congestion, NS/EP priority treatment may be required for certain communications such as electronic mail, instant messaging and video conferencing. The Commission’s rulemaking process must keep this in mind.”

More than just government seeks to retain oversight of VoIP at the state level. Cable MSOs, ILECs and their national associations, while calling for state preemption for economic regulation, nevertheless call for state public utility

¹ After this letter was prepared the Department of Defense filed late Comments in the IP docket at the FCC. The filing associates DOD with the Comments of DHS regarding NS/EP and called upon the Commission to retain Title II oversight over IP services so that transfers of IP service providers would be subject to Section 214 of the Act. Section 214 provides that transfers to foreign parties may be examined to determine whether an applicant affects national security, infrastructure protection, law enforcement, foreign policy and trade policy.



commission oversight and authority to protect universal service, enforce inter-carrier compensation, enforce interconnection rights, preserve access to the North American Numbering Plan assets and E911 resources.

- *See e.g.* Cox Communications at p. 13 calls upon the Commission to adopt a framework that includes speedy enforcement and dispute resolution at the state level for VoIP providers' interconnection needs. *See also* Attachment A to Comcast's filing and the "VoIP White Paper" of the National Cable & Telecommunications Association, *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition* (Feb. 2004)

It is not just government and incumbents that want the continued role of local government. Parties that one would expect to be served by S. 2281 also call for a continued role of state government. Facility and non-facility based providers call on the Commission (and Congress by extension) to enforce a Title II common carrier regime enforced at the state level to regulate the underlying transport platforms. The industry's desires could not be met under the S 2281.

- AT&T at p. 9 states: "The Act...does not permit the elimination of core obligations that apply to basic telecommunications services because they simply employ Internet Protocol (IP)."

Not surprisingly the National Consumers League calls for preserving the role of states in VoIP.

S. 2281 IS OVERLY SEVERE IN ITS LIMITING FCC OVERSIGHT.

S. 2281 (Section 3) severely limits authority of the FCC to manage VoIP and VoIP providers. In doing so the bill goes too far and creates a regulatory regime that has no basis in legal precedence, experience or vision of a world in which facility providers are fairly compensated for the use of their facilities and subject to asymmetric regulations.

- BellSouth at p. 47 cites the Commission to *Cincinnati Bell Tel. Co v. FCC* 69 F 3d 752 (6th Cir. 1995) for the proposition that Courts have found the Commission has an obligation to regulate like services in a like manner. The Sununu legislation would jeopardize the Commission's ability to meet this standard.
- "Comcast also urges the Commission to avoid disproportionately burdening those VoIP providers that are facilities-based in favor of those that are not." Comcast at 17.

Ban on Access Charges

Section 4 of S. 2281 bans access charges on inter-carrier compensation unless such compensation is limited to reciprocal obligations. The industry does not agree. Cable MSOs, Wireless Carriers and ILECs, both rural and urban, have made clear to the Commission that they should be entitled to fair compensation for the use of their networks. Such reciprocal compensation is not attainable under S. 2281.



The result is that existing networks become stranded assets financially, despite being integral platforms for service.

- OPASTCO said the use of IP technology does not reduce an ILEC's cost of providing access to the network, so VoIP services "should provide equitable compensation."
- The Ad-Hoc Telecommunications Users Committee at p. 12 called upon the Commission to adopt a unified intercarrier compensation regime to include VoIP providers.
- BellSouth at p. 43 calls upon the FCC to establish a regulatory structure that requires all VoIP providers that integrate with the PSTN to contribute to universal service, intercarrier compensation, CALEA, and E911. No such requirements would be possible under S. 2281.

Universal Service Exclusion

S. 2281 creates an exemption for contributing to universal service.

While a couple of non-facility VoIP providers filed comments at the Commission seeking exemption from universal service, not a single federal, state or local government party supported any such exemption. Likewise every Cable MSO and ILEC supported the requirement that VoIP providers pay into the USF. Even major VoIP providers such as AT&T and Vonage did not oppose the imposition of a USF contribution, although they did suggest that such continuation might be delayed.

- BellSouth at p. 48-49 asserts that all IP providers must contribute to universal services as an information service contains a telecommunications component.
- Level 3 calls upon the Commission at p. 3 to create a world in which IP enabled services are governed by reciprocal compensation and contribute to the USF.
- National Consumer League said that since VoIP is a telecom service, it should contribute to the universal service fund.

CALEA

Section 4 (c) of S 2281 would establish VoIP as a CALEA free zone ensuring its position as the criminals' and terrorists' telecommunications network of choice.

Government, ILEC, Cable MSOs, CLECs, CPE manufacturers and consumer groups filing in the FCC's IP docket agree that VoIP should be subject to CALEA. For whom, therefore, is this section drafted?

- The Department of Justice made clear at p. 5 that the "Commission [and Congress?] ...should be mindful not to adopt a classification scheme that could inhibit the ability of law enforcement to conduct court-ordered surveillance of communications occurring via IP-enabled services." Justice further clarified that unlike S. 2281, the Commission can not rely upon Title I only. "If the Commission utilizes its ancillary jurisdiction under Title I to apply mandates required by CALEA, such action could be challenged in court and result in delays and prolonged regulatory uncertainty, which is not in the interest of industry or of law enforcement." P. 7
- DHS at p. 3 associates itself with the comments of Justice on CALEA.



- ILECs and Cable MSO agrees that CALEA should apply. *See e.g. Comments of USTA, NCTA, BellSoth, Cox, Comcast et. al.*

E911

S. 2281 would create a voluntary process for the development of E911 capabilities compliant with the ADA, as well as reliability and privacy standards

- Federal, state and local elected officials and law enforcement at all levels of government filed with the Commission to make clear that industry standards alone are not acceptable. Additionally, ILECs and Cable MSOs have made it clear that regulation of their services, which are subject to government oversight in each of the identified areas, should not be more onerous than that required of their competitors – VoIP providers.
- APCO stated the “Commission must not succumb to the temptation to defer entirely to voluntary standards and guidelines to address the E-911 problem.” P. 3

The National Consumer League stated VoIP is a telecom service that should provide full E-911, provide all consumer protections and meet all disability access mandates.

S. 2281 requires only the disclosure of the absence of 911 capabilities.

Government and consumer groups alike have documented that such a solution is not acceptable and fraught with perils for the public.

- APCO at p.8 documents how voluntary disclosure at point of sale is just not a workable solution.” In a residential setting, the person attempting to make the 911 call may be a child of an injured parent or caretaker, a neighbor unfamiliar with the limitations of the homeowner’s VoIP telephone, or even the original purchaser who, in the heat of the emergency, forgets the 9-1-1 disclaimer that they may or may not have read when acquiring the VoIP service. In a business setting, the VoIP/911 call is likely to be made by an employee, contractor or customer who had no role in selecting the non-compliant VoIP service.”