Telecommunications Alert: Because They Are "Information Services": Federal District Court Finds That Access Charges Should Not Apply to VoIP-Originated Calls Regardless of Filed Tariff Language b

3/2/2010

By Howard J. Symons, Michael H. Pryor, and Darren J. Abernethy

On February 18, 2010, the United States District Court for the District of Columbia held[1] that interconnected Voice over Internet Protocol (VoIP) service is an information service not subject to access charges. It concluded that a carrier could not collect access charges for such a service notwithstanding that it had filed a tariff with the FCC purporting to impose access charges on VoIP-originated calls. The case arose out of a dispute over compensation for VoIP-originated long-distance calls by CommPartners customers that were converted by CommPartners to a different format before being transmitted to PAETEC customers and "terminated" using PAETEC's facilities.

Background

Two formats for transmitting telephone calls are relevant for this case: Time-Division Multiplexing (TDM) calls, the format used for traditional telephone calls, and VoIP calls. Calls initiated in one format can be converted once or multiple times to the other format during transmission. It was recognized by both CommPartners and PAETEC that calls begun and transferred in TDM format are subject to access charges, *i.e.,* those charges made by a local exchange carrier for use of its local exchange facilities to originate or terminate a call carried to or from a long-distance interexchange carrier. However, as noted above, there was disagreement as to whether calls beginning on CommPartners' network in VoIP format that were then converted to TDM format for transfer to the PAETEC network should be treated as subject to access charges.

PAETEC's Federal Communications Commission (FCC) tariff stated that access charges apply to all services and facilities for the origination or termination of any interstate traffic "regardless of the technology used in transmission." Given that the courts have recognized that once tariffs are approved, they "are the law, and not mere contracts," PAETEC asserted that its termination of VoIP-originated traffic counted as an access charge-eligible service per its accepted federal tariff. CommPartners argued, however, that even if PAETEC's tariff does cover VoIP-originated calls, it nonetheless conflicts with general intercarrier compensation law, as established by the Communications Act and interpreted by the FCC. CommPartners contended that the court should ignore PAETEC's reliance on the so-called "filed-rate doctrine," which generally holds that a filed tariff must prevail over any other consideration, and view the termination of VoIP-originated calls as an "information service" exempt from access charges.

Discussion

Noting that "information services," as opposed to "telecommunications services," include the ability to communicate between networks that employ different data-transmission formats, the court was persuaded that CommPartners' VoIP-to-TDM conversion results in such an information service. Recognizing that this issue has been a controversy that the FCC has "been unable to decide" for a decade, the court cited two earlier federal district court cases that held that transmissions including net format conversion from VoIP-to-TDM are information services. The court found that a "reciprocal compensation" payment regime should govern in this situation.

The court also found that because a tariff cannot conflict with the underlying statutory framework pursuant to which it was created, PAETEC's tariff must yield. The court did not invalidate the tariff, which arguably would be a violation of the filed-rate doctrine, but rather found that even though the disputed terms were *ultra vires* and lacked legal force, the tariff could still be applied to traffic which the statutory framework allowed it to reach. The court was mindful that otherwise allowing such language in tariffs "would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice." Seeking to avoid allowing tariffs to "sidestep" the applicable legal framework while simultaneously upholding the purposes of the filed-rate doctrine of preventing discrimination among consumers and preserving the rate-making authority of federal agencies, Judge James Robertson stated that the doctrine is not undercut by this decision but nonetheless is partly overridden in this case.

* * *

Please contact your Mintz Levin telecommunications attorney, or any attorney listed in the right column of this Alert, for more information as we continue to follow these developments.

Endnotes

[1] PAETEC *Communications, Inc. v. CommPartners, LLC*, Case 1:08-cv-00397-JR (D.D.C. Feb. 18, 2010).

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

Howard J. Symons
Chair, Communications Practice
(202) 434-7305
HJSymons@mintz.com

Michael H. Pryor
(202) 434-7365
MHPryor@mintz.com

Darren J. Abernethy
(202) 434-7347
DJAbernethy@mintz.com