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| 108TH CONGRESS *2d Session* | SENATE | REPORT 108–425 |
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# VOIP REGULATORY FREEDOM ACT OF 2004

## R E P O R T

OF THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

## S. 2281

DECEMBER 7, 2004.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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# VOIP REGULATORY FREEDOM ACT OF 2004

DECEMBER 7, 2004.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

## R E P O R T

[To accompany S. 2281]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2281) to provide a clear and unambiguous structure for the jurisdictional and regulatory treatment for the offering or provision of voice-over-Internet-protocol applications, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

### PURPOSE OF THE BILL

The primary objective of this legislation is to provide a legal framework for the jurisdictional and regulatory treatment of voice-over-Internet-protocol (VOIP) applications.

### BACKGROUND AND NEEDS

VOIP generally describes a type of technology available in many forms that enable the sending and receiving of voice communications by packetizing, transporting, and routing such communications as data. The principal difference among various types of VOIP offerings is the degree to which Internet Protocol (IP) or an IP network is used to complete an end-to-end call, with some VOIP calls riding entirely over the Internet and others originating, terminating, or doing both, on the public switched telephone network (PSTN).

Over the past few years, improvements in VOIP technology and the deployment of broadband Internet service have led to increased offering and use of IP telephony services. This in turn raises questions of whether, and how best, to regulate the services. Under the

1996 Telecommunications Act, the regulatory obligations that apply to the provision of this service depend largely on whether it is classified as a telecommunications service or an information service. Generally, information services are subject to minimal, if any, regulation. Telecommunications services, however, are subject to significant common carrier regulation under Title II of the Communications Act with respect to all interstate telecommunications services, as well as separate State regulation with respect to all intrastate telecommunications services.

S. 2281 was introduced in response to this situation and is intended to give authority to the Federal Government to regulate VOIP services.

## LEGISLATIVE HISTORY

On April 4, 2004, Senator Sununu introduced S. 2281, "The VOIP Regulatory Freedom Act." The Committee on Commerce, Science, and Transportation held two hearings concerning the appropriate Federal and State regulatory treatment of VOIP and the provisions of S. 2281 on February 24, 2004, and June 16, 2004 respectively. Witnesses at the hearings included members of Congress, representatives of the Federal Government, the Federal Communications Commission, and a diverse group of companies, associations, and private parties interested in the regulatory treatment of VOIP services.

On July 20, 2004, the Committee met in open executive session to consider an amendment in the nature of a substitute to S. 2281 offered by Senators Sununu and Stevens. The substitute amendment generally preempts States from regulating voice-over-Internet-protocol applications and was adopted by unanimous consent.

Senators Burns and Nelson offered an amendment to preserve the ability of States to require VOIP applications to provide 911 and E911 services and was adopted by rollcall vote 22–0.

Senator Dorgan offered an amendment clarifying that nothing in the bill would exempt providers of a VOIP application from requirements imposed by a State commission on all providers of telecommunications services and to pay appropriate compensation for the transmission of a VOIP application over the facilities and equipment of another provider. The amendment was adopted by rollcall vote 12–10.

The amendments were adopted, and the bill was ordered to be reported as amended, by voice vote.

## ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

*S. 2281—VOIP Regulatory Freedom Act of 2004*

Summary: S. 2281 generally would reserve the authority to regulate a form of telephone service known as Voice-over-Internet-Protocol (VOIP) to the federal government for three years. States would retain jurisdiction over the regulation of state Universal Service Funds—programs to ensure all citizens have access to

phone service—emergency 911 services, and compensation among phone companies. Within 180 days after enactment of the bill, the Federal Communications Commission (FCC) would be required to develop rules to ensure that all VOIP carriers provide 911 service, to the extent possible. S. 2281 also would require both the Comptroller General and the FCC to complete studies of the effect of the legislation.

Assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would cost the federal government about $1 million a year over the 2005–2009 period. Enacting the bill would not affect direct spending or revenues.

By prohibiting most state and local regulation of VOIP, S. 2281 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). CBO estimates, however, that the costs to comply with this mandate would be small and would not exceed the threshold established in UMRA ($60 million in 2004, adjusted annually for inflation).

S. 2281 also would impose private-sector mandates, as defined in UMRA, on providers of VOIP services. CBO estimates that the aggregate cost of those mandates would not exceed the threshold for private-sector mandates established by UMRA ($120 million in 2004, adjusted annually for inflation).

Estimated cost to the Federal Government: S. 2281 would require the FCC to regulate voice-over-Internet-protocol technology. Based on information provided by the FCC and assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would cost about $1 million a year over the 2005–2009 period for additional regulatory staff. Enacting the bill would not affect direct spending or revenues.

Estimated impact on state, local, and tribal governments: S. 2281 would prohibit states from regulating VOIP for three years. It would preserve the ability of states to regulate and assess fees on state Universal Service Funds, emergency 911 services, and compensation among phone companies for the use of telephone lines. While this preservation of state authority would protect significant state and local government revenues, the underlying prohibition on state regulation of VOIP would constitute an intergovernmental mandate as defined in UMRA. Because the bill would not require states to implement costly programs or prohibit them from raising significant revenues, however, the costs of S. 2281 would be small and would not exceed the threshold established in UMRA ($60 million in 2004, adjusted annually for inflation).

Based on information from industry analysts, CBO assumes that the bill would not prohibit states from taxing VOIP in the same way that they tax other telephone services. While there are currently court cases pending in both Minnesota and New York, as well as expected FCC action that will address the issue of what state taxing schemes may be applied to VOIP, this legislation does not address that issue.

Estimated impact on the private sector: S. 2281 would impose private-sector mandates, as defined in UMRA, on certain providers of VOIP. Section 4 would require providers of VOIP applications capable of connecting to the public switched telephone network to provide 911 and enhanced 911 (E–911) services for their subscribers—to the extent that it is technologically and economically

feasible—on terms comparable to 911 services offered by traditional telecommunications carriers. CBO estimates that the aggregate cost of mandates in the bill would not exceed the annual threshold for private-sector mandates established by UMRA ($120 million in 2004, adjusted annually for inflation).

VOIP companies incur start-up and ongoing costs to provide 911 and E–911 services to their subscribers. Start-up costs include additional data processing, personnel training, and the development and purchase of equipment. Primary ongoing costs include the costs of maintaining an accurate database of addresses and operating linkages between the Internet protocol networks and the telephone network. According to information from public safety sources, the start-up costs to VOIP providers could amount to about $75 million per year over the next five years.

CBO assumes that the demand for VOIP services will grow over the next five years to account for roughly nine million U.S. households with telephone service in 2009. Public safety sources estimate that the ongoing monthly cost of 911/E–911 services for VOIP providers would average about 35 cents per household. Using those figures, CBO estimates that operating costs of providing 911/E–911 services in 2009 would be about $40 million. Thus, in 2009 the cost of implementing 911/E–911 services for VOIP providers is estimated to be about $115 million.

The 911 requirements under the bill are already being discussed or implemented by some VOIP market participants. VOIP service providers have an incentive to provide 911 services in order to be competitive with other telephone services and some providers are already offering 911 and similar services. In addition, representatives of the VOIP provider industry are currently working with the National Emergency Number Association to develop voluntary standards for VOIP 911 services. Because some VOIP providers would offer 911 services independent of the mandate in S. 2281, the incremental cost to the industry of complying with the mandate would be lower than the total cost of implementing 911 services.

Estimate prepared by: Federal Costs: Melissa Zimmerman. Impact on State, Local, and Tribal Government: Sarah Puro. Impact on the Private Sector: Philip Webre.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

## REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

### NUMBER OF PERSONS COVERED

S. 2281 would establish a regulatory framework for VOIP applications. Thus, the bill would cover any provider of these applications.

### ECONOMIC IMPACT

The bill would clarify the regulatory treatment of VOIP applications. The use of such applications may increase given the increased regulatory certainty provided by the legislation.

PRIVACY

S. 2281 would not alter or affect the personal privacy protections of consumers using VOIP applications.

PAPERWORK

S. 2281 would require the Federal Communications Commission and the Government Accountability Office to submit reports to Congress regarding the ability of law enforcement to access VOIP applications.

SECTION-BY-SECTION ANALYSIS

*Section 1. Short title*

This section would set forth the short title of the bill as the "VOIP Regulatory Freedom Act of 2004."

*Section 2. Assertion of federal jurisdiction*

Subsection (a) reserves authority to the Federal Government to regulate the offering of a voice- over-Internet-protocol application.

Subsection (b) prohibits any State or political subdivision from enacting or enforcing any law, regulation, standard, or any other provision, or has the effect of regulating the offering or provision of a VOIP application.

Subsection (c) preserves the authority of a State to enact or enforce criminal laws or regulations of general applicability regarding doing business in that State, consumer protection, or unfair or deceptive trade practices.

Subsection (d) specifies that nothing in this act limits State jurisdiction of 9–1–1 or enhanced 9–1–1 services, including State jurisdiction over connected VOIP applications with respect to 9–1–1 and enhanced 9–1–1 services or the ability of State and local governments to require providers of all connected VOIP application to collect fees to support the provision of 9–1–1 or enhanced 9–1–1 services.

Subsection (e) specifies that nothing in this act exempts providers of a VOIP application from requirements imposed by a State commission on all providers of telecommunications services and to pay appropriate compensation for the transmission of a VOIP application over the facilities and equipment of another provider. It also specifies that all providers of a VOIP application contribute on an equitable and non-discriminatory basis to the preservation and advancement of universal service.

*Section 3. No impact on transmission facilities*

This section specifies that nothing in this act shall affect the authority of the FCC or any State to regulate the transmission facilities use to transmit a voice communication of a VOIP application.

*Section 4. 9–1–1 and enhanced 9–1–1 services*

Subsection (a) requires the Commission to conclude a proceeding no later that 180 days after the date of enactment of this Act establishing a transition period in which providers of a VOIP application are required to provide 9–1–1 and enhanced 9–1–1 services comparable to those provided by other telecommunications carriers.

Subsection (b) requires the FCC to report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce on the progress of enhanced 9–1–1 implementation for connected VOIP applications.

*Section 5. Law enforcement*

Subsection (a) specifies that nothing in this act modifies, impairs, or supersedes the Communications Assistance for Law Enforcement Act (CALEA) and not alter the obligation of a provider of a VOIP application to furnish to an authorized law enforcement agency all information and technical assistance necessary.

Subsection (b) requires the Government Accountability Office within 6 months after the enactment of this Act to submit a report assessing law enforcement's current technical capability to intercept and analyze data over the Internet; assess any problems intercepting data over the Internet; a description of options for addressing any such problems; an evaluation of such options for different configuration of broadband access, connected VOIP service, and VOIP applications in terms of effectiveness, effect on innovation, effect on privacy, and the cost to customers; an assessment of the first 10 years of implementation of CALEA.

Subsection (c) requires an FCC study no later than 6 months after the date of the enactment of this act that includes an assessment of the first 10 years of implementation of the CALEA.

*Section 6. Expiration*

This section would provide that the legislation expires 3 years after the date of enactment.

*Section 7. Definitions*

This section would provide definitions of terms in this Act.

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 2281:

Senator Burns offered an amendment for himself and Senator Nelson to the substitute amendment proposed by Senator Sununu et al. to ensure that States retain jurisdiction of 9–1–1 and enhanced 9–1–1 services with respect to connected VOIP applications and to require the Commission to adopt rules to ensure that VOIP service providers provide 9–1–1 and enhanced 9–1–1 service comparable to that provided by telecommunications carriers. By a roll-call vote of 22 yeas and 0 nays as follows, the amendment was adopted:

| YEAS—22 | NAYS—0 |
|---|---|
| Mr. Stevens | |
| Mr. Burns | |
| Mr. Lott | |
| Mrs. Hutchison | |
| Ms. Snowe | |
| Mr. Brownback | |
| Mr. Smith | |
| Mr. Fitzgerald | |
| Mr. Ensign | |

Mr. Allen
Mr. Sununu
Mr. Hollings
Mr. Inouye[1]
Mr. Rockefeller[1]
Mr. Breaux
Mr. Dorgan
Mr. Wyden
Mrs. Boxer
Mr. Nelson
Ms. Cantwell
Mr. Lautenberg
Mr. McCain

[1]By proxy

Senator Dorgan offered an amendment to the substitute amendment proposed by Senator Sununu et al. to provide that nothing in the bill may be construed to exempt VOIP application providers from State requirements to compensate other providers for the transmission of VOIP applications or to contribute to the universal service fund. By a rollcall vote of 12 yeas and 10 nays as follows, the amendment was adopted:

YEAS—12

Mr. Burns
Mrs. Hutchison
Ms. Snowe
Mr. Brownback
Mr. Hollings
Mr. Inouye[1]
Mr. Rockefeller[1]
Mr. Breaux
Mr. Dorgan
Mr. Wyden
Mrs. Boxer
Mr. Nelson

NAYS—10

Mr. Stevens
Mr. Lott
Mr. Smith
Mr. Fitzgerald
Mr. Ensign
Mr. Allen
Mr. Sununu
Ms. Cantwell
Mr. Lautenberg
Mr. McCain

[1]By proxy

By a rollcall vote of 13 yeas and 10 nays as follows, the bill was ordered reported with an amendment in the nature of a substitute:

YEAS—13

Mr. Stevens
Mr. Burns
Mr. Lott
Mr. Smith
Mr. Fitzgerald
Mr. Ensign
Mr. Allen
Mr. Sununu
Mr. Wyden
Mrs. Boxer
Ms. Cantwell
Mr. Lautenberg
Mr. McCain

NAYS—9

Mrs. Hutchison
Ms. Snowe
Mr. Brownback
Mr. Hollings
Mr. Inouye[1]
Mr. Rockefeller[1]
Mr. Breaux
Mr. Dorgan
Mr. Nelson

[1]By proxy

## CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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