**PHOENIX CENTER FOR ADVANCED LEGAL
& ECONOMIC PUBLIC POLICY STUDIES**
5335 Wisconsin Avenue, NW, Suite 440 • Washington, D.C. 20015
Tel: (+1) (202) 274-0235 • Fax: (+1) (202) 244-8257//9342 • e-Fax: (+1) (202) 318-4909
www.phoenix-center.org

Contact:
Lawrence J. Spiwak
President
lspiwak@phoenix-center.org

BLOCKING VOIP CALLS: FOREBODING HARBINGER OR BENIGN FLUKE?

The recent *Madison River* case was no "benign fluke"; rather, it exposes the hard fact that the existing binary legal regime of "information services" under Title I versus "telecommunications services" under Title II and "cable operator" under Title IV of the Communications Act does not reflect, and cannot adapt to, the digital world.

That is to say, for the past fifteen years, classifying products and services as "information services" under Title I has provided a convenient legal construction to shield new products and services from onerous legacy regulations. While this approach may have started as a clever idea at the time when information services consisted of now-pedantic things such as voice mail or international satellite feeds, new entrants are currently finding out that so-called Title I jurisdiction does not provide all of the legal solutions innovative new broadband products and services such as VoIP and IPTV need to take hold, flourish and compete against legacy applications.

Take the current VoIP debate. As VoIP providers all rushed to be declared "information service" providers to avoid paying access charges and universal service contributions, they overlooked a basic legal fact that nobody wants to talk about – *i.e., under current law, "information service" providers are not entitled to basic interconnection rights with other networks, only Title II telecommunications carriers – who adhere to all legacy regulations – are.* While this is no big deal for novelty computer-to-computer VoIP such as Free World Dial-up or Skype, upholding the plain letter of the current law would bring all managed-VoIP deployment from both incumbents and new entrants alike that originates on broadband and terminates on the PSTN (or visa versa) to a screeching halt. The FCC understands this problem all too well, which is why it both settled the *Madison River* dispute so quickly and recently launched two NPRMs to determine how best it can fit the round peg of VoIP into the square hole of the Communications Act and how it should formulate a comprehensive solution to the Byzantine inter-carrier compensation system.

But the problems created by the legal limitations of Title I will not end here. For example, in order to financially justify wide-spread fiber roll-outs – particularly with the marginal cost of providing VoIP near $0 – new entrants are also going to have to provide video services. Traditional cable regulation under Title VI of the Communications Act, like its telephone counterpart in Title II, can impose numerous barriers to entry such as local franchising requirements, residual cable rate regulation, and PEG channel requirements. If we classify video delivered by Internet Protocol (IPTV) as an "information service" because the functionality of the service resides in the network itself, then a legitimate argument can be made that IPTV providers need not be subject to traditional Title VI regulation. Yet, if IPTV is classified as an "information service", then IPTV will fall under neither the definition of "cable systems" nor "satellite carriers" for purposes of the crucial Compulsory License under the Copyright Act to re-transmit television and radio broadcasts. Hence the economic conundrum for people seeking to deploy IPTV: *while becoming classified as an "information service" provider might eliminate the major regulatory barriers to entry for your residential fiber roll-out, what good is this victory if you still have no programming to sell on your system?*

In sum, it is pathetic that the only serious way we have to reduce government-induced entry barriers for new broadband services is to classify them as an "information service" subject to exclusive federal jurisdiction. The regulatory distortions caused by this arbitrary dichotomy are growing every day, and the legal chaos is just going to get worse with the Supreme Court's pending decision in the *Brand X* case, where the Court is expected to rule whether cable modem service should be classified as an "information service" or as a "telecommunications service". Accordingly, the most constructive approach would be for Congress to eliminate the current arbitrary regulation based upon the type of service provided and focus instead on the key structural problems of the market.