

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 19-15072

AUTAUGA COUNTY EMERGENCY MANAGEMENT
COMMUNICATION DISTRICT,
CALHOUN COUNTY 911 DISTRICT,
BIRMINGHAM EMERGENCY COMMUNICATIONS
DISTRICT,
MOBILE COUNTY COMMUNICATIONS DISTRICT,

Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

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ATT,
BELLSOUTH,

Intervenors-Respondents.

Petition for Review of a Decision of the
Federal Communications Commission
Agency No. 19-FCC-44

Before ROSENBAUM, LUCK, and ANDERSON, Circuit Judges.

ROSENBAUM, Circuit Judge:

Dialing 9-1-1 from anywhere in the United States, using just about any type of phone system, connects a user with an emergency-services hotline. That, of course, is by design.

The groundwork for our national emergency-system hotline started to be laid in the 1960s. Since that time, new telephony technology continued to develop: basic analog systems, digital systems, mobile and cellular systems, and most recently, systems that use the internet to transmit messages. This internet telephony

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technology is often referred to as “Voice over Internet Protocol,” or “VoIP,” for short.¹ And Congress took notice of it.

Indeed, in 2008, Congress enacted legislation that required the development of a “national plan for migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen-activated emergency communications and improving information sharing among all emergency response entities.” 47

¹ To understand how VoIP functions, it’s helpful to compare it to how conventional phone calls work. A “regular” phone call using the “public switched telephone network” (“PSTN”) (also known by the retronym “plain old telephone service” (“POTS”)) relies on circuit-switched telephony. See ThinkSecure Network, *How does a VoIP phone system work differently than POTS?, Difference Between VoIP and PSTN*, ThinkSecureNet (June 11, 2021), <https://www.thinksecurenet.com/blog/how-does-a-voip-phone-system-work-differently-than-pots/>. The system works by setting up a dedicated circuit between two points at different sites for the duration of a call. See Cameron Johnson, *What is POTS? Plain Old Telephone Service Line & Network Explained*, Nextiva Blog (Oct. 15, 2018), <https://www.nextiva.com/blog/what-is-pots.html>. Traditionally, this type of telephony system has used copper wires carrying analog voice data over dedicated circuits. *Id.* In more recent years, integrated services digital network (“ISDN”) technology has been used to carry digital voice data, using the traditional public switched telephone network. *Id.* In contrast, VoIP refers to phone service over the internet. See *Difference Between VoIP and PSTN*, GeeksforGeeks (updated on Aug. 14, 2020), <https://www.geeksforgeeks.org/difference-between-voip-and-pstn/>. For calls using VoIP, the internet is the transmission medium for voice data in the form of packets using Internet Protocol (“IP”). *Id.* VoIP transmits real-time voice signals from a source IP address to the target IP address. *Id.* VoIP has come a long way since its invention, and today, some consider it more reliable and cost-effective than good, old-fashioned POTS. *Id.*

U.S.C. § 942(d)(1) (2008). That legislation is called the New and Emerging Technologies 911 Improvement Act of 2008 (“NET 911 Act”), Pub. L. 110-283, 122 Stat. 2620 (July 23, 2008), and it is codified at 47 U.S.C. §§ 222, 615a, 615a-1, 615b and 942.²

Congress identified three interrelated purposes of the NET 911 Act: “To promote and enhance public safety by facilitating the rapid deployment of IP-enabled 911 and E-911 services, encourage the Nation’s transition to a national IP-enabled emergency network, and improve 911 and E-911 access to those with disabilities.” Pub. L. 110-283, 122 Stat. 2620.

In furtherance of these purposes, Congress legislated “parity” between VoIP-based and non-VoIP-based providers and subscribers when it comes to providing and obtaining 911-system access. Put simply, Congress sought to eliminate any financial penalty to VoIP providers and subscribers, in comparison to non-VoIP providers and subscribers, for 911-system access.

As part of this plan, Congress enacted 47 U.S.C. § 615a-1(f)(1), which we refer to as the “911 Fee Parity Provision.” This statute allows non-federal government entities to charge a fee to commercial phone services for the support or implementation of various 911 services. But it specifies that, “[f]or each class of

² Section 942 has since been substantially amended by the Next Generation 9-1-1 Advancement Act of 2012, Pub. L. 112-96, §§ 6501-09, 126 Stat. 156, 237-45 (Feb. 22, 2012). For that reason, our further citations of Section 942 in this opinion refer to the 2008 version.

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subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.” *Id.*

Appellants here are four 911 Districts in Alabama who contend that the 911 Fee Parity Provision authorizes them to charge non-VoIP and VoIP service providers using a different unit of measure for each, as long as the Districts apply the same base fee for each unit. For example, the 911 Districts argue that they may charge non-VoIP service providers per access line and VoIP service providers per ten-digit telephone number as long as they charge, say, \$1.00 each for both units—even if the total charges for a given class of VoIP subscribers exceed the total charges for the same class of non-VoIP subscribers for the same amount of burden each group of subscribers imposes on the 911 system.

Asserting that Intervenor BellSouth failed to pay the fee for each ten-digit number, the 911 Districts filed suit against BellSouth in district court. BellSouth disagreed that it was required to pay these fees.

Under the primary-jurisdiction doctrine, the district court referred the matter to the Federal Communications Commission (the “Commission”), since the Commission was charged with executing and enforcing the provisions of the NET 911 Act, *see* 47 U.S.C. § 151. After receiving comments, the FCC issued a declaratory ruling concluding that the 911 Fee Parity Provision prohibits state and local governments from charging 911 fees to VoIP providers that are greater than those charged to non-VoIP providers

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