

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Vonage Holdings Corporation's	)	WC Docket No. 03-211
Petition for Declaratory Ruling	)	
Concerning an Order of the Minnesota	)	
Public Utilities Commission	)	

**COMMENTS OF MOTOROLA, INC.**

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Motorola, Inc. (“Motorola”), by its attorneys, hereby submits these comments in support of Vonage Holding Corporation’s (“Vonage”) petition requesting that the Commission preempt an order of the Minnesota Public Utilities Commission (“Minnesota PUC”) requiring Vonage to comply with state laws governing providers of telephone service.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

Motorola believes that voice over IP (“VoIP”) regulations adopted by Minnesota and other states are resulting in a patchwork of inconsistent regulations and policies that, in turn, are creating significant uncertainty in the market for VoIP equipment and services, to the detriment of consumers. Motorola believes the Commission should take three steps to eliminate this uncertainty and set a path for future growth, investment, innovation, and competition surrounding VoIP.

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<sup>1</sup> See In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Dkt. No. 03-211 (Sept. 22, 2003) (“Petition”).

First, the Commission should grant the Vonage Petition and preempt the Minnesota PUC regulations, consistent with the recent actions of a federal district court in Minnesota.<sup>2</sup> The Commission should take this action for the reasons, set forth below, that support establishing a uniform national policy for VoIP.

Second, the Commission should immediately preempt, as part of the instant proceeding, *all* state regulation of VoIP services that share the same or similar characteristics as the Vonage service until the Commission establishes a national policy for VoIP regulatory treatment. This will avoid the uncertainty and other detrimental effects associated with inconsistent state regulation of VoIP from developing in the interim. Such preemption is also completely justified based on the analysis in Section IV.C of these comments.

Finally, the Commission should launch a broader rulemaking to address in a comprehensive manner the regulatory issues raised by Vonage's and other VoIP-related petitions filed with the Commission over the last year.<sup>3</sup> Motorola believes that such a general rulemaking proceeding should establish a clear, *national* deregulatory policy with respect to VoIP service. In this regard, Motorola strongly supports the Commission's prior determination that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation."<sup>4</sup> This policy has worked in fostering a robust and growing market for high-speed

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<sup>2</sup> See *Vonage Holdings Corp. v. Minnesota Public Utils. Comm'n*, Civil No. 03-5287, Memorandum and Order, slip. op. (D. Minn. Oct. 16, 2003) ("*Vonage Holdings*").

<sup>3</sup> Chairman Powell indicated recently that the Commission may launch a rulemaking on VoIP issues later this year. See Ted Hearn, *FCC To Study How To Treat VoIP Services*, Multichannel News (Oct. 6, 2003). Separate petitions for declaratory ruling have been filed with the Commission by pulver.com and AT&T. See *Petition for Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor A Telecommunications Service*, WC Dkt. No. 03-45 (Feb. 5, 2003); *Petition for Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*, WC Dkt. No. 02-361 (Oct. 18, 2002).

<sup>4</sup> *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling & NPRM, 17 FCC Rcd. 4798 ¶¶ 5, 73 (2002).

cable Internet services,<sup>5</sup> and should guide the Commission as it considers the proper regulatory treatment of VoIP services and equipment (as well as other broadband-related services and equipment).<sup>6</sup>

This is not to say that VoIP services should necessarily be exempt from *all* federal regulation. Rather, the Commission should pursue a regulatory paradigm for VoIP predicated on two key principles: *First*, the Commission should generally refrain from extending existing regulations to, or imposing new regulations on, VoIP platforms and services -- regardless of whether such services are currently classified as “information services” or “telecommunications services” -- unless and until clear and convincing evidence demonstrates that marketplace constraints are inadequate to promote fair competition and consumer welfare. *Second*, the Commission should preempt inconsistent state regulations. Such a national policy would be consistent with the generally deregulatory -- and highly successful -- approach toward broadband and Internet-related services favored by Congress and the Commission. It would also benefit consumers by spurring continued investment in VoIP services and equipment and the development of innovative, competitive phone service options.

## **II. MOTOROLA’S INTEREST IN THIS PROCEEDING**

Motorola’s position as a leading consumer electronics and telecommunications equipment manufacturer, designing everything from digital consumer and commercial terminals and network equipment that delivers advanced communications, to wireless handsets, provides it

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<sup>5</sup> See generally Jason Oxman, Office of Plans & Policy, FCC, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, at 22 (July 1999). See also Gen. Accounting Office, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, GAO-01-93, 54-59 (Oct. 12, 2000); Cable Servs. Bureau, *Broadband Today*, at 47 (October 1999).

<sup>6</sup> See Motorola Comments, filed in GN Dkt. No. 00-185, at ii-iii (June 17, 2002) (urging deregulatory policy with respect to broadband services and equipment).

with a unique perspective on developing VoIP technology. The migration to broadband and IP-based networks and services in the United States affects almost every business sector within Motorola.

Motorola is committed to VoIP, and is working with cable operators and other service providers to roll out VoIP products and services as quickly as possible. We now offer VoIP telephony systems that include both a switched IP access system that interoperates with standard central office switches and a full VoIP softswitched-based system that includes an IP gateway linked to the public switched telephone network. Our VoIP offering includes a Multimedia Terminal Adapter (“MTA”), a device that supports all standard voice service features and a variety of advanced call features that customers expect, such as Caller-ID, call waiting, and call forwarding. The MTA is available as a standalone device, with an ethernet interface to a cable/DSL modem, or as an integrated offering, with the MTA functionality embedded in the modem. We also sell advanced headend routing equipment, such as the Broadband Services Router 64000, which enables operators to deliver integrated voice and data services over their broadband networks.

VoIP technology development is integral not only to our wireline platforms but to our wireless networks, as well. For example, VoIP wireless technology forms the basis of the simplex Push-to-Talk services that have been launched by a number of U.S. cellular carriers.

Motorola is excited about the future consumer benefits and business opportunities that VoIP phone services offer, and we continue to dedicate substantial resources toward making VoIP phone services a marketplace reality. The instant proceeding is of particular interest to Motorola because Vonage is one of the many companies for whom we are developing VoIP

products, and because Motorola has a strong desire to see a coherent, national minimal regulatory framework develop that encourages continued investment and innovation in VoIP.

### **III. A PATCHWORK OF STATE REGULATIONS OF VOIP WOULD DIMINISH COMPETITION, INVESTMENT, AND INNOVATION.**

Notwithstanding its enthusiasm and strong support for VoIP service and technology, Motorola is concerned about state government regulatory efforts or policies that could undermine the promise of VoIP. VoIP is a new service that is only now starting to attract significant interest from consumers as well as network operators and equipment suppliers. The creation of multiple, possibly conflicting, regulatory regimes and the need to expend significant resources participating in state-by-state reviews of the regulatory status of VoIP would threaten to choke off future investment in VoIP and limit further commercial deployment of the service.

This is not a theoretical concern. While some states have properly refrained from regulating VoIP service, others, including Minnesota, have imposed, or are considering imposing, legacy common carrier regulations on VoIP service. A summary of some recent state actions follows:

- **Minnesota:** The Minnesota PUC concluded that Vonage provides “telephone service” as defined in Minnesota law, and is therefore prohibited from offering service in Minnesota until it receives a certificate of authority from the PUC (which in turn requires approval of a 911 service plan) and files tariffs for its services with the PUC.<sup>7</sup> The Minnesota PUC’s decision was recently enjoined by a federal district court in Minnesota.<sup>8</sup>

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<sup>7</sup> See *Complaint of the Minnesota Department of Commerce against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Dkt. No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (Minn. PUC Sept. 11, 2003).

<sup>8</sup> See *Vonage Holdings*, slip op. at 22.

- **California:** On September 30, 2003, the California PUC asked six VoIP providers, including Vonage and Net2Phone, to apply for the same license that landline phone companies need to operate in California by October 22, 2003.<sup>9</sup>
- **New York:** The New York PSC has previously determined that US DataNet, a provider of IP telephone service, is subject to access charges,<sup>10</sup> and has initiated a similar proceeding involving Vonage.<sup>11</sup>
- **Florida and Colorado** have thus far taken a deregulatory approach to IP phone service.<sup>12</sup>
- **Wisconsin:** On September 11, 2003, the Wisconsin PSC sent a letter to VoIP providers 8x8, Vonage, and Delta 3 seeking information on the specific services being offered by those entities in Wisconsin. The PSC's letter stated that such entities cannot provide resold intrastate services in Wisconsin without certification and that any customer bills for intrastate services provided are void and not collectible.<sup>13</sup>
- **Alabama:** On August 29, 2003, the Alabama PSC issued an order in which it requested comment on whether VoIP service is a telephone service. Among other things, the PSC asks whether providers of intrastate VoIP service are subject to state tariff requirements and are responsible for the payment of access charges.<sup>14</sup>
- **Washington:** On September 4, 2003, the U.S. District Court for the Western District of Washington remanded a case involving payment of access charges by a VoIP provider, LocalDial, to the Washington Utilities and Transportation

<sup>9</sup> See Ben Charny, *California to License VoIP Providers*, CNET News.com (Sept. 30, 2003), available at <http://news.com.com/2100-7352-5084711.html>. Those VoIP providers have responded that their VoIP services are exempt from state phone regulations. See Ben Charny, *VoIP Firms Battle California Regulators*, CNET News.com (Oct. 24, 2003), available at [http://news.com.com/2100-7352\\_3-5096966.html?tag=cd\\_lede](http://news.com.com/2100-7352_3-5096966.html?tag=cd_lede).

<sup>10</sup> See *Complaint of Frontier Telephone of Rochester Against U.S. DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Access Charges*, Case No. 01-C-1191, Order Requiring Payment of Intrastate Carrier Charges (N.Y. Pub. Serv. Comm'n May 31, 2002).

<sup>11</sup> See *Complaint of Frontier Telephone of Rochester Against Vonage Holding Corp. Concerning Provision of Local Exchange and Inter-Exchange Telephone Service in New York State in Violation of the Public Service Law*, Case No. 03-C-1285, Notice Requesting Comment (N.Y. Pub. Serv. Comm'n Oct. 9, 2003).

<sup>12</sup> See *Investigation into the Appropriate Methods to Compensate Carriers for Exchange Traffic Subject to Section 251 of the Telecommunications Act of 1996*, No. 000075-TP, Order on Reciprocal Compensation (Fla. Pub. Serv. Comm'n. Sept. 10, 2002); *Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with U.S. West Communications, Inc.*, No. C00-858, Initial Commission Decision (Colo. Pub. Utils. Comm'n Aug. 1, 2000).

<sup>13</sup> See *8x8 Announces Receipt of Notification From Public Service Commission of Wisconsin*, 8x8 Press Release (Sept. 12, 2003), available at [http://www.8x8.com/news\\_events/releases/2003/pr091203.asp.html](http://www.8x8.com/news_events/releases/2003/pr091203.asp.html).

<sup>14</sup> See *In Re: Petition for a Declaratory Order Regarding Classification of IP Telephony Service*, Dkt. No. 29016, Order Establishing Declaratory Proceeding (Ala. Pub. Serv. Comm'n Aug. 29, 2003), available at <http://www.psc.state.al.us/orders/03aug/29016aug.html>.

Commission.<sup>15</sup> The state commission is to determine whether the plaintiff's access tariffs apply to VoIP intrastate telephone calls made by LocalDial's customers.<sup>16</sup>

- **Virginia:** The Virginia State Corporation Commission ("SCC") was reportedly considering formal action against Vonage, either in the form of a "show cause" order to the company or by opening a formal inquiry to determine whether VoIP providers are subject to the commission's jurisdiction. The SCC has not announced timelines for either of these two possible proceedings.<sup>17</sup>
- **North Carolina** is reportedly considering taking action against VoIP providers in the state.<sup>18</sup>
- **Pennsylvania, Ohio, and Illinois** have studied or are studying VoIP service and the extent to which such service should be regulated, if at all.<sup>19</sup>

Given that many VoIP service and equipment providers, such as Vonage, operate on a multi-state or national basis, the prospect of various states addressing and resolving these important regulatory issues -- and in different and inconsistent ways -- is a formula for wreaking havoc on the business plans, and competitive promise, of VoIP providers, especially since multi-state rollouts require central planning efficiencies (e.g., ordering, provision, and billing systems) that flow from regulatory consistency. Indeed, one industry analyst has concluded that "a patchwork of differing state interpretations is likely to sow confusion amongst providers and

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<sup>15</sup> See *Washington Exchange Carrier Ass'n v. LocalDial Corp.*, Case No. C03-5102, Stay Order and Order of Referral to the Washington Utilities Transportation Commission, (W.D. Wash. Sept. 4, 2003), available at <http://www.wutc.wa.gov>.

<sup>16</sup> See *Washington Exchange Carrier Ass'n v. LocalDial Corp.*, Dkt. No. UT-031472, Notice of Prehearing Conference (Wash. St. Utils. Comm'n Sept. 29, 2003), available at <http://www.wutc.wa.gov>.

<sup>17</sup> See *Updated: VoIP Regulatory Battle Moving to the US States*, available at <http://www.pulver.com/reports/statesfightvoip.html> (last visited Oct. 22, 2003).

<sup>18</sup> See Leo John, *Battle Lines Shaping Up as Internet Telephone Firms Move Into State*, Triangle Bus. J. (Aug. 18, 2003), available at <http://triangle.bizjournals.com/triangle/stories/2003/08/18/story3.html>.

<sup>19</sup> See *Investigation into Voice over Internet Protocol as a Jurisdictional Service*, No. M-00031707 (Pa. Pub. Utils. Comm'n May 17, 2003); *In the Matter of the Commission's Investigation Into Voice Services Using Internet Protocol*, No. 03-950-TP-COI (Oh. Pub. Util. Comm'n Apr. 17, 2003). See also Illinois Commerce Commission, Notice of Workshop: Local Voice Services Provided Over Packet-Switched Networks (May 8, 2003).

customers, potentially slowing VoIP take up,”<sup>20</sup> while another noted that the “classification conundrum” surrounding VoIP service will “add[] to market uncertainty.”<sup>21</sup>

#### **IV. THE COMMISSION SHOULD GRANT VONAGE’S PETITION AND LAUNCH A GENERAL PROCEEDING THAT ESTABLISHES A NATIONAL DEREGULATORY POLICY TOWARD VOIP SERVICE AND PREEMPTS INCONSISTENT STATE REGULATION.**

In response to this hodgepodge of state initiatives, the Commission should utilize this petition to 1) preempt the Minnesota PUC regulation, consistent with the decision of the federal district court in Minnesota; and 2) immediately preempt *all* state regulation of VoIP service (whether in Minnesota or in other states) that share the same or similar characteristics as the Vonage service until the Commission establishes a national policy for VoIP regulatory treatment. This latter preemption is necessary to avoid the uncertainty and other detrimental effects associated with inconsistent state regulation of VoIP from developing in the interim period.

The Commission should also expeditiously launch a broader rulemaking proceeding that 1) establishes a clear, *national* deregulatory policy with respect to VoIP services; and 2) preempts inconsistent state regulation. There are a number of ways the Commission could preempt state regulation of services such as those offered by Vonage. For example, it could determine that such services are information (or enhanced) services -- a category of service that is generally unregulated under the Commission’s rules<sup>22</sup> -- to the extent VoIP performs a net

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<sup>20</sup> A. Quinton, *et al.*, *The Telecommunicator -- Vonage and Broadband VoIP Update*, Merrill Lynch Capital Markets, Industry Report No. 7599561, at 2 (Sept. 16, 2003).

<sup>21</sup> Blair Levin, *et al.*, Legg Mason Wood Walker, Inc., *Washington Telecom & Media Insider*, at 1 (Oct. 10, 2003).

<sup>22</sup> “Information Service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications[.]” 47 U.S.C. § 153(20). This statutory definition parallels the definition of “enhanced service” developed in the Commission’s *Computer II* proceeding. *See Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (“*Computer II*”). “Enhanced services” are not subject to Title II common carrier regulations. *See* 47 C.F.R. § 64.702(a). *See also Federal-State Joint Board on* (footnote continued ...)

protocol conversion on the information sent and received by the subscriber.<sup>23</sup> In particular, Vonage's service converts the asynchronous IP packets generated by the customer's VoIP equipment into synchronous TDM format used by the telephone network (and vice versa).<sup>24</sup> The federal district court in Minnesota concluded that the Vonage VoIP service qualified as an information service for this very reason.<sup>25</sup>

This is not to suggest that VoIP services should necessarily be permanently exempt from *all* federal regulation. Rather, as noted, the Commission should generally refrain from extending existing regulations to, or imposing new regulations on, VoIP platforms and services *unless and until* clear and convincing evidence demonstrates that marketplace constraints are inadequate to promote fair competition and consumer welfare.

**A. A National Deregulatory Policy Will Have Clear Pro-Consumer Benefits.**

However the Commission elects to establish a national deregulatory policy for services such as those offered by Vonage, such an approach will clearly promote competition and consumer welfare. First, it will continue to foster investment in VoIP services and equipment.

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(... footnote continued)

*Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, ¶39 (1998) (“*Universal Service Report*”) (finding that the categories of “telecommunications service” and “information service” are mutually exclusive).

<sup>23</sup> See Petition at 12-13. A “net protocol conversion” occurs when the service “employ[s] computer processing applications that act on . . . the protocol . . . of the subscriber’s transmitted information,” provided such protocol processing takes place during end-to-end communications between or among subscribers. *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, 95 FCC 2d 584, ¶¶ 1, 14 (1983).

<sup>24</sup> See Petition at 12.

<sup>25</sup> See *Vonage Holdings*, slip. op. at 11-12. It is not necessary to conclude that Vonage’s service -- or VoIP service generally -- constitutes an “information service” in order to grant the Vonage Petition or to establish a federal policy of minimal regulation. The Commission could also find that certain VoIP services should be classified as “telecommunications services,” see 47 U.S.C. § 153(43) (defining “telecommunications”), § 153(46) (defining “telecommunications service”), but forbear from applying Title II common carrier regulations to such services under Section 10 of the Communications Act. See *id.* § 160(a) (authorizing the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, under certain conditions). See also *Universal Service Report* ¶ 92 (“We will need to consider carefully whether, pursuant to our authority under section 10 of the Act, to forbear from imposing any of the rules that would apply to phone-to-phone IP telephony providers as ‘telecommunications carriers.’”).

Today, VoIP is a nascent service with relatively little subscribership.<sup>26</sup> That situation is forecast to change dramatically in coming years. IP phone shipments are expected to grow from approximately 4 million today to over 10 million in 2006,<sup>27</sup> and total global equipment purchases of VoIP gateways, soft switches, and VoIP application servers are expected to reach almost \$12 billion by 2006, a six-fold increase since 2001.<sup>28</sup> Likewise, the number of VoIP subscribers is projected to grow from 2.5 million today to over 7 million by 2007.<sup>29</sup> Plans by established communications providers, such as Verizon, SBC, and Cablevision, to roll out VoIP offerings that share characteristics with the Vonage service provide further evidence of the growing promise of the service.<sup>30</sup> However, subjecting such services to unnecessary common carrier regulation at this time will, as Chairman Powell previously noted, “constrain the flow of capital investment in these growth industries, out of fear that the regulator and the tax-man cometh.”<sup>31</sup>

Second, a national deregulatory approach will advance continued innovation in VoIP offerings. VoIP is a flexible and extensible technology that allows providers to offer a wide

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<sup>26</sup> Currently, VoIP accounts for less than 3% of global voice phone calls. See Peter Grant & Almar Latour, *Battered Telecoms Face New Challenge: Internet Calling*, Wall St. J., at 1 (Oct. 9, 2003) (citing AT&T estimate).

<sup>27</sup> See T. Luke, et al., Lehman Brothers, Inc., *The Investors' Guide To Enterprise VoIP*, Industry Report No. 7505964, at 20 (June 2, 2003).

<sup>28</sup> See *Internet Protocol (IP) Telephony Market Trends*, Microsoft (Apr. 1, 2003) (citing Frost & Sullivan report), available at <http://www.microsoft.com/windows/Embedded/devices/voip/voipindtrends.asp>. See also Eric Hellweg, *An Investor's Guide to VoIP*, Business 2.0 (Oct. 20, 2003) (“Avaya says its global IP-based hardware and software division has grown 300 percent in the past year. According to Infotech, the general VOIP hardware and software market in the United States has grown 88 percent during the past year.”).

<sup>29</sup> See *Powell Promises Inquiry As VoIP Regulation Moves to Front Burner*, Telecommunications Reports, at 38 (Oct. 15, 2003) (citing In-Stat/MDR estimates). See also *Enterprise VoIP Solutions Backgrounder*, AudioCodes, at 1 (Jan. 2002) (noting that sales of IP lines will grow from about 200,000 in 2001 to 8.3 million IP lines in 2005, according to Phillips InfoTech estimates), available at [http://www.audiocodes.com/objects/enterprise\\_backg.pdf](http://www.audiocodes.com/objects/enterprise_backg.pdf).

<sup>30</sup> See, e.g., Grant & Latour, *Battered Telecoms Face New Challenge*, *supra* note 26 (noting deployment plans of SBC and Verizon). See also Karen Brown, *Cablevision Ready to Roll Out VoIP*, Multichannel News (June 30, 2003) (noting that Cablevision's VoIP rollout later this year “will turn up a telephony service passing 3.1 million homes in the span of roughly one month”).

<sup>31</sup> *Universal Service Report*, 13 FCC Rcd. at 11,625 (Separate Statement of Commissioner Michael Powell, Concurring) (“Powell Statement”).

array of customized calling features and services. For example, as noted in the Petition, Vonage's customers can use the service in any state, or virtually anywhere in the world, so long as they have access to a broadband Internet connection, and can do so using a wide variety of devices, including traditional telephones, native IP phones, and personal computers.<sup>32</sup> VoIP also offers consumers new service options, including the delivery of integrated voice, data, and advanced calling features. For example, VoIP customers can program their phones to redirect calls to other numbers, take messages only during certain hours, give messages only to certain callers, and send a text message or an e-mail in response to a voice call.<sup>33</sup> Imposing unnecessary legacy common carrier regulation on VoIP services could, in contrast, stifle such innovation and competitive choices for consumers.<sup>34</sup>

Third, a national deregulatory approach will enable consumers and providers alike to enjoy the competitive effects and substantial cost-savings associated with VoIP service. VoIP appears to offer several cost advantages over traditional phone services. It enables gains in bandwidth efficiencies, which reduce cost and increase quality of service.<sup>35</sup> As noted, it allows for the offering of integrated voice, video, and data services over a single network, thereby eliminating infrastructure and maintenance redundancies. And it permits VoIP systems and devices to be managed remotely, which curtails costs associated with customer moves and service changes. These efficiencies may well reduce costs for VoIP providers and, ultimately,

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<sup>32</sup> See Petition at 4-5 (also noting that Vonage is testing the compatibility of its service with PDA devices and WiFi-enabled phones).

<sup>33</sup> See Grant & Latour, *Battered Telecoms Face New Challenge*, *supra* note 26.

<sup>34</sup> See Powell Statement, *supra* note 31, at 11,625 (noting that “adopting a rule that invades on a broad front the Internet field and its underlying technology is likely to chill, if not freeze, innovation in broadband digital service”).

<sup>35</sup> For example, legacy TDM-based phone networks continuously allocate capacity to the user, even when the user is not speaking (which can be half of the time during a normal conversation). In contrast, IP-based networks only allocate capacity as defined by the network.

consumers, and, when combined with the innovation-enhancing possibilities noted above, provide a compelling competitive alternative to traditional service providers.<sup>36</sup>

**B. A Deregulatory Approach Is Consistent With Congressional And Commission Policies Toward Broadband And Other Internet-Related Services.**

Congress and the Commission have repeatedly stated their clear preference for pursuing deregulatory policies with respect to Internet-related services. For example, Congress stated in the 1996 Telecommunications Act that “it is the clear policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to promote the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”<sup>37</sup> Likewise, Congress directed the Commission to pursue policies that encourage the deployment of “advanced telecommunications capability” by utilizing its forbearance authority and other measures at its disposal to remove barriers to infrastructure investment.<sup>38</sup>

The Commission’s policy of treating information services on an unregulated basis date back to the *Computer II* decision in 1980. The Commission has adopted a similar deregulatory approach with respect to new and emerging Internet-related technologies and services. It has repeatedly rejected proposals to impose general common carrier-type regulations on high-speed

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<sup>36</sup> See Marcelo Rodriguez, *Leaving the Phone Company Out of the Loop*, Mercury News (Aug. 7, 2003) (“The new competition [from VoIP] is also forcing local phone companies to do something that was unheard of before: drop prices.”). See also Yuki Noguchi, *Identity Crisis: Internet Services Challenge Definition of “Phone Company,”* Wash. Post, at E1 (Oct. 23, 2003) (“Internet telephony finally appears ready to go mainstream, with improvements in the technology and a recent push from start-ups and cable operators. The upshot, according to analysts, may be lower costs for consumers and brutal price competition for phone companies.”).

<sup>37</sup> 47 U.S.C. § 230(b)(1-2) (emphasis added).

<sup>38</sup> Pub. L. No. 104-104, Title VII, § 706(a), Feb. 8, 1996, 110 Stat. 56. Section 706 defines such “advanced telecommunications capability” “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” *Id.* § 706(c)(1).

cable Internet service.<sup>39</sup> And it has thus far declined to subject VoIP services to Title II regulation.<sup>40</sup> In fact, in the international context, the Commission has acknowledged that VoIP services operate outside the international settlement rate system that applies to international circuit-switched telecommunications traffic.<sup>41</sup>

**C. The Commission Has Ample Authority to Preempt Minnesota and Other State Regulation of VoIP Services During the Pendency of a Rulemaking Proceeding and all Inconsistent State Regulation Thereafter.**

As noted above, the Commission should grant Vonage's petition to preempt Minnesota's regulation of VoIP services and should also preempt *all* state regulation of VoIP services that share the same or similar characteristics as the Vonage service during the interim period when the Commission is establishing its national policy. Moreover, in the broader rulemaking proceeding discussed above, the Commission should preempt any state regulation of such VoIP services that is inconsistent with the national policy also outlined above. The Commission has ample support for exercising such interim and long-term preemption authority, *regardless* of how it decides to classify VoIP services.

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<sup>39</sup> See *First 706 Report*, 14 FCC Rcd. 2398 (1999); *Second 706 Report*, 15 FCC Rcd. 20913 (2000); *Third 706 Report*, 17 FCC Rcd. 2844 (2002). The Commission reached the same conclusion in three merger proceedings, as well. See *AT&T-TCI Merger Order*, 14 FCC Rcd. 3160 (1999); *AT&T-MediaOne Merger Order*, 15 FCC Rcd. 9816 (2000); *Comcast-AT&T Merger Order*, 17 FCC Rcd. 23246 (2002). Finally, although the Commission imposed a specific ISP access condition in the *AOL-Time Warner Merger Order*, the Commission clearly held that its order did not "portend any specific policy determinations" but was based on the "unique" facts of that merger. See *AOL-Time Warner Merger Order*, 16 FCC Rcd. 6547, ¶¶ 54-55, 58 (2001). Specifically, the Commission found that AOL Time Warner would have a "unique concentration of assets (vast narrowband membership and the product that created it, access to Time Warner cable systems, and extensive Time Warner content assets)." *Id.* ¶ 54. See also *id.* ¶ 55 (noting that "this merger would place AOL Time Warner in a unique position").

<sup>40</sup> See *Universal Service Report* ¶¶ 83-93 ("We defer a more definitive resolution of these [VoIP-related] issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.") (footnotes omitted). The Commission also declined to consider a petition by U S West requesting that access charges apply to "phone-to-phone IP telephony services." See *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony*, Petition for Expedited Declaratory Ruling (Apr. 5, 1999).

<sup>41</sup> See, e.g., *In the Matter of International Settlements Policy Reform; International Settlement Rates*, 17 FCC Rcd. 19954, ¶¶ 13, 18 (2002).

To the extent the Commission determines that under current law such VoIP service constitutes an information service, the Commission has already preempted state regulation of information services under *Computer II* and its progeny,<sup>42</sup> and can do so here. Moreover, the courts have repeatedly upheld the Commission’s authority to preempt such regulation.<sup>43</sup> In this regard, it is worth emphasizing that the federal district court in Minnesota preempted the Minnesota PUC’s order regulating Vonage’s VoIP service because, among other things, it conflicted with clear federal policy to leave information services unregulated.<sup>44</sup>

Moreover, the Commission has the authority to preempt Minnesota and other state regulation under the so-called “impossibility doctrine.” Even where the Communications Act does not reflect a clear grant of Commission jurisdiction over intrastate services, the Commission still has the authority to preempt inconsistent state regulations where it is “*not* possible to separate the interstate and intrastate components of the asserted FCC regulation.”<sup>45</sup> The courts have clarified that the “impossibility doctrine” requires a fact-specific showing by the Commission that “state regulation would negate valid FCC regulatory goals.”<sup>46</sup> The

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<sup>42</sup> See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Order on Further Reconsideration, 88 FCC 2d 512, ¶ 83 n.34 (1981) (determining that “[s]tates . . . may not impose common carrier tariff regulation on a carriers’ provision of enhanced services”).

<sup>43</sup> See *California v. FCC*, 39 F.3d 919, 931 (9<sup>th</sup> Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) (upholding Commission orders preempting state regulation of enhanced services by communications common carriers, including state tariffing of enhanced services). See also *Computer and Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (“*CCIA*”) (upholding Commission order preempting state tariffing of CPE).

<sup>44</sup> See *Vonage Holdings*, slip. op., at 17. To the extent the Commission concludes that under current law certain VoIP services might qualify as “telecommunications services,” the Commission may be able to preempt state regulation of such services pursuant to an express grant of authority over the intrastate aspect of the services. Section 201(b) gives the Commission authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act].” 47 U.S.C. § 201(b). The Supreme Court has held that Section 201(b) applies equally to provisions of the Communications Act that clearly cover intrastate services and those that do not. See *Iowa Utils. Bd. v. FCC*, 525 U.S. 366, 380 (1999).

<sup>45</sup> *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (emphasis in original).

<sup>46</sup> *California*, 39 F.3d at 931. See also *CCIA*, 693 F.2d at 214 (“Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the  
(footnote continued . . .)

Commission has invoked the “impossibility doctrine” to preempt state regulation when the Commission is acting pursuant to specified regulatory duties under Title II, such as setting tariffs, or when implementing the more general goals of Title I.<sup>47</sup>

The Commission may rely on the doctrine here, as well, to preempt inconsistent state regulation of VoIP services. As Vonage notes in its Petition, for example, the Internet-based nature of VoIP service makes it difficult, if not impossible, to separate the interstate and intrastate components of VoIP service.<sup>48</sup>

There are other possible statutory tools the Commission might utilize for the interim and long-term preemption of state regulation of VoIP. For example, Section 253 of the Communications Act gives the Commission the authority to preempt state regulations that “prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service.”<sup>49</sup> The Commission has successfully employed this authority to preempt state and local regulations that imposed barriers to entry to competitive phone providers.<sup>50</sup> Likewise, the Commission could rely on its forbearance authority under

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(... footnote continued)

Commission’s jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.” (citations omitted)).

<sup>47</sup> See, e.g., *Public Service Comm’n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (upholding Commission order preempting state regulation of DNC service); *National Ass’n of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (upholding Commission order preempting state regulation of certain services relating to inside wiring).

<sup>48</sup> See Petition at 29 (noting that “the Minnesota PUC cannot enforce its Order with respect to Vonage’s intrastate services without also interfering with Vonage’s ability to provide at least some jurisdictionally interstate services over interstate communications facilities”).

<sup>49</sup> 47 U.S.C. § 253(a). See also *id.* § 253(d) (granting the Commission preemption authority).

<sup>50</sup> See, e.g., *RT Communications, Inc. v FCC*, 201 F.3d 1264, 1267 (10th Cir. 2000) (upholding a Commission decision to preempt a section of Wyoming’s telecommunications law regarding licensing of LECs because the law was not competitively neutral and therefore created a barrier to entry under Section 253(d)). See also *Hyperion of Tennessee, L.P. Petition for Preemption*, 14 FCC Rcd 11064, 11071 (1999) (holding that Tennessee’s protection of LECs with less than 100,000 customers from competition is a barrier to entry and is therefore preempted under 253(d)).

Section 10. Section 10 specifically provides that: “A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying[.]”<sup>51</sup> While this provision has yet to be tested by the Commission or in the courts, the clear implication is that the exercise of Section 10 forbearance authority would have a preemptive effect on state regulation, to the extent the state is enforcing the relevant provision of federal law.

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<sup>51</sup> 47 U.S.C. § 160(e).

## V. CONCLUSION

Based on the foregoing, Motorola respectfully urges the Commission to: 1) grant Vonage's petition for declaratory ruling and preempt the Minnesota PUC decision; 2) immediately preempt, as part of the instant proceeding, *all* state regulation of VoIP service that shares the same or similar characteristics as the Vonage service until the Commission establishes a national policy for VoIP regulatory treatment; and 3) expeditiously launch a broad rulemaking proceeding that will establish a *national* deregulatory policy for VoIP service and preempt inconsistent state regulation, consistent with the comments herein. Such an approach will help create a stable regulatory environment, which, in turn, will foster the continued investment, innovation, competition, and other consumer benefits associated with VoIP services.

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