

**CLARENCE A. WEST**

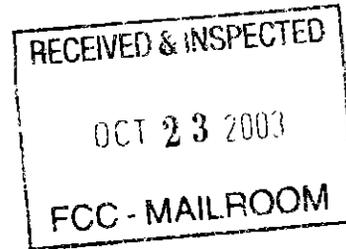
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October 22, 2003

**VIA FEDEX**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Wireline Competition Bureau  
9300 East Hampton Drive  
Capitol Heights, MD 20743



03-211

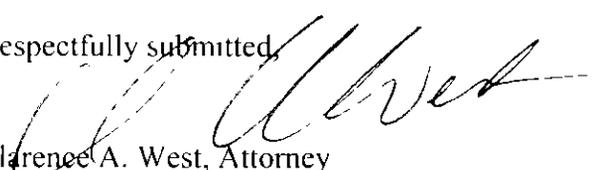
Re In the Matter of Vonage Holdings Corporation's Petition for Declaratory Ruling

Dear Ms. Dortch,

On behalf of Texas Coalition of Cities For Utility Issues ("TCCFUI"), enclosed please find an original and four (4) copies of TCCFUI's Comments on Vonage Holdings Corporation's Petition for Declaratory Ruling.

Please date stamp the enclosed extra copy and return it in the envelope provided. Please do not hesitate to contact me if you have any questions regarding this filing.

Respectfully submitted,

  
Clarence A. West, Attorney

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Enclosures

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Before the  
Federal Communications Commission  
Washington, DC 20554

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In the Matter of § DA No. 03-2952  
Vonage Holdings Corp Petition for §  
Declaratory Ruling § WC Docket No 03-211  
Concerning an Order of the Minnesota §  
Public Utilities Commission

**TEXAS COALITION OF CITIES FOR UTILITY ISSUES' COMMENTS ON**  
**VONAGE'S PETITION FOR DECLARATORY RULING**

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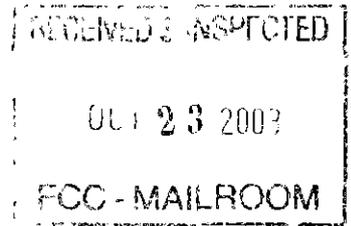
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Federal Communications Commission  
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**In the Matter of**  
**Vonage Holdings Corp Petition for**  
**Declaratory Ruling**  
**Concerning an Order of the Minnesota**  
**Public Utilities Commission**

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§

**DA No. 03-2952**  
**WC Docket No 03-211**

**TEXAS COALITION OF CITIES FOR UTILITY ISSUES' COMMENTS ON**  
**VONAGE'S PETITION FOR DECLARATORY RULING**

COMES NOW the Texas Coalition of Cities for Utility Issues (Referred to as "TCCFUI"<sup>1</sup>) and files these Comments to Vonage's Petition for Declaratory Ruling to preempt state law.

**I. OVERVIEW**

TCCFUI welcomes and encourages any and all competition for local exchange service in Texas; however it should not be provided to the detriment of competing providers, rural telephone customers, Texas cities or in such a manner that endangers the citizens of Texas. Preempting state regulation of VoIP adversely impacts each group. Exempting VoIP providers from carefully crafted state regulations that apply to all other telecommunications providers allows a single type of communications provider to avoid, *by simply deploying its service via a different technology*. By the exempting a VoIP provider from state and local regulation they would avoid at least the following:

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<sup>1</sup> Attached as Exhibit A is a list of all current City members of TCCFUI.

- contributing to universal telephone service, paid by other providers to achieve the long established policy goal of connectivity to all;
- complying with the public safety policy goals inherent to mandatory interconnections for emergency 911 service (“E 911 service”); and
- paying fees to Cities for using public rights-of-way to deliver services.

Such a result was not the intent of Congress – or the Federal Communication Commission (“FCC”) for that matter – when either began addressing the divergent types of communication services provided over a “wired network” VoIP service is not an “information service”, for which “no regulation” is the current mantra “Information” is not the commodity being provided or sold by VoIP, it is telecommunication service through a different technology. VoIP providers acknowledge this fact by marketing their services as a replacement of the incumbent telephone company.<sup>2</sup> VoIP cannot be carved out as an “information service” from its “uses” of telecommunication services.

While the FCC previously characterized “telecommunication services” and “information services” as mutually exclusive provisions of services (*1998 FCC Report to Congress*, paragraph 39), the FCC also acknowledged that at least with respect to “phone-to-phone IP Telephony,” further review of that mutual exclusivity might be required (*1998 FCC Report to Congress*, paragraph 55). As was noted, the FCC found that phone-to-phone IP service bears the characteristics of telecommunications services. A distinction between phone-to-phone VoIP and

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<sup>2</sup> The Federal Communication Commission (“FCC”) itself has previously commented that VoIP, at least in certain configurations of “phone-to-phone” connections, had the characteristics of a “telecommunication service” rather than an “information service” *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11541-51, (“*1998 FCC Report to Congress*” herein) when the FCC stated that IP Telephony bears “. . . the characteristics of ‘telecommunication services’ [as opposed to ‘information service’]” in ¶ 83

“computer-to-computer” VoIP does not follow the FCC’s own functional analysis. It is the service not the equipment that determines the regulatory regime. TCCFUI agrees with the functional approach analysis used by the FCC in its past analysis of these types of issues. In fact in the *1998 Report to Congress*, the FCC specifically concluded that classification must not be dependent on the facilities used to provide the services (*1998 FCC Report to Congress*, paragraph 59). Nor should the analysis depend on the type of technology used to provide the services, such as VoIP. In the same report the FCC clearly stated, “In every case, some entity must provide telecommunications to the information service provider” (*1998 FCC Report to Congress*, paragraph 69, footnote 138). In the case of VoIP, particularly if it is being provided by a cable provider, clearly the cable provider is providing those facilities<sup>3</sup> for telecommunication services.

The recent opinion issued by the 9<sup>th</sup> Federal Circuit Court of Appeals regarding classification of “cable modem services” rejects the “mutually exclusive” approach taken by the FCC. *Brand X Internet Services, et al, vs FCC*, No. 02-70879, (9<sup>th</sup>. Fed. Cir., Oct. 6, 2003, slip opinion). The Court found that “cable modem service” is two separate types of services, both “information service” and “telecommunication services”, remanding the FCC Order for further proceedings consistent with the opinion. The FCC must accept the rejection of its “mutual exclusivity” approach when reviewing the demands of Vonage regarding VoIP.

## II. VOIP AS VIEWED BY THE TEXAS PUBLIC UTILITY COMMISSION

In the Public Utility Commission of Texas’s (“PUCT”) Final Order in Docket No. 26412 (*Order Adopting Amendments To §26.465*, Approved Feb.1, 2003, filed March 6, 2003), the

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<sup>3</sup> Although we would note that the FCC was not commenting on cable providers in its *1998 FCC Report to Congress*, footnote 140.

PUCT preamble discusses how the provisioning of local exchange service via VoIP constitutes a “telecommunication service” and could constitute an “access line”<sup>4</sup> for purposes of rights-of-way compensation to local governments (page 14-15 of the PUCT Order). The PUCT bases its determination of what constitutes an “access line” on whether or not a service meets the eight requirements of basic local telecommunication service (“BLTS”), as defined under Texas law. VoIP as Plain Old Telephone Service (“POTS”) must meet the BLTS criteria in Texas to be certified by the PUCT to provide local exchange services. In case there is was any doubt, the PUCT stated: **“So, to clarify its [PUCT] previous decisions, ...the commission [PUCT] finds that POTS lines are access lines, because [PUCT] regulation ensures that POTS meets the eight requirements of BLTS....”** (PUCT Order at page 16).

### III. PENDING VOIP ISSUES IN TEXAS

On August 7, 2003, Time Warner Cable Information Services (Texas), LP, d/b/a Time Warner Cable (“Time Warner”) filed an application (“Application”) under § 54.151 of the Public Utility Regulatory Act, TEX UTIL. CODE ANN. (Vernon 1998 & Supp. 2003) (PURA) for approval to provide facilities-based **“local exchange service”** within the entire State of Texas in the name of Time Warner Cable using Voice Over Internet Protocol (“VoIP”) technology (PUCT, Docket No. 28303; *Application of Time Warner Cable Information Services (Texas), LP. D/B/A Time Warner Cable for a Service Provider Certificate of Operating Authority*). While the issues as to the applicability of state regulations has not been directly challenged by

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<sup>4</sup> In Texas municipalities are compensated for use of their rights-of-ways by Certificated [Local Exchange] Telecommunication Providers (“CTP”), pursuant to Chapter 283 of the Texas Local Gov. Code, as set forth in PUCT Rules 26.461-26.468 based upon the number of “access lines” (a defined term, somewhat akin to a dial tone for “switched lines” [circuit or packet], but also including private line data connection termination points)

Time Warner in its application, inconsistencies and reservations in Time Warner's responses may indicate such a challenge is all but imminent.

Time Warner's answers to questions Nos. 4, 6, and 16 (and Exhibit D) of its Application regarding the type of services proposed by Time Warner make it clear that 'local exchange service' is to be provided. Time Warner states in its answer to Question No. 4 (a) that it "intends to provide facilities-based local Internet Protocol ("IP") voice ... [with] access to the public switched telephone network ("PSTN")...on a flat-rate basis and will **allow standard local exchange calling** in addition to operator services; directory assistance ... Enhanced **911 services** .[with] a toll free customer service number..." Time Warner's answer to Question No. 4 (a) concludes with a request for authority "to provide facilities-based **local exchange service**..." (Emphasis added). The answer to No. 4 (b) indicates that "**Plain Old Telephone Service**" ("**POTS**") will be provided. The answer to Question No. 6 (b) states the Cable VoIP Provider will provide "**local voice service**". In the answer to Question No. 16, on Service Quality standards, it states that if the Applicant is providing telecommunications services Time Warner " will have responsibility for meeting or exceeding service quality standards...." The "yes" answers in Exhibit D - "Service Quality Questionnaire" confirms Time Warner will provide and meet the PUCT Service Quality Standards as required by the PUCT of any other Certificated Telecommunication Providers ("CTP") in detail. Those standards include, among other requirements, E 911 connections and universal service contributions, as detailed below.

However, Time Warner concluded its Application by noting in its answer to Question No. 26 (Application, p. 23) all prior answers in the Application **should not be "construed as a concession or agreement by TWCIS that the services at issue in this Application constitute telecommunications services, local exchange services, common carrier offerings, or services**

**that are otherwise subject to federal or state regulation, nor that the entity or entities providing them constitute telecommunications carriers, telecommunications providers, local exchange carriers, common carriers, or other regulated entities.”** (Emphasis added.)

On October 17, 2003 the PUCT requested that Time Warner explain the apparent inconsistencies or amend its Application accordingly. An FCC finding that Texas law as applied to VoIP is preempted does nothing to resolve the confusion.

The characterization of VoIP service is of immense fiscal and regulatory importance to both the PUCT and to Texas municipalities, including those members of TCCFUI. TCCFUI agrees with Time Warner's initial characterization, and the PUCT's Order that these are access lines for purpose of Texas law, and as such are subject to state regulation which should not be preempted by the FCC.

#### **IV. PUBLIC SAFETY - E 911 COMPLIANCE**

PUCT Rule 26.111 (c) (2) (E) (as to the issuance of a certificate for a CTP) requires that the local exchange provider be able to meet the “[PUCT] quality of service standards . . . [which] shall include 911 compliance” in accordance with State law (*Texas Health and Safety Code*, Chapter 771 and 772). If the service is “data-only”, the lines are exempted from the 911 requirements under subsection (h) of that same rule-unless and until “voice service” is added. Under Texas law, it is not the transmission technology that determines the applicability of 911 compliance-but the *type* of transmissions - (*data-only vs. voice*). Citizens in Texas now trust that 911 capabilities will be available when they make a call, regardless of the *technology* used to *make* that call - VoIP or otherwise.

PUCT Rules 26.431 to 26.433 pertaining to 911 emergency services and funding must be strictly enforced as a matter of public safety and competitive neutrality. As stated in Rule

26.433: **“Purpose.** The provisions of this section are **intended to assure the integrity of the state’s emergency 9-1-1 system in the context of a competitive telecommunications market.”**

(Emphasis added.) That “integrity” of the state’s emergency 911 system should not be skewed by the entrance into the competitive market by an “*exempted*” VoIP provider.

As to local 911 areas, the legislature stated the following purpose for enactment of the statute (*Texas Health & Safety Code*, § 772.102), which is quoted in full:

**“Purpose.** It is the purpose of this subchapter to establish the number 9-1-1 as the primary emergency telephone number **for use by certain local governments in this state and to encourage units of local government and combinations of the units to develop and improve emergency communication procedures and facilities in a manner that makes possible the quick response to any person calling the telephone number 9-1-1 seeking police, fire, medical, rescue, and other emergency services.** To this purpose the legislature finds that:

(1) **it is in the public interest to shorten the time required for a citizen to request and receive emergency aid;**

(2) there exist thousands of different emergency telephone numbers throughout the state, and telephone exchange boundaries and central office service areas do not necessarily correspond to

public safety and political boundaries;

(3) a dominant part of the state's population is located in rapidly expanding metropolitan areas that generally cross the boundary lines of local jurisdictions and often extend into two or more counties; and

(4) **provision of a single, primary three-digit emergency number through which emergency services can be quickly and efficiently obtained would provide a significant contribution to law enforcement and other public safety efforts by making it less difficult to notify public safety personnel quickly.”** (Emphasis added).

PUCT Rule 26.272 (e) (1) (B)) provides in detail the “Minimum interconnection arrangements.” as to E-911. VoIP providers should not be exempted from these minimal requirements.

Elimination of 911 interconnectivity is contrary to public policy and just plain dangerous. No governmental body should even seriously consider such an “exemption” for a telephone service that wants to compete in Texas or in the nation. This is of course in addition to the

discriminatory regulatory treatment between competing providers as to the applicability of 911 rules. VoIP providers should not have a competitive regulatory advantage over other providers of local exchange services simply due to the technology used to deploy the service at the expense of the integrity of the state's and local emergency 911 systems.

## V. COMPETITIVE NEUTRALITY ISSUES

### A. Competitively Neutral Contributions to the Universal Service Fund

Under PUCT Rules as to the Texas Universal Service Fund obligations, PUCT Rules 26.401 to 26.420 must apply equally to all providers of local exchange services; otherwise VoIP providers will have a competitive regulatory advantage over other providers of local exchange services simply due to the technology used to deploy the service. The state and national goals of universal service must be honored.

### B. Competitively Neutral Compensation for Use of the Public Rights-of-Way

As was noted in footnote no. 3 Texas municipalities are compensated for use of their rights-of-ways by CTPs, pursuant to state law and PUCT Rules based upon the number of "access lines".<sup>5</sup> Any potential for discriminatory regulatory treatment between providers of local exchange services as to payment of "access line fees" must be eliminated; otherwise VoIP

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<sup>5</sup> It should also be noted that while the "access line" compensation methodology is relatively new, since 1999, it is the successor methodology to a value based percentage of gross receipts compensation for use of the rights-of-way which was paid to cities in Texas for decades. Prior to that it was assessed as a per pole fee. *Southwestern Te. & Tel. V City of Dallas*, 174 S.W. 636 (Tex. Civ. App. -1915, reh. den.). For a summary on how such municipal franchise fees have been viewed historically in Texas, see Texas Attorney General Opinion, H-1265 (Tex. A.G. Op. 1978).

providers will have a competitive regulatory advantage over other providers of local exchange services simply due to the technology used to deploy the service.

## VI. CONCLUSION

In conclusion, TCCFUI respectfully requests that this Request for a Declaratory Ruling to Preempt Minnesota state law, and by implication all State law, as to the regulation of VoIP by states be Denied.

Respectfully submitted,

Clarence A West, Attorney

By:   
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ATTORNEY FOR TCCFUI

**EXHIBIT A----TCCFUI Member Cities**

1	City of Abernathy	42	City of Lancaster
2	City of Addison	43	City of Laredo
3	City of Allen	44	City of League City
4	City of Andrews	45	City of Levelland
5	City of Arlington	46	City of Lewisville
6	City of Big Spring	47	City of Longview
7	City of Bowie	48	City of Los Fresnos
8	City of Breckenridge	49	City of Mansfield
9	City of Brenham	50	City of McAllen
10	City of Brookside Village	51	City of Midlothian
11	City of Brownwood	52	City of Missouri City
12	City of Buffalo	53	City of North Richland
13	City of Canyon	54	City of Palacios
14	City of Carrollton	55	City of Paris
15	City of Cedar Hill	56	City of Pearsall
16	City of Center	57	City of Plano
17	City of Cleburne	58	City of Ralls
18	City of College Station	59	City of Refugio
19	City of Conroe	60	City of Reno
20	City of Corpus Christi	61	City of River Oaks
21	City of Crockett	62	City of Rosenberg
22	City of Dallas	63	City of San Saba
23	City of Denison	64	City of Selma
24	City of Denton	65	City of Seminole
25	City of Dickinson	66	City of Seymour
26	City of El Lago	67	City of Snyder
27	City of Electra	68	City of South Padre
28	City of Fairview	69	City of Spearman
29	City of Flower Mound	70	City of Sugar Land
30	City of Fort Worth	71	City of Sunset Valley
31	City of Friendswood	72	City of Taylor Lake
32	City of Frisco	73	City of Terrell
33	City of Grand Prairie	74	City of Thompsons
34	City of Grapevine	75	City of Timpson
35	City of Greenville	76	City of Trophy Club
36	City of Henrietta	77	City of Tyler
37	City of Huntsville	78	City of University Park
38	City of Irving	79	City of Victoria
39	City of Jamaica Beach	80	City of Waxahachie
40	City of Kilgore	81	City of Webster
41	City of La Grange	82	City of Westlake