

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS  
OF  
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**REPLY COMMENTS OF SPRINT CORPORATION**

Sprint Corporation hereby respectfully submits its reply to comments filed on October 27, 2003 in the above-captioned proceeding.

**I. BACKGROUND AND SUMMARY.**

As evidenced by comments filed in this proceeding, there is considerable debate over the regulatory status of Voice over Internet Protocol (VoIP) services, and over what regulations do now and should in the future apply to such services. The record in the instant proceeding demonstrates that Vonage's VoIP offering is functionally equivalent from the end user's perspective to other real-time voice services offered to the public by traditional common carriers. The Commission should accordingly find that Vonage's DigitalVoice offering is a telecommunications service, subject to USF, access charge, and public safety and security requirements. The Commission should also reject Vonage's request that it preempt state regulation of VoIP services. Even if the Commission were to here find that Vonage's VoIP service is an information service, there is no evidence to suggest that any existing state regulations would be in conflict with such a finding or any associated federal objectives or requirements.

Sprint does agree that technological developments have overtaken many existing federal regulations which were designed years or even decades ago to try to distinguish between telecommunications and information (basic and enhanced) services, and to designate the regulatory obligations associated with each category of service. Thus, Sprint welcomes the Commission's stated plan to institute a comprehensive rulemaking proceeding regarding VoIP. We encourage the Commission to consider in this rulemaking issues such as whether or what access charges should apply to enhanced/information services, and whether a more relaxed regulatory regime should apply to telecommunications services based on an analysis of the provider's market power rather than on the technology used. However, a decision on Vonage's petition should not be deferred pending the outcome of this rulemaking proceeding, since such a delay would add to the uncertainty in the market, further destabilize the USF and access charge systems, and risk public safety and security.

**II. UNDER THE FUNCTIONAL EQUIVALENCY TEST, VONAGE'S DIGITAL VOICE OFFERING MUST BE FOUND TO BE A TELECOMMUNICATIONS SERVICE.**

There is no dispute that Vonage -- "The Broadband Phone Company" -- holds itself out, through its website, advertising and press releases, as a provider of telecommunications services intended to replace those provided by the incumbent local carrier and traditional long distance carriers.<sup>1</sup> There is also no dispute that Vonage is offering such services to the public, for a fee. To existing and potential Vonage

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<sup>1</sup> See, e.g., Sprint, p. 5; California, p. 3; Frontier/Citizens, p. 1; ICORE, p. 2; Minnesota Dept. of Commerce, p. 1; NASUCA, p. 4; OPASTCO, p. 2; Surewest, p. 4; TCA, p. 2; Verizon, p. 4; Washington E911, p. 2; Beacon, p. 2; CenturyTel, p. 4; CWA, p. 2; ITTA, p. 10; Minnesota 911 Program, p. 3; Montana Telecom Association, p. 5; NECA, p. 2; Warinner, p. 3.

subscribers -- excluding regulatory *cognoscenti* who may understand that telecommunications and information services are subject to different regulatory regimes - - Vonage is simply another “phone company.” Vonage customers are assigned 10-digit North American numbering plan telephone numbers; use the same dialing sequences as do subscribers of traditional common carriers to place local (except for E911), long distance, and international calls; use “regular” telephones to make and receive real-time voice calls; pay a monthly telephone bill (including a USF surcharge); and experience no change in the content of their voice communications. In short, from an end user’s perspective, Vonage’s VoIP service is functionally equivalent to the telecommunications services offered by traditional LECs and IXC. The Commission has stated that “the classification of a service under the 1996 Act depends on the functional nature of the end-user offering.”<sup>2</sup> Under this test, the Commission must conclude that Vonage’s VoIP offering is a telecommunications service.

Ignoring this functional equivalency analysis, certain parties assert that Vonage’s service is an information service because some (but not all) of its calls undergo net protocol conversion.<sup>3</sup> While it may be the case that calls between Vonage’s subscribers and users of the PSTN undergo IP-TDM protocol conversion, it has now become technologically irrational to attempt to distinguish between telecommunications and

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<sup>2</sup> *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, 11543 (para. 86) (1998), cited by Sprint, p. 6; California, p. 9; ICORE, p. 6; OPASTCO, p. 3; Surewest, p. 5; see also, BellSouth, p. 4; Iowa Utilities Board, p. 1; Minnesota AGO, p. 7; Minnesota PUC, p. 1; NASUCA, p. 7; TCA, p. 1; Verizon, p. 2; CenturyTel, p. 4.

<sup>3</sup> See, e.g., Cisco, p. 2; High Tech Broadband Coalition, p. 2; Time Warner Telecom, p. 2; 8X8, p. 6.

information services based purely upon a net protocol conversion standard.<sup>4</sup> Other real-time voice communications which undergo some form of net protocol conversion (*e.g.*, frame relay calls, calls between wireline and wireless customers, calls between CDMA and GSM wireless customers) are classified and regulated as telecommunications, and the need for intermediate protocol conversion may be expected to increase in the future as new technologies and equipment are deployed. As CenturyTel points out (pp. 12-13), the Commission has acknowledged that there may be cases where, although net protocol conversion occurs in order to process voice calls which involve different network technologies, “the service itself would remain a switched message [basic] service otherwise unchanged except for the characteristics of the electrical interface.”<sup>5</sup>

The deployment of and interaction between new technologies will blur the distinction, under the net protocol conversion standard, between telecommunications and information services in an increasing number of cases. The Commission should therefore rely upon the end user functional equivalency test cited in the *1998 Report to Congress* to determine whether a service should be classified in the telecommunications or information service category. If the service is being marketed as a telecommunications

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<sup>4</sup> It would be strange indeed if some of Vonage’s calls (those between two Vonage subscribers) were considered to be telecommunications because no net protocol conversion occurs, but other of Vonage’s calls (those between Vonage’s subscribers and users of the PSTN) were considered to constitute an information service because net protocol conversion does occur.

<sup>5</sup> Citing *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, 95 FCC 2d 584, 591 (1983). In this order, the Commission stated that it was “prepared to act favorably and expeditiously on petitions for waiver of the *Computer II* rules to ensure that new technology to implement an existing service can and will be employed” (*id.* at 592). Thus, the Commission attempted to balance the need to encourage deployment of new technology with the need to regulate basic services in a matter which ensured that public interest considerations continued to be met.

service, and is, from the end user's perspective, functionally equivalent to traditional telecommunications services despite any net protocol conversion, the Commission should treat such service offering as a telecommunications service.

### **III. FEDERAL PREEMPTION OF STATE VoIP REGULATION IS NOT WARRANTED.**

A few commenting parties recommend that the FCC preempt state regulation of VoIP services, arguing that (1) a patchwork of state regulation will discourage investment in and deployment of VoIP technology, and (2) where it is not possible to determine the jurisdiction of a call, the service should be considered interstate.<sup>6</sup> Neither of these arguments withstands scrutiny.

Sprint agrees that a clearly articulated, consistent national policy regarding regulation of VoIP services would add much-needed certainty to the market; would help companies to make rational network investment, sales, and product development decisions; would help reduce access billing disputes; and would address critical public interest concerns such as stabilization of the USF and protection of public safety and security.<sup>7</sup> It is for all these reasons that Sprint urges the Commission to find that Vonage's service is a telecommunications service. However, the desire for a national policy on VoIP services does not constitute sufficient grounds for federal preemption of state VoIP regulations. The Commission may preempt state regulation only when the

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<sup>6</sup> See, e.g., Cisco, p. 4; High Tech Broadband Coalition, p. 8; Motorola, p. 2; Time Warner Telecom, p. 3; VON Coalition, p. 13; 8X8, p. 14; USA Datanet, p. 3.

<sup>7</sup> As the Department of Justice/FBI point out (p. 2), classifying VoIP as an information service "would pose a serious risk that certain call content and call identifying information would evade lawful electronic surveillance, thereby undercutting CALEA's very purpose and jeopardizing the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats."

state regulation is incompatible with an explicit federal objective, and when it would be impossible to comply with both the states' and the FCC's regulations.<sup>8</sup> Neither condition exists here.

As Sprint and other parties have explained,<sup>9</sup> the FCC has never made any definitive findings about the regulatory status of the various flavors of VoIP. Indeed, in the only FCC document which specifically raised this issue – the *1998 USF Report to Congress* – the Commission declined to make “any definitive pronouncement [regarding the regulatory classification of IP telephony services] in the absence of a more complete record focused on individual service offerings.”<sup>10</sup> Because federal regulation of VoIP remains “unsettled” (DoJ/FBI, p. 16), there is no federal goal which is compromised by state VoIP regulations, and thus there is no basis for federal preemption. Until the FCC renders a decision on the regulatory status of VoIP as a telecommunications or information service, and until some party demonstrates that the federal and state regulations are in conflict,<sup>11</sup> it is premature to even consider federal preemption of state VoIP regulations.

Advocates of federal preemption also assert that because it is not possible to determine the geographic point of origination of a VoIP call, the service must be

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<sup>8</sup> *Louisiana PSC v. FCC*, 476 U.S. 355 (1986).

<sup>9</sup> See, e.g., Sprint, p. 8; Alliance for Public Technology, p. 2; California, p. 9; ICORE, p. 6; Minnesota PUC, p. 2; US Dept. of Justice and FBI, p. 16; CenturyTel, p. ; ITTA, p. 13; Level 3, p. 11.

<sup>10</sup> 13 FCC Rcd at 11541 (para. 83).

<sup>11</sup> If, as recommended by Sprint, the Commission were to find that Vonage's VoIP service is telecommunications, there would not seem to be any conflict with state VoIP regulations adopted to date.

considered jurisdictionally interstate.<sup>12</sup> Such logic is difficult to follow. As an initial matter, it is not clear why Vonage and other VoIP providers would be unable to determine where a call originates. Although their subscribers might be able to obtain their VoIP service through any broadband connection,<sup>13</sup> Vonage's equipment presumably is able to determine where the packet originates and terminates in order to route the call properly. Even if this is not possible, there are, as 8X8 acknowledges (p. 14), "several possible future solutions to this location issue." Pending deployment of such "solutions," there would seem to be no reason why VoIP service providers could not employ some safe-harbor PLU (percent local use) and PIU (percent interstate use) factors (presumably based on a special study). As CenturyTel points out (p. 16), "[w]hile the process of identifying the location of IP-based callers may be different and less straightforward than the process for locating a user of a wireline circuit-switched network, the Commission has successfully directed carriers...to overcome difficulties this mobility creates for a host of purposes...." In short, the purported inability to determine the geographic origination of every VoIP call is not an insurmountable, inseverable problem which warrants federal preemption.

Furthermore, there is no legal basis for declaring VoIP jurisdictionally interstate where the geographic origination of the call is in question. The Commission's finding

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<sup>12</sup> See, e.g., CISCO, p. 4; High Tech Broadband Coalition, p. 3; 8X8, p. 14.

<sup>13</sup> While it is apparently possible for Vonage's subscribers to move their ATA device from one broadband connection to another, Sprint is unaware of anything in the record to suggest that this is a common practice.

that GTE's ADSL Internet access service was an interstate service<sup>14</sup> is not applicable to VoIP service; in fact, the *ADSL Order* did not even address situations in which the geographic point of origination is purportedly unknowable. In the *ADSL Order*, the Commission noted that an Internet user may, "[i]n a single Internet communication, ...access websites that reside on servers in various state[s] or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country...." Because an Internet session may involve end-to-end transmissions between the end user and Internet websites that are both interstate and intrastate, and because more than a *de minimis* (10% or more) amount of that Internet traffic was likely to be interstate, the Commission concluded that GTE's ADSL service should be classified as interstate under the mixed-use facilities rule.<sup>15</sup> VoIP service, in contrast, does not involve transmissions to multiple termination points in a single session; VoIP customers originate a call from a specific number/location, and terminate that call to a specific number. When they wish to place a call to another party, VoIP customers hang up their first call, and dial the new telephone number. There is no mixed use in any given VoIP transmission, and thus the *ADSL Order* does not constitute a basis on which to declare that VoIP services are jurisdictionally interstate.

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<sup>14</sup> *GTE Telephone Operating Companies, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466 (1998), cited by Cisco (p. 4) and High Tech Broadband Coalition (p. 8).

<sup>15</sup> 13 FCC Rcd at 22480, citing *MTS/WATS Market Structure Order*, 4 FCC Rcd 5660 (1989).

#### **IV. A DECISION ON VONAGE'S PETITION SHOULD NOT BE DEFERRED TO A COMPREHENSIVE VoIP RULEMAKING PROCEEDING.**

Several parties recommend that the Commission dismiss or defer action on Vonage's petition pending the outcome of a comprehensive rulemaking proceeding.<sup>16</sup> Sprint supports a comprehensive rulemaking on VoIP to address changes to existing rules, such as whether the ESP access charge exemption should be curbed or lifted (if VoIP is found to be an information service), or whether application of telecommunications regulations should reflect a market power analysis (if VoIP is found to be a telecommunications service). However, it would be contrary to the public interest to defer action on Vonage's petition pending the outcome of such a rulemaking proceeding.

In its petition, Vonage requested federal preemption of state VoIP regulations whether its DigitalVoice service was considered to be either a telecommunications or an information service. As explained in Section III above, federal preemption is wholly unjustified at the current time: no federal objective has even been identified (much less compromised by state VoIP regulations), and the alleged inability to identify the geographic origination of a call has not been shown to be an insurmountable problem. Deferring a decision on Vonage's preemption request would have a chilling effect on good-faith efforts by the states to apply their own laws to products that are offered to the public as local or intrastate services. Unless or until a federal basis for preemption is

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<sup>16</sup> See, e.g., BellSouth, p. 2; Iowa Utilities Board, p. 3; NASUCA, p. 1; New York DPS, p. 2; Ohio PUC, p. 2; Qwest, p. 2; SBC, p. 1; USTA, p. 2. Several parties who support Vonage's petition also support a comprehensive federal proceeding (see, e.g., Level 3, p. 4; MCI/Comptel, p. 4; Motorola, p. 2).

found, there is no reason to prohibit states from taking whatever steps they deem necessary to protect the public safety.

Numerous carriers have announced plans to deploy IP technology extensively in their networks,<sup>17</sup> and there seems to be general consensus that VoIP calls are likely to grow rapidly and comprise an increasing percentage of overall voice traffic.<sup>18</sup> As more and more consumers subscribe to VoIP services, it becomes only a matter of time before one of those consumers will require E911 assistance. States have the right -- indeed, the obligation -- to take steps to protect the public safety by ensuring that providers of local calling services are deploying adequate E911 capability.<sup>19</sup> Although Vonage has indicated that it is working on an E911 solution, it is not at all clear when its fix will be implemented or whether it will be adequate. The Minnesota Metropolitan 911 Board, for

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<sup>17</sup> See, e.g., "SBC Telecom Plan is Set to Take on Regional Bells," *Wall Street Journal*, Nov. 20, 2003, p. B10 (plans to offer VoIP services to midsize business users to most metropolitan areas in the U.S. by the end of 2004); "Verizon details Internet phone plans," CNET News, [http://news.com.com/2100-7352\\_3-5108908.html](http://news.com.com/2100-7352_3-5108908.html), Nov. 18, 2003 (plans to offer VoIP to residential and business customers beginning early next year); "Qwest to roll out Internet voice service in Minnesota," Reuters, Nov. 4, 2003, [http://biz.yahoo.com/rc/031104/telecoms\\_quest\\_voip\\_1.html](http://biz.yahoo.com/rc/031104/telecoms_quest_voip_1.html) (plans to extend VoIP offering from business to mass market customers in Minnesota since "traditional, costly regulations do not apply there"); "Screaming Match," *Forbes*, Oct. 13, 2003 (MCI planning to migrate all of its traffic from circuit-switched networks to the Internet by 2005).

<sup>18</sup> See, e.g., "Telecom and Cable: VoIP Will Force Regulatory Lines to Be Redrawn," Bernstein Research Call, Nov. 13, 2003; "Three Trends and a Train Wreck, Consolidation, Broadband/VoIP, and Bundling are Driving Market, But on Collision Course with Telecom and Media Regulatory System," Legg Mason, Nov. 17, 2003; "Battered Telecoms Face New Challenge: Internet Calling. Once a Minor Player, Service Captures Growing Share of Home, Business Market," *Wall Street Journal*, Oct. 9, 2003, p. A8.

<sup>19</sup> See, e.g., APCO, p. 2; CWA, p. 11; Metropolitan 911 Board, p. 1; Minnesota Dept. of Commerce, p. 5; Minnesota Office of the Attorney General, p. 10; Minnesota Statewide 911 Program, p. 1; NASUCA, p. 12; Texas Commission on State Emergency Communications and Texas Emergency Communication Districts, p. 2; Washington Enhanced 911 Program, p. 1.

example, expressed serious concern about Vonage's proposed plan, noting (p. 3) that its plan proposed to route 911 calls to potentially unattended PSAP administrative numbers, and did not include automatic location information.

Particularly in the absence of any identified federal objective here, the Commission must not interfere with states' legitimate right to enforce state laws governing public safety. To the extent that Vonage or any other VoIP service provider is unable to comply with those requirements, they may request a waiver of such requirements accompanied by a showing of why grant of their waiver request would be in the public interest.

#### **V. CONCLUSION.**

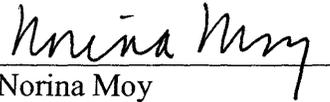
Vonage's DigitalVoice service is, from the end user's perspective, functionally equivalent to telecommunications services offered by incumbent LECs and traditional IXCs. Under this standard, the Commission must find that Vonage's VoIP offering is a telecommunications service, subject to existing USF, access charge, and public safety and security obligations. The Commission may leave to the upcoming rulemaking proceeding consideration of whether these existing requirements are appropriately applied to all telecommunications service providers, or whether different regulatory requirements should apply based upon the service providers' market power.

The Commission should refrain from preempting any state VoIP regulations at this time. There is thus far no federal objective which is compromised by state VoIP regulations. Even if the Commission were to here rule that VoIP services are information services, there is no indication that existing state VoIP regulations in any way conflict with such a federal finding and related requirements.

Finally, the Commission should address Vonage's petition expeditiously. Delaying a decision would only prolong market uncertainty, further destabilize the USF and access charge regimes, and imperil public safety and security.

Respectfully submitted,

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November 24, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **REPLY COMMENTS OF SPRINT CORP.** was filed by electronic mail and sent by United States first-class mail, postage prepaid, on this the 24<sup>th</sup> day of November, 2003 to the parties on the attached pages.

  
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