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October 1, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC 03-211; Vonage Petition for Declaratory Ruling

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC") Rules, this letter serves to provide notice in the above-captioned proceedings of a September 30, 2004, *ex parte* meeting among the undersigned, Mr. Chris Murray, Director of Government Affairs, Vonage Holdings Corp. ("Vonage"), and Mr. Christopher Libertelli, Senior Legal Advisor to Chairman Powell.

The purpose of the meeting was to provide the Chairman and the FCC with the current status of the ongoing Federal litigation as well as to supplement the record and keep the FCC current on Vonage and the Vonage service at issue in this proceeding.¹

¹ As the FCC is aware, Vonage has successfully enjoined the attempts of the Minnesota and New York commissions to impose state telephone common carrier regulation on Vonage's service. *See Vonage Holdings Corp. v. Minnesota Public Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *appeal pending*, No. 04-1434 (8th Cir.); Preliminary Injunction Order, *Vonage Holdings Corp. v. The New York State Public Serv. Com'n. et al.* (S.D.N.Y. July 16, 2004) (Docket No. 04 Civ. 4306 (DFE)). As of today's filing, an argument date has not yet been set in the Minnesota PUC's appeal to the Eighth Circuit.

In response to questions raised regarding the procedural posture of the Minnesota litigation and arguments made to the Minnesota PUC prior to the initiation of Vonage's action in Federal court, Vonage attaches as Exhibit 1 a "timeline" of the significant events before the PUC. Also attached are several of the key filings: *see Complaint of the Minnesota Department of Commerce*, Request for Temporary Relief, Request for and Expedited Hearing, Docket No. P6214/C-03-108 (filed Jul. 15, 2003) (attached hereto as Exhibit 2); *Response of Vonage Holdings* (cont'd)

During the course of the meeting, Vonage advised the FCC that since filing its petition on September 22, 2003, Vonage has grown to provide service to over 275,000 line equivalents. Vonage has subscribers with billing addresses in each of the 50 states and the District of Columbia. Vonage's subsidiary, Vonage Canada Corp., now offers service to subscribers with billing addresses throughout Canada. Although Vonage does not market its service to subscribers with billing addresses outside of the United States and Canada, the Vonage multimedia terminal adapter ("MTA") and software client are capable of facilitating subscriber communications from any broadband connection world-wide.² While it is technically impossible for Vonage to determine the physical location of its subscribers when they use the service, Vonage's customers frequently share their experiences with the Company when using the product abroad. Vonage's customers regularly use its service from countries outside of North America. Some of these nations include Argentina, Australia, Belgium, China (Hong Kong), France, Jamaica, Mexico, the Netherlands, the Philippines, Singapore, and the United Kingdom. As of this filing, Vonage's customers have used its service from virtually every inhabitable continent in the world.

Vonage noted during the meeting that in offering its service, the Company fully discloses that a third-party provided broadband Internet connection is required to utilize the service. This disclosure is not only clear from the Company's advertising, marketing material and "tag line," it is also disclosed in multiple locations on the Company's web-site and on the product activation web pages; it is further disclosed on the retail product packaging, and disclosed verbally if the product is ordered over the telephone.³ Broadband Internet connectivity is required not only to maintain sufficient call quality but also to ensure the "always on" character of the service is retained. Although a suggested 128k minimum upstream broadband connection is required to use the service, Vonage currently offers customers use of a "Bandwith Saver" feature that

Corporation to Request for Temporary Relief, Docket No. P6214/C-03-108, at 6 (filed Jul. 22, 2003) (attached hereto as Exhibit 3); *Answer of Vonage Holdings Corporation*, Docket No. P6214/C-03-108 (filed Jul. 30, 2003) (attached hereto as Exhibit 4); *Motion to Dismiss of Vonage Holdings Corporation*, Docket No. P6214/C-03-108 (filed Jul. 30, 2003) (attached hereto as Exhibit 5); *Memorandum in Support of Vonage Holdings Corp.'s Motion for Preliminary Injunction*, File No. 03-5287MJD/JGL (filed Sept. 24, 2003) (attached hereto as Exhibit 6). See also *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 1000-03 (D. Minn. 2003); see also *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. Civ. 03-5287(MJD/JG), 2004 WL 114983 (D. Minn. 2004) (denying Minnesota PUC's motion for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial), *appeal pending*, Docket No. 04-1434 (8th Cir.). Attached hereto as Exhibit 7.

² See http://www.vonage.com/products_tour.php; <http://www.vonage.com/features.php?feature=softphone>. See also Press Release, Vonage Selects Xtens X-Pro As the SoftPhone of Choice (Mar. 23, 2004) (attached hereto as Exhibit 8).

³ See, e.g., http://www.vonage.com/help_broadband.php; http://www.vonage.com/products_tour.php; <https://subscribe.vonage.com/vonage-subscribe/subscribe/step0.do>. Customers failing to acknowledge these clear disclosures would also be able to return the product subject to either the Vonage money back guarantee or retail store policy. See Vonage's Terms of Service, Section 4.7, attached hereto as Exhibit 9.

activates one of 3 alternative software compression/decompression (“codex”) options.⁴ These codexes are stored in the flash memory – this is the RAM that preserves it’s data when the device is turned off in the customer’s MTA or on the subscriber’s computer if the SoftPhone is utilized. The various codexes are activated by customer interaction with the Vonage web interface or “Dashboard.” The 3 codexes consist of a 30k, 50k and 90k version. Because of total system overhead and overall bandwidth utilization requirements, even the lowest quality codex does not enable reliable transmissions over non-broadband connections. Rather, Vonage offers these choices to permit customers to limit the possibility of voice quality degradation in the event of a congested third-party Internet connection. Vonage notes that 84% of its customers utilize the maximum quality codex with another 8% of users selecting both the 50k and 30k codexes.

During the meeting, Vonage provided the FCC the attached paper describing its “Dialing 911” emergency calling service and discussed the same.⁵ The paper reviews the history, development and features of Vonage’s 911 Service and includes a summary analysis of the *current* inherent limitations of VoIP 911 calling as compared to 911 calls placed over the PSTN. The paper also surveys the extensive disclosures Vonage makes to its customers concerning those limitations.

Since filing its Petition just over a year ago, Vonage emphasized to the FCC that the Company has continued to develop and introduce new features that further highlight the unique character of its software application.⁶ Some of these features were discussed during the meeting. For example: Vonage has reached agreement with at least one VoIP provider—Free World Dialup (“FWD”) –to directly peer IP traffic between the two services. Similar peering arrangement announcements are forthcoming. When two VoIP providers are peered with each other, as are Vonage and FWD, communications between subscribers of the networks never touch the PSTN. Vonage-to-Vonage calls also work in much the same way since they are free and also never touch the PSTN.⁷ When making a Vonage to FWD call, the Vonage customer dials 0110-FWD-(FWD Identifier). This does not represent a traditional North American Numbering Plan assigned telephone number, but the Vonage servers nevertheless identify the communication as a valid call intended for the FWD user. After verifying that the user placing the call is an active Vonage subscriber, Vonage signals FWD servers and, in a secure fashion, identifies the transmission as originating from Vonage. After receiving a “handshake” from FWD, routing information is received and the call SIP invite is addressed to the IP address

⁴ See http://www.vonage.com/features.php?feature=bandwidth_saver.

⁵ Attached hereto as Exhibit 10 is Vonage’s 911 Primer.

⁶ The Vonage User Guide is attached hereto as Exhibit 11. The Guide is included with the terminal adaptor and, along with the web site, www.vonage.com, provides information on the latest features.

⁷ This configuration was also described in detail in the FCC’s Pulver Order. See *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order (rel. Feb 19, 2004) (“*Pulver Order*”).

associated with the FWD user. All of this occurs over the public Internet, not the PSTN. When a FWD subscriber intends to contact a Vonage customer, the FWD subscriber dials **2431 and then the Vonage number.⁸ Again calls are routed entirely over the Internet.

Although, absent a peering arrangement, a call from a Vonage customer to the customer of another VoIP provider will not avoid the PSTN entirely, it is worthwhile to note that these types of communications both originate and terminate on the Internet and *not* the PSTN.⁹

Earlier this year, Vonage formally launched the latest version of a software product that allows its customers to transform their computers into portable communications systems using a product called "Vonage SoftPhone."¹⁰ Vonage SoftPhone is a computer application that simulates a telephone keypad through downloadable software installed on a computing device. Through the use of the software and an attachable microphone, a customer can make a call, receive a call, retrieve their voicemails and perform all other functions associated with the Vonage service. Vonage SoftPhone works with both Mac and PC desktop computers and laptops. Versions are also available for other devices including mobile Wi-Fi Pocket PCs. Wherever Vonage customers have broadband Internet access and their computers, or Wi-Fi enabled Pocket PCs, they are able to place and receive calls. The Vonage SoftPhone exemplifies how the service is truly a software application since neither a terminal adaptor or a telephone is necessary to utilize the service.

Always adding features, Vonage continues to improve its real-time online account management system. Through this system, the customer has real-time access to stored account information including billing, account and feature characteristics. By manipulating the "Dashboard" web interface, customers can interact with their account to change and view a variety of service information and functions including billing information, voicemail characteristics, and account activity.¹¹ Subscribers to Vonage's 911-type calling service can also update their location information so that emergency services can be dispatched to wherever they are accessing the Vonage service.

Vonage has also transformed the way in which its customers are able to access voicemail. Once again, leveraging the power of the software application and the functionality of the Dashboard and the user's computer, Vonage customers are not only able to retrieve voicemails in

⁸ See http://www.freeworlddialup.com/advanced/peering_numbers.

⁹ In this configuration, both VoIP providers still perform a net-protocol conversion. The originating provider converting from IP to TDM and handing off through the PSTN with the terminating VoIP provider converting from TDM to IP for delivery to the customer adaptor or SoftPhone client.

¹⁰ See Press Release, Vonage Holdings Corp., Vonage Selects Xtens X-Pro As the SoftPhone of Choice (Mar. 23, 2004) (attached hereto as Exhibit 8). See also <http://www.vonage.com/features.php?feature=softphone>.

¹¹ See http://www.vonage.com/features.php?feature=online_account_mgt.

traditional fashion, but they are capable of playing them via the Web, or directing them to be forwarded to any e-mail address for playback at the moment it is received. Vonage is currently working to add functionality that would enable Vonage customers to schedule customized recordings for different hours of the day and different days of the week.

One of the most recent features available to subscribers is “Click-2-Call”^{SM, 12}. This feature is the first of several to be released that will enhance the functionality of the Vonage Internet communications application through the use of additional software downloaded to the user’s computer. With Click-2-Call, Vonage lets a subscriber highlight a telephone number on their computer – for example, a contact in Microsoft OutlookTM. By selecting the telephone number, the software uses the Internet to interact with the Vonage servers, first signaling the servers to initiate a “ring” sequence at the subscriber’s Vonage MTA or SoftPhone. Once the subscriber picks up their receiver or connects via SoftPhone client, the system automatically initiates a sequence to connect the subscriber to the intended called party. This service is free with all Vonage calling plans. Other features that interact with Outlook are also planned, including an intelligent “Do Not Disturb” function.

These new features, and others like them that Vonage will roll out in the months and years to come, all underscore the essential “enhanced” nature of the service. Like the FWD service provided by pulver.com, which the FCC previously found is properly classified as a statutory information service, 47 U.S.C. § 153(20), Vonage’s service is based on its capacity for “acquiring, storing, ... retrieving [and] utilizing ... information via telecommunications.” Vonage’s service does not just utilize this capacity, it is the basis for its operation. Consider, for example, the basic call-routing service that Vonage offers: when an end-user on the PSTN places a call to a phone number assigned to a Vonage customer, Vonage not only converts the call content into IP format for transmission on the Internet, but must also identify the IP address associated with the Vonage customer being called (the same type of stored member information that FWD accesses), and encode that information onto the Internet data stream. This address identification requires Vonage to access and process stored information.

As the FCC has explained, the Internet’s reliance on Domain Name Systems (“DNS”) is one of the “information service” characteristics of the Internet:

A DNS is an Internet service that enables the translation of domain names into IP addresses. When queried about a domain name, a DNS server provides the query with the IP address of the domain name or the IP address of another DNS server.... This translation process is necessary because routing of traffic over the Internet is based on IP addresses, not domain names. As a result, before a

¹² See http://www.vonage.com/features.php?feature=click_2_call.

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browser can send a packet to a website, it must obtain the address for the site.¹³

On these facts, the FCC has explained that DNS “constitutes a general purpose information processing and retrieval capability,”¹⁴ that “encompasses the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,’ and thus constitute[s] an information service, as defined in the Act.”¹⁵

Many other aspects of Vonage’s service require interaction with stored information.¹⁶ For instance, Vonage customers who dial others within the same area code need only dial seven digits (dialing the area code is not required) even though PSTN users must dial ten digits.¹⁷ When Vonage customers dial seven digits, Vonage’s servers are required to retrieve and supply the area code. All of the other new, enhanced services described require similar interaction with and processing of stored data, which is an essential characteristic of an information service.

Sincerely,



William B. Wilhelm, Jr.
Ronald W. Del Sesto, Jr.

Attorneys for Vonage Holdings Corp.

¹³ *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, ¶ 17 n.74 (2002) (“Cable Modem Order”), vacated on other grounds, *Brand X Internet v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

¹⁴ *Id.* at ¶ 37.

¹⁵ *Id.* at ¶ 38 (quoting 47 U.S.C. § 153(20) (statutory definition of information service)).

¹⁶ See *Vonage Holdings Corp. Comments*, WC Docket No. 04-36 (filed May 28, 2004), at 23-28; *Vonage Holdings Corp. Reply Comments*, WC Docket No. 04-36 (filed July 14, 2004), at 19-20. By this filing, Vonage incorporates its comments, reply comments and related exhibits filed in the *IP-Enabled Services* proceeding.

¹⁷ Vonage addressed this in reply comments filed in the proceeding opened to consider SBC IP Communications, Inc. petition for limited waiver of section 52.15(g)(2)(i) of the Commission’s rules regarding access to numbering resources. See *Vonage Holdings Corp. Reply Comments*, CC Docket No. 99-200 (filed Aug. 31, 2004).