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October 21, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

Re: Vonage Holdings Corporation Petition for a Declaratory Ruling
WC Docket No. 03-211

Dear Ms. Dortch:

I write on behalf of AT&T Corp. ("AT&T") to address in this docket the fact that AT&T CallVantage service is essentially identical to the service that is the subject of Vonage's above-captioned petition. As described in AT&T's IP-Enabled Services NPRM Comments, WC Docket No. 04-36, filed May 28, 2004, pp. 6-12:

> AT&T CallVantage service is an innovative new IP-based offering that enables customers to place phone calls over the Internet, and send to and receive calls from ordinary POTS subscribers. AT&T CallVantage service customers thus can obtain telephone service wherever they have a broadband Internet connection. AT&T CallVantage service customers are not limited to their "geographic" telephone number, but can obtain numbers from across the United States. AT&T CallVantage service is now offered in 33 major markets in nine states, and will be expanded to over 100 major markets by the end of 2004.
>
> Although the technology used in AT&T CallVantage service is advanced, the offering itself is user-friendly. Customers connect an "ordinary" voice-grade telephone to an AT&T-supplied adapter, and connect the adapter to either a cable or DSL modem. The adapter converts the customer's analog voice signals into IP packets (and *vice-versa*). AT&T CallVantage service allows the customer to make and receive calls from anyone, PSTN-connected and broadband-connected customers alike.

> AT&T CallVantage service offers far more than high quality voice calls at very affordable rates. Not only does it include traditional "vertical features" such as voice mail, caller ID, call waiting and call forwarding, the use of next generation IP technology has allowed AT&T to provide consumers with unique "e-features" not available with POTS service. Among those currently included in AT&T's service are the ability to check voice mail from any phone or computer; the option of sending "talking" emails containing voice mail messages; a real-time call log; a "do not disturb" feature (*i.e.*, call blocking for certain time periods); personal conferencing; and the "locate me" feature, which allows calls to be forwarded to up to five additional numbers. These features and functions only scratch the surface of VoIP's potential. AT&T is in the process of researching and developing new features for its VoIP service that will leverage its existing IP platform to bring additional consumer benefits.
>
> AT&T CallVantage service also gives customers unprecedented control over call management. AT&T CallVantage service customers have the ability to access and change their "e-features" over the telephone or via the Internet. Thus, for example, a customer can adjust the "locate me" call forwarding feature to ring to the customer's current location and modify the application of the "do not disturb" feature. These systems can also be used to check voice mail from any location. And, as AT&T adds new e-features to its VoIP service, it will also develop Internet-accessible management tools that give customers' unprecedented ability to control those features as well.

As AT&T further explained, AT&T CallVantage service, like the Vonage's, should be treated as *interstate* (*id.* pp. 45-47):

> [I]t is not practically or economically possible to separate the intrastate and interstate components of an IP-PSTN "call" without negating the federal objectives to preserve and promote the viability of the Internet and other interactive computer services. *Pulver.com Order* [WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004) ¶ 20. It is impossible to determine the geographic endpoints of the IP end of an IP-PSTN call. The IP end of a call has a "portable nature without fixed geographic origination or termination points," which "means that no one but the [end users themselves] know where the endpoints are." *Pulver.com Order* ¶ 21. And just as the Commission noted in the *Pulver.com* decision, even if it were "possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining state jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical." *Id.* ¶ 24. Tracking packets "to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end users," which "would improve neither service nor efficiency." *Id.* In the *Pulver Declaratory Ruling,* the Commission found that such requirements would be directly contrary to the public

interest: "In a dynamic market such as the market for Internet applications . . . , we find that imposing this substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications." *Id.* That is equally true here, and the Commission should preempt state entry and rate regulation that would negate the federal interest in promoting the development of VoIP services. *See also* Memorandum Opinion and Order, *GCI* v. *ACS*, 16 FCC Rcd. 2834, ¶ 24 (2001) ("[i]t is well-settled that when communications, such as ISP traffic, are jurisdictionally mixed, containing both interstate and intrastate components, the Commission has authority to regulate such communications").

The inherently nomadic nature of VoIP services and CPE makes patchwork regulation by the states particularly unjustified. The Commission should sustain the conditions for vigorous development of these applications by making specific findings for these services that reaffirm and extend the application of the *Computer Inquiries*' conclusions, which preempted states from applying "common carrier tariff regulation" and "public-utility type regulation" to information services, to IP-enabled applications. *See* Further Reconsideration Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, ¶ 83 n.34 (1980).

There can be no lawful distinction between Vonage's service and AT&T CallVantage service. To the contrary, it would be manifestly unreasonable and discriminatory for the Commission to treat one differently than the other for jurisdictional or other regulatory classification.[1] Indeed, such an outcome would be blatantly discriminatory, in violation of Sections 201 and 202 of the Act.[2]

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1 *See, e.g., Adams Telcom, Inc.* v. *FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) ("We have . . . reminded the FCC of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment" (internal quotation marks omitted)); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (to justify disparate treatment of parties, FCC "must explain its reasons and do more than enumerate factual differences, if any, between [them]; it must explain the relevance of those differences to the purposes of the Federal Communications Act"); *FEC* v. *Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

2 Under Section 202(a) "like" services must be treated similarly. The "test of whether services are 'like' is functional similarity or equivalence." Tentative Decision, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd. 1059, ¶ 19 (1994) ("*SNFA Remand Findings*"). "This test looks to the nature of the service" to determine "whether the services 'are different in any

(footnote continued on following page)

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

/s/

Judy Sello

cc: Jeffrey Carlisle
Michelle Carey
Tom Navin
Julie Veach
Darryl Cooper
Russell Hanser
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material functional respect.'" *Id.* And the test considers whether services are functionally equivalent "from the perspective of consumers." *Id.* ¶ 20; *see also Ad Hoc Telecommunications Users Committee* v. *FCC,* 680 F.2d 790, 796 (D.C. Cir. 1982). In this regard, the D.C. Circuit and the Commission have emphasized that "the functional equivalency test should be allowed to yield a determination that . . . services are 'like,' whether or not they are 'identical.'" *SNFA Remand Findings* ¶ 20; *Ad Hoc* v. *FCC*, 680 F.2d at 797. The Commission has explained that discriminatory rates are unjust or unreasonable if they are not "justified by considerations such as differences in cost" or do not serve the "goals of the Act." *SNFA Remand Findings* ¶ 135.