

n106 See *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, n.7 (1989) (*MTS/WATS Market Structure Separations Order*) (finding that "mixed use" special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to the Commission's jurisdiction for jurisdictional separations purposes because separating interstate from intrastate traffic on many such lines could not be measured without "significant additional administrative efforts"); see also *Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 380 F.3d 367, 374 (finding that the Commission's preemptive intent concerning the *de minimis* rule relates to cost allocation for ratemaking purposes rather than plenary regulatory authority but stating that the Commission "*certainly has the wherewithal to preempt state regulation in this area if it so desires*") (emphasis added); *BellSouth MemoryCall*, 7 FCC Rcd at 1620, para. 7 (preempting order of a state commission imposing regulatory conditions on the offering of the intrastate portion of a jurisdictionally mixed service because of the expense, operational, and technical difficulties associated with identifying the intrastate portion and the effect it would likely have on the provider's continued offering of the interstate portion). [*57]

n107 See, e.g., *MTS/WATS Market Structure Separations Order*, 4 FCC Rcd 5660, n.7; *BellSouth MemoryCall*, 7 FCC Rcd at 1620, para. 7

n108 See *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 10 FCC Rcd 11700, 11727-28, para. 77 (1995) (citing *California v. FCC*, 39 F.3d 919 (9th Cir. 1994)), *aff'd*, *California v. FCC*, 75 F.3d 1350 (9th Cir. 1996). The Ninth Circuit affirmed the Commission's preemption in this case, finding it to fit within the impossibility exception. See *California v. FCC*, 75 F.3d at 1360. Indeed, when possible, this Commission prefers that economic and market considerations drive the development of technology, rather than regulatory requirements. See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, FCC 04-248, para. 19 (rel. Oct. 18, 2004) (concluding that decision regarding "which broadband technologies to deploy is best left to . . . the market We decline to second-guess or skew those technology choices . . ."). [*58]

30. In the case of DigitalVoice, Vonage could not even avoid violating Minnesota's order by trying *not* to provide intrastate communications in that state. n109 For the same reasons that Vonage cannot identify a communication that occurs within the boundaries of a single state, it cannot prevent its users from making such calls by attempting to block any calls between people in Minnesota. n110 Indeed, Vonage could not avoid similar "intrastate" regulations if imposed by any of the other more than 50 separate jurisdictions. Due to the *intrinsic ubiquity of the Internet, nothing short of Vonage ceasing to offer its service entirely could guarantee that any subscriber would not engage in some communications where a state may deem that communication to be "intrastate" thereby subjecting Vonage to its economic regulations absent preemption.*

n109 See Vonage Petition at v, 31; see also *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 171 (explaining that no aspect of the Internet can fairly be closed off to users from any state).

n110 See Vonage Petition at v, 31.

31. There is, quite simply, no practical way to sever DigitalVoice into [*59] interstate and intrastate communications that enables the *Minnesota Vonage Order* to apply only to intrastate calling functionalities without also reaching the interstate aspects of DigitalVoice, nor is there any way for Vonage to choose to avoid violating that order if it continues to offer DigitalVoice anywhere in the world. n111 Thus, to whatever extent, if any, DigitalVoice includes an intrastate component, because of the impossibility of separating out such a component, we must preempt the *Minnesota Vonage Order* because it outright conflicts with federal rules and policies governing interstate DigitalVoice communications.

n111 See *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375, the court upheld preemption of a Texas Public Utility Commission order prohibiting an incumbent LEC from providing interconnection to the PSTN to a customer where the FCC cannot "separate the interstate and the intrastate components of [its] asserted regulation."); *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d at 1515 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375, to uphold Commission's preemption of a state commission's prescribed rates for LEC charges to interexchange carriers for customer disconnections based on the impossibility exception). [*60]

32. Indeed, the practical inseparability of other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent as described herein. Specifically, these basic characteristics include: a requirement for a broadband connection from the user's location; a need for IP-compatible CPE; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video. n112 In particular, the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services, n113 we would preempt state regulation to an extent comparable to what we have done in this Order.

n112 See, e.g., SBC Oct. 8 *Ex Parte* Letter, Attach. at 4-11; BellSouth Oct. 26 *Ex Parte* Letter, Attach. at 6-12; BellSouth Oct. 7 *Ex Parte* Letter, Attach. at 4. [*61]

n113 See, e.g., Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1-2 (filed Oct. 27, 2004) ("This network design also permits providers to offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines. . . . In addition to call setup, these functions include generation of call announcements, record-keeping, CALEA, voice mail and other features such as *67, conferencing and call waiting. . . . There are no facilities at the local level of a managed voice over IP network that can perform these functions."); Letter from Henk Brands, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 2, 9 (filed Oct. 29, 2004) (Time Warner Oct. 29 *Ex Parte* Letter) ("The Commission should take a broader approach by recognizing additional characteristics of IP-based voice services and extend the benefits of

preemption to all VoIP providers. . . . By its nature, VoIP is provided on a multistate basis, making different state regulatory requirements particularly debilitating."); NCTA Oct. 28 *Ex Parte* Letter, Attach. at 1 ("Cable VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service. . . . A cable company may have no idea whether a customer is accessing these features from home or from a remote location. The integral nature of these features and functions renders cable VoIP service an interstate offering subject to exclusive FCC jurisdiction. . . . Not every cable VoIP service has the same mix of features and functionalities . . . , but all cable VoIP offers the types of enhancements that render it an interstate service. Similarly, while the network architecture of each cable VoIP system will not be identical, they share the same centralized network design that impart an interstate nature."); Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 1 (filed Oct. 27, 2004) ("Functions integral to every call, such as CALEA compliance, voicemail recording, storage, and retrieval, call record-keeping, 3-way calling and other functions are provided from these central facilities. These facilities are often located in a state different from the origin of the call."). [*62]

5. Policies and Goals of the 1996 Act Consistent With Preemption of Minnesota's Regulations

33. We find that Congress's directives in sections 230 and 706 of the 1996 Act are consistent with our decision to preempt Minnesota's order. As we have noted, Congress has included a number of provisions in the 1996 Act that counsel a single national policy for services like DigitalVoice. n114

n114 See *supra* para. 14; see also, e.g., BellSouth Comments at 3; SBC Comments at 2; VON Coalition Comments at 13; MCI/CompTel Reply at 11; VON Coalition Aug. 19 *Ex Parte* Letter, Attach at 12-13; Time Warner Oct. 29 *Ex Parte* Letter at 8-9; Letter from Carolyn W. Brandon, Vice President, Policy, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 2 (filed Nov. 2, 2004).

34. Congress's definition of the Internet in the Act recognizes its global nature. n115 In addition to defining the Internet in section 230 of the Act, Congress used section 230 to articulate its national Internet policy. There, Congress stated that "it is the policy of the United States - to preserve the vibrant and competitive free market that presently exists for the Internet and other [*63] interactive computer services, unfettered by Federal or State regulation." n116 We have already determined in a prior order that section 230(b)(2) expresses Congress's clear preference for a national policy to accomplish this objective. n117 In *Pulver*, we found this policy to provide support for preventing state attempts to promulgate regulations that would apply to Pulver's service. n118 While we found Pulver's FWD service to be an information service, the Internet policy Congress included in section 230 is indifferent to the statutory classification of services that may "promote its continued development." n119 Rather, it speaks generally to the "Internet and other interactive computer services," a phrase that plainly embraces DigitalVoice service. n120 Thus, *irrespective of the statutory classification of DigitalVoice, it is embraced by Congress's policy to "promote the continued development" and "preserve the vibrant and competitive free market" for these types of services.* n121

n115 In section 230(f) of the Act, Congress describes the Internet as "an *international* network of federal and non-federal interoperable packet switched data networks." See 47 U.S.C. § 230(f)(1) (emphasis added). Similarly, in section 231, the Internet is defined in terms of computer facilities, transmission media, equipment and software "comprising the

interconnected *worldwide* network of computer networks." 47 U.S.C. § 231(e)(3) (emphasis added). Courts have similarly described it. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."); see also *Zeran v. America Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (stating that section 230 represents Congress's approach to a problem of national and international dimension "whose international character is apparent"). DigitalVoice is a service that falls squarely within the phrase "Internet and other interactive computer services" as defined in sections 230(f)(1) & 230(f)(2), contrary to the claims of some commenters. See Minnesota Independent Coalition Comments at 5 (claiming 230(f) definitions pertain to content services which DigitalVoice does not meet). While we do not decide the classification of DigitalVoice today so as to specify what type of "interactive computer service" it is under section 230(f)(2), that determination is unnecessary for purposes of demonstrating its nexus to section 230. DigitalVoice is unquestionably an "Internet" service as defined in section 230(f)(1), a definition which is not limited to any particular content as we discuss in more detail below. [*64]

n116 47 U.S.C. § 230(b)(2).

n117 See *Pulver*, 19 FCC Rcd at 3319, para. 18 n.66.

n118 See *id.* We found *Pulver's* FWD service to be an information service -- a determination which further supported a national federal regulatory regime for that service. Indeed, were we to reach a similar statutory "information service" classification determination for DigitalVoice in this Order, there would be no question that Congress intended it to remain free from state-imposed economic, public-utility type regulation, consistent with the Commission's long-standing policy of non-regulation for information services. See *id.* at 3317-22, paras. 17-22. In *Pulver*, we explained that through codifying the Commission's decades old distinction between "basic services" and "enhanced services" as "telecommunications services" and "information services," respectively, in the 1996 Act, and by specifically excluding information services from the ambit of Title II, Congress indicated, consistent with the Commission's long-standing policy of nonregulation, that information services not be regulated. See *id.* at 3318-19, para. 18; see also *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56, para. 102; *IP-Enabled Services Proceeding*, 19 FCC Rcd at 4879-81, 4890-91, paras. 25-27, 39. While Congress has indicated that information services are not subject to the type of regulation inherent in Title II, Congress has provided the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its mandates under the Act. Although the Commission has clear authority to do so, it has only rarely sought to regulate information services using its Title I ancillary authority. See *Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999). [*65]

n119 47 U.S.C. § 230(b)(1).

n120 47 U.S.C. § 230(b)(1), (2) (emphasis added). Indeed, the communications that occur when a subscriber uses the DigitalVoice service are Internet communications, no less than e-mail, instant messaging, or chat rooms. See, e.g., VON Coalition Aug. 19 *Ex Parte* Letter,

Attach at 2. Although DigitalVoice may be functionally similar in some respects to voice communications that are not dependent upon the Internet, this does not change the fact that *DigitalVoice is an Internet-based communications service. See also supra* note 115.

n121 47 U.S.C. § 230(b)(1), (2) (emphasis added).

35. While the majority of those commenting on the applicability of section 230 in this proceeding share this view, n122 others claim that section 230 relates only to content-based services and DigitalVoice is not the type of content-based service Congress intended to reach. n123 We are cognizant, as we must be, of context as we review the statute, but we look primarily to the words Congress chose to use. n124 While we acknowledge that the title of section [*66] 230 refers to "offensive material," the general policy statements regarding the Internet and interactive computer services contained in the section are not similarly confined to offensive material. In the case of section 230, Congress articulated a very broad policy regarding the "Internet and other interactive computer services" without limitation to content-based services. Through codifying its Internet policy in the Commission's organic statute, Congress charges the Commission with the ongoing responsibility to advance that policy consistent with our other statutory obligations. Accordingly, in interpreting section 230's phrase "unfettered by Federal or State regulation," we cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations such as Minnesota's on DigitalVoice and still meet our responsibility to realize Congress's objective.

n122 See, e.g., MCI/CompTel Comments at 11; Motorola Comments at 12; SBC Comments at 2-4; VON Coalition Comments at 13; AT&T Reply at 2; Vonage Aug. 13 *Ex Parte* Letter, Attach. at 3; VON Coalition Aug. 19 *Ex Parte* Letter, Attach. at 13.

n123 See, e.g., California Commission Comments at 15-17; Minnesota Independent Coalition Comments at 4-6; MTA Comments at 6. [*67]

n124 See 47 U.S.C. § 230.

36. We are also guided by section 706 of the 1996 Act, which directs the Commission (and state commissions with jurisdiction over telecommunications services) to encourage the deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market" and removing "barriers to infrastructure investment." n125 Internet-based services such as DigitalVoice are capable of being accessed only via broadband facilities, *i.e.*, advanced telecommunications capabilities under the 1996 Act, n126 thus driving consumer demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706. n127 Indeed, the Commission's most recent *Fourth Section 706 Report to Congress* recognizes the nexus between VoIP services and accomplishing the goals of section 706. n128 Thus, precluding multiple disparate attempts to impose economic regulations on DigitalVoice that would thwart its development and potentially result in it exiting the market will advance the goals and objectives of [*68] section 706.

n125 47 U.S.C. § 157 nt. Section 706 of the 1996 Act is located in the notes of section 7 of the Communication Act. To implement section 706's mandate, the Commission has considered, among other things, whether its rules promote the delivery of innovative

advanced services offerings. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (FNPRM), corrected by Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), cert. denied *sub nom. Nat'l Ass'n Regulatory. Util. Comm'rs v. United States Telecom Ass'n*, 73 USLW 3234 (U.S. Oct. 12, 2004) (Nos. 04-12, 04-15, 04-18). We find that our actions in this ruling are also consistent with this provision of the Act. [*69]

n126 See 47 U.S.C. § 157 nt. (c)(1) (defining "advanced telecommunications capability").

n127 See 8x8 Comments at 5; VON Coalition Aug. 19 *Ex Parte* Letter, Attach at 7-8.

n128 See *Fourth Section 706 Report* at 38 ("Subscribership to broadband services will increase in the future as new applications that require broadband access, *such as VoIP*, are introduced into the marketplace, and consumers become more aware of such applications.") (emphasis added); see also *id.* at 3 (Statement of Chairman Powell) ("Disruptive VoIP services are acting as a demand-driver for broadband connections, lighting the industry's fuse, and exciting a moribund market."); APT Comments at 2; Motorola Comments at 12.

37. Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on DigitalVoice, which could severely inhibit the development of this and similar VoIP services. n129 We cannot, and will not, risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, [*70] and promotes continued development and use of the Internet. To do so would ignore the Act's express mandates and directives with which we must comply, in contravention of the pro-competitive deregulatory policies the Commission is striving to further.

n129 See *Pulver*, 19 FCC Rcd at 3319-20, para. 19; see also *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 183 ("Haphazard and uncoordinated state regulation [of the Internet] can only frustrate the growth of cyberspace.").

B. Commerce Clause

38. We note that our decision today is fully consistent with the Commerce Clause of the United States Constitution. The Commerce Clause provides that "the Congress shall have Power ... to regulate Commerce ... among the several States." n130 As explained by the Supreme Court, "though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." n131 Under the Commerce Clause jurisprudence, a state law that "has the 'practical effect' of regulating [*71] commerce occurring wholly outside that state's borders" is a violation of the Commerce Clause. n132 In addition, state regulation violates the Commerce Clause if the burdens imposed on interstate commerce by state regulation would be "clearly excessive in relation to the putative local benefits." n133 Finally, courts have held that "state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause." n134

n130 U.S. Const. art. 1, § 8, cl. 3.

n131 *Oregon Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994) (citations omitted); see also *PSINet Inc. v. Chapman*, 362 F.3d 227, 239 (4th Cir. 2004) (quoting *General Motors Corp. v. Tracey*, 519 U.S. 278, 287 (1997)); *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 173 (holding that the Internet is an instrument of "interstate commerce" under the Commerce Clause).

n132 *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989); see also *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is *per se* invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.") (emphasis added) (citation omitted). [*72]

n133 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also *Cotto Waxo Co. v. Williams*, 46 F.3d at 793 ("If the challenged statute regulates evenhandedly, then it burdens interstate commerce indirectly and is subject to a balancing test. Under the balancing test, a state statute violates the Commerce Clause only if the burdens it imposes on interstate commerce are 'clearly excessive in relation to the putative local benefits.'") (citation omitted).

n134 *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 169 (citing *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886)); see *id.* at 181 ("The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level."); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999).

39. Minnesota's regulation likely has "the 'practical effect' of regulating commerce occurring wholly outside that state's borders." n135 Because the location of Vonage's [*73] users cannot practically be determined, n136 Vonage would likely be required to comply with Minnesota's regulation for all use of DigitalVoice -- including communications that do not originate or terminate in Minnesota, or even involve facilities or equipment in Minnesota -- in order to ensure that it could fully comply with the regulations for services in Minnesota. And, as we have explained above, this would likely be the result even if Vonage elected to discontinue seeking subscribers in Minnesota, given that end users could use the service from any broadband connection in Minnesota. n137 While states can and should serve as laboratories for different regulatory approaches, we have here a very different situation because of the nature of the service -- our federal system does not allow the strictest regulatory predilections of a single state to crowd out the policies of all others for a service that unavoidably reaches all of them. For these reasons, Minnesota's regulation would likely have the "practical effect" of regulating beyond its borders and therefore would likely violate the Commerce Clause. n138

n135 *Healy v. Beer Institute*, 491 U.S. at 332; see also *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 173-74, 177; *American Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d

Cir. 2003) (acknowledging that because of "the Internet's boundary-less nature," regulations of Internet communications may not be "wholly outside" a state's borders, but nonetheless may impose extraterritorial regulation in violation of the Commerce Clause). [*74]

n136 See *supra* para. 5.

n137 See *supra* para. 30.

n138 See Vonage Petition at 29 ("Vonage has no way of assuring that it is in compliance with the [*Minnesota Vonage Order*] unless it blocks a substantial amount of interstate traffic as well."); *id.* at 31 ("Since *any* Vonage customer could, in theory, travel to Minnesota at any time and connect their MTA computer to a broadband Internet connection, Vonage could never prevent *all* intrastate Minnesota use of its service unless it blocked *all* interstate 'calls' as well.") (emphasis in original); *id.* at 25, 27; see also *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 171 ("No aspect of the Internet can feasibly be closed off to users from another state.").

40. In addition, we believe the burdens imposed on interstate commerce by the Minnesota Commission's regulation would likely be "clearly excessive in relation to the putative local benefits." n139 The Minnesota regulation would impose significant burdens on interstate commerce. n140 As discussed above, even if it were relevant and possible to track the geographic location of packets and isolate traffic for [*75] the purpose of ascertaining jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical and costly. n141 At the same time, we believe that the local benefits of state economic regulation would be limited. In a dynamic market such as the market for Internet-based services, we believe that imposing this substantial burden on Vonage would serve no useful purpose and would almost certainly be significant and negative for the development of new and innovative interstate Internet-based services.

n139 See *Pike v. Bruce Church, Inc.*, 397 U.S. at 142; see also *Cotto Waxo Co. v. Williams*, 46 F.3d at 793. See generally Michael A. Bamberger, *The Clash Between the Commerce Clause and State Regulation of the Internet*, Internet Newsletter, Apr. 2002 (explaining that "for the most part, courts have analyzed the constitutionality of state Internet regulation under the test employed by the *Pike* court") (emphasis added).

n140 Indeed, one federal court has already determined, in the specific context of Vonage, that state entry regulation of DigitalVoice would interfere with interstate commerce. See *New York Preliminary Injunction* at 2; see also *American Booksellers Found. v. Dean*, 342 F.3d at 104 ("We think it likely that the Internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand [] a single uniform rule.'") (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851)). [*76]

n141 See *supra* para. 29; see also *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 170 ("The Internet is wholly insensitive to geographic distances. . . . Internet protocols were designed to ignore rather than document geographic location . . .").

41. Finally, DigitalVoice, like other Internet services, is likely the type of commerce that is of

such a "unique nature" that it "demand[s] cohesive national treatment" under the Commerce Clause. n142 Because DigitalVoice is not constrained by geographic boundaries and cannot be excluded from any particular state, inconsistent state economic regulation could cripple development of DigitalVoice and services like it. If Vonage's DigitalVoice service were subject to state regulation, it would have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations. n143 As discussed above, because of the unbounded characteristics of the Internet, Vonage would likely be required in practical effect to subject its service to all customers across the country to the regulations imposed by Minnesota. Moreover, state regulation of Internet-based services, [*77] such as DigitalVoice, would make them unique among Internet services as the only Internet service to be subject to such state obligations. Indeed, allowing the imposition of state regulation on Vonage would likely eliminate any benefit of using the Internet to provide the service. The Internet enables individuals and small providers to reach a global market simply by attaching a server to the Internet; requiring Vonage to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of Internet-based communication. Thus, services, such as DigitalVoice, are likely of a "unique nature" that "demand[s] cohesive national treatment," and therefore, inconsistent state regulations would likely violate the Commerce Clause. n144

n142 American Libraries Ass'n v. Pataki, 969 F. Supp. at 69 (citing Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557); see also American Civil Liberties Union v. Johnson, 194 F.3d at 1162 ("As we observed, . . . certain types of commerce have been recognized as requiring national regulation. . . . The Internet is surely such a medium."). [*78]

n143 See also American Libraries Ass'n v. Pataki, 969 F. Supp. at 169 ("The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation - and in particular, the national infrastructure of communications and trade - as a whole.") (citing Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992)).

n144 Federal court decisions applying the Commerce Clause to state regulation of Internet services have come to similar conclusions. In American Libraries Ass'n v. Pataki, a leading case on this issue, a federal district court struck down a New York state statute making it a crime to disseminate indecent material to minors over the Internet. The court held that the New York law violated the Commerce Clause because it (1) overreached by seeking to regulate conduct occurring outside its borders; (2) imposed burdens on interstate commerce that exceeded any local benefit; and (3) subjected interstate use of the Internet to inconsistent regulations. See American Libraries Ass'n v. Pataki, 969 F. Supp. at 183-84. In several subsequent cases, federal courts of appeal expressly adopted these holdings. See PSINet, Inc. v. Chapman, 362 F.3d 227; American Booksellers Found. v. Dean, 342 F.3d 96; American Civil Liberties Union v. Johnson, 194 F.3d 1149; see also American Libraries Ass'n v. Pataki, 969 F. Supp. at 182 ("The Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.").

We also note examples from other network-based industries where, although an intrastate component may exist, state authority must nonetheless yield to exclusive federal jurisdiction in the area of economic or other state regulations affecting interstate commerce. For example, in the case of railroads, the Supreme Court struck down a state regulation regarding the length of trains, holding that "examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate,

economical and efficient railway transportation service, which must prevail." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783-84 (1945). Similarly, in trucking cases, the Supreme Court has invalidated state laws regulating the length of trucks under the Commerce Clause when the regulation imposes a burden on interstate trucking that is not outweighed by the local interest. See *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). In another transportation case, the Court struck down an Illinois law mandating a particular type of mudguards on trucks operating in the state, concluding that the regulation imposed significant burdens on interstate trucking with no countervailing benefits. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). [***79**]

C. Public Safety Issues

42. As discussed above, we preempt the *Minnesota Vonage Order* because it imposes entry and other requirements on Vonage that impermissibly interfere with this Commission's valid exercise of authority. As Vonage indicates in its Petition, Minnesota includes as one of its entry conditions the approval of a 911 service plan "comparable to the provision of 911 service by the [incumbent] local exchange carrier." n145 In the *Minnesota Vonage Order*, the Minnesota Commission specifically subjected Vonage to this requirement. n146 Because Minnesota inextricably links pre-approval of a 911 plan to becoming certificated to offer service in the state, the application of its 911 requirements operates as an entry regulation. Vonage explains that there is no practicable way for it to comply with this requirement: it cannot today identify with sufficient accuracy the geographic location of a caller, and it has not obtained access in all cases to incumbent LEC E911 trunks that carry calls to specialized operators at public safety answering points (PSAPs). n147 Under the Minnesota "telephone company" rules, therefore, this requirement bars Vonage from entry in Minnesota. [***80**] To that extent, this requirement is preempted along with all other entry requirements contained in Minnesota's "telephone company" regulations as applied to DigitalVoice. n148 Although we preempt Minnesota from imposing its 911 requirements on Vonage as a condition of entry, this does not mean that Vonage should cease the efforts it has undertaken to date and we understand is continuing to take both to develop a workable public safety solution for its DigitalVoice service and to offer its customers equivalent access to emergency services.

n145 See Vonage Petition at 25 (citing Minn. Rule § 7812.0550 subp. 1).

n146 See *Minnesota Vonage Order* at 8.

n147 See Vonage Petition at 8-9, 24-25.

n148 See *supra* paras. 20-22 (explaining preemption of entry requirements). Indeed, Vonage notes in its petition that "If the Commission preempts Minnesota's certificate requirement . . . this issue [911 comparability to an incumbent LEC] will be moot." See Vonage Petition at 25. Similarly, to the extent the Minnesota Commission demands payment of 911 fees as a condition of entry, that requirement is preempted.

43. There is no question that innovative services like [***81**] DigitalVoice are having a profound and beneficial impact on American consumers. n149 While we do not agree with unnecessary economic regulation of DigitalVoice designed for different services, we do believe that important social policy issues surrounding services like DigitalVoice should be considered and resolved. n150 Access to emergency services, a critically important public

safety matter, is one of these important social policy issues. In this proceeding, Vonage has indicated that it is devoting substantial resources toward the development of standards and technology necessary to facilitate some type of 911 service, working cooperatively with Minnesota agencies and other state commissions, public safety officials and PSAPs, the National Emergency Number Association (NENA), and the Association of Public-Safety Communications Officials (APCO). n151 Moreover, it has demonstrated that it is offering its version of 911 capability to all its customers, including those in Minnesota, and has provided us information indicating what actions its customers must take to activate this 911 capability. n152 We are also aware that Vonage recently announced the successful completion of an E911 [*82] trial in Rhode Island, a state that has not, to our knowledge, attempted to regulate DigitalVoice. In collaboration with the State of Rhode Island, Vonage has developed a technical solution to deliver a caller's location and call back number to emergency service personnel for 911 calls placed in that state by DigitalVoice users. n153 We fully expect Vonage to continue its 911 development efforts and to continue to offer some type of public safety capability during the pendency of our *IP-Enabled Services Proceeding*. n154

n149 See VON Coalition Aug. 19 *Ex Parte* Letter at 4.

n150 As explained above, these issues are currently being considered in pending proceedings before this Commission. See *supra* note 46. See also, e.g., Minnesota Commission Comments at 4; Surewest Comments at 12, Texas 911 Agencies Comments at 2-3 (urging the Commission to consider public safety issues related to VoIP services).

n151 See NENA Reply at 1-2; Vonage Aug. 13 *Ex Parte* Letter at 1-2; Minnesota Statewide 911 Program Comments at 4.

n152 In offering its "911" capability to its customers, Vonage has provided the Commission information regarding how and what it tells its customers about its limited 911 capabilities such that its customers are fully aware of those limitations when they subscribe to the service and clearly understand that it is not a comparable emergency service to the 911 capability they obtain with local exchange service. We fully expect Vonage to continue providing customers information such as this about its "911" capability. See Vonage Oct. 1 *Ex Parte* Letter at 3-4 & Exhibit 10. [*83]

n153 See Letter from William B. Wilhelm, Jr. and Ronald W. Del Sesto, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1 (filed Oct. 14, 2004).

n154 We look beyond Vonage's efforts of today, however, toward work that remains to be done in the area of 911 and the opportunities that this new technology presents for public safety. To that end, we are aware of the six principles NENA has advanced: (1) establish a national E911 VoIP policy; (2) encourage vendor and technology neutral solutions and innovation; (3) retain consumer service quality expectations; (4) support dynamic, flexible, open architecture system design process for 911; (5) develop policies for 911 compatible with the commercial environment for IP communications; and (6) promote a fully funded 911 system. See National Emergency Number Association, *E9-1-1, Internet Protocol & Emergency Communications*, Press Release (Mar. 22, 2004). We applaud NENA's vision in establishing these principles to support a process to "promote a fully functional 9-1-1 system that

responds any time, anywhere from every device." *See id.* We endorse these principles because they provide a sound blueprint for the development of a national 911 solution for VoIP services and we encourage all VoIP providers and industry participants to work toward their realization. [*84]

44. We emphasize that while we have decided the jurisdictional question for Vonage's DigitalVoice here, we have yet to determine final rules for the variety of issues discussed in the *IP-Enabled Services Proceeding*. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as universal service, intercarrier compensation, section 251 rights and obligations, n155 numbering, disability access, and consumer protection in that proceeding. n156

n155 We note that nothing in this Order addressing the Commission's jurisdictional determination of or regulatory treatment of particular retail IP-enabled services impacts competitive LEC access to the underlying facilities on which such retail services ride. *See Letter from Jason D. Oxman, General Counsel, Association for Local Telecommunications Services, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 04-29, 04-36 (filed Nov. 2, 2004).*

n156 *See supra* note 46.

45. Furthermore, we acknowledge that a U.S. District Court in New York has recently ordered Vonage "to continue to provide the same emergency 911 calling services currently available to [*85] Vonage customers" within that state n157 and to "make reasonable good faith efforts to participate on a voluntary basis" in workshops pertaining to the development of VoIP 911 calling capabilities. n158 Because DigitalVoice is a national service for which Vonage cannot single out New York "intrastate" calls (any more than it can Minnesota "intrastate" calls), as a practical matter, the District Court's order reaches DigitalVoice wherever it is used. n159 Thus, we need not be concerned that as a result of our action today, Vonage will cease its efforts to continue developing and offering a public safety capability in Minnesota. The District Court order ensures that these efforts must continue while we work cooperatively with our state colleagues and industry to determine how best to address 911/E911-type capabilities for IP-enabled services in a comprehensive manner in the context of our *IP-Enabled Services Proceeding*. n160

n157 *See New York Preliminary Injunction* at 3. We note that Vonage's "emergency 911 calling service" is not a service that is provided pursuant to the New York Commission's rules or any other state commission's rules. This is a service Vonage has voluntarily undertaken in response to consumer demand. [*86]

n158 *See New York Preliminary Injunction* at 4.

n159 We recognize that Vonage's 911 capability relies on the cooperation of its customers in accurately registering and re-registering their user location when they move about with the service.

n160 *See IP-Enabled Services Proceeding*, 19 FCC Rcd at 4897-901, paras. 51-57.

IV. CONCLUSION

46. For the reasons set forth above, we preempt the *Minnesota Vonage Order*. As a result, the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state. Moreover, for services having the same capabilities as DigitalVoice, the regulations of other states must likewise yield to important federal objectives. To the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.

V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 3, 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-53, 154(i), 303(r), **[*87]** and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Vonage's Petition for Declaratory Ruling IS GRANTED in part and the *Minnesota Vonage Order* IS PREEMPTED.

48. IT IS HEREBY FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

CONCURRY: POWELL; ABERNATHY; COPPS; ADELSTEIN

CONCUR:
STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order in WC Docket No. 03-211.

Since 1870 home telephone service has been essentially the same--two phones connected by a wire. This landmark order recognizes that a revolution has occurred. Internet voice services have cracked the 19th Century mold, to the great benefit of consumers. VoIP services certainly enable voice communications between two or more people, just as the traditional telephone network does, but that is where the similarity ends. Internet voice is an internet application that takes its place alongside email and instant **[*88]** messaging as an incredibly versatile tool for communicating with people all over the world. As such it has truly unique characteristics.

Internet Voice is More Personal: VOIP services allow people to dynamically structure the way they communicate and to customize and personalize messages in a way that is impossible with traditional telephones. Just as consumers personalize their cell phones with ring tones, pictures and applications, the same is possible with internet voice. Consumers have come to expect technology to be tailored to their preferences--"My Amazon," "My Tivo," "My Ipod." Internet voice, ushers in the era of "My Telephone." Adding enhancements to voice is no longer a highly complex and expensive modification to the network -- now it is just a matter

of adding to the next software release.

Internet Voice is Cheaper: Consumers always want to pay less and VOIP promises enormous value. Because of the efficient technology and underlying economics of the service, Consumers can expect flat rate prices, for unlimited services and features. Just as consumers have responded strongly to buckets of minutes at low fixed prices in mobile phone service, the same characteristics [*89] will bring these innovative pricing models to the wired phone world. The proof is in the pudding, VOIP is barely a few years old as a retail offering and providers have already cut prices several times to compete for consumers. VoIP providers have begun offering local and long-distance calling plans for as low as \$ 14.99 and \$ 19.99 per month. Most recently, Vonage and AT&T slashed the monthly prices of their unlimited local and long-distance calling plans by \$ 5 per month. If we let competition and innovation rage, unencumbered by the high cost of regulation, Consumers can expect more of the same--lower prices, more choice, and more innovative offerings.

Internet Voice is Global: Today's decision lays a jurisdictional foundation for what consumers already know -- that the Internet is global in scope. The genius of the Internet is that it knows no boundaries. In cyberspace, distance is dead. Communication and information can race around the planet and back with ease. The Order recognizes that several technical factors demonstrate that VoIP services are unquestionably interstate in nature. VoIP services are nomadic and presence-oriented, making identification of the end points [*90] of any given communications session completely impractical and, frankly, unwise. In this sense, Internet applications such as VoIP are more border busting than either long distance or mobile telephony--each inherently, and properly classified, interstate services.

To subject a global network to disparate local regulatory treatment by 51 different jurisdictions would be to destroy the very qualities that embody the technological marvel that is the Internet. The founding fathers understood the danger of crushing interstate commerce and enshrined the principle of federal jurisdiction over interstate services in the commerce clause of the U.S. Constitution. In the same vein, Congress rightly recognized the borderless nature of mobile telephone service and classified it an interstate communication. VOIP properly stands in this category and the Commission is merely affirming the obvious in reaching today's jurisdictional decision.

This is not to say that there is no governmental interest in VOIP. There will remain very important questions about emergency services, consumer protections from waste, fraud and abuse and recovering the fair costs of the network. It is not true that states are [*91] or should be complete bystanders with regard to these issues. Indeed, there is a long tradition of federal/state partnership in addressing such issues, even with regard to interstate services. For example, in long distance services, the FCC and state commissions have structured a true partnership to combat slamming and cramming. We have also worked closely with the states to strike a balance in the area of do-not-call enforcement. In the mobile services area, the FCC has worked closely with states on E911 implementation. With regard to critical 911 capability for VOIP, I note already that several Internet voice providers have entered into an agreement with the National Emergency Number Association to extend 911 capabilities to Internet voice services to "promote a fully functional 9-1-1 system that responds any time, any where from every device." Efforts such as these are essential to educating policy makers and providing a basis for solutions to complex technical problems. These can and will serve as models for VOIP.

While today's item preempts an order of the Minnesota Commission applying its traditional "telephone company" regulations to Vonage's DigitalVoice service, it is important [*92] that I emphasize that the Commission expresses no opinion here on the applicability to Vonage of state's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing and advertising. Just as this ruling does not alter traditional state powers, we do not alter facilities-based competitor

rights, or state authority pursuant to section 252 of the Act. It is my hope that the Commission's decision today will focus the debate and permit our colleagues in the industry and at the state commissions to direct their resources toward helping the Commission answer the important questions that remain after today's Order.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order in WC Docket No. 03-211.

This decision provides much-needed clarity regarding the jurisdictional status of Vonage's DigitalVoice service and other VoIP services. By fencing off these services from unnecessary regulation, this Order will help unleash a torrent of innovation. [*93] Indeed, by facilitating the IP revolution, rather than erecting roadblocks, our action will drive greater broadband adoption and deployment, and thereby promote economic development and consumer welfare.

There is no doubt that VoIP services of the type provided by Vonage are inherently interstate in nature. As the Order describes in detail, several factors combine to make it impossible to isolate any intrastate-only component of such services. These factors include the architecture of packet-switched networks and the enhanced features that are offered as an integral part of VoIP services. Together, these attributes necessarily result in the interstate routing of at least some packets. These services are also marked -- in striking contrast to circuit-switched communications -- by a complete disconnect between the subscriber's physical location and the ability to use the service. A subscriber's physical location is not only unknown in many instances, but also completely irrelevant. Allowing state commissions to impose traditional public-utility regulations on these interstate communications services would frustrate important federal policy objectives, including the congressional directive [*94] to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." n1

n1 47 U.S.C. § 230(b)(2).

Thus, while I do not lightly arrive at any decision to preempt state regulatory authority, I believe it is imperative for the Commission to do so here. Allowing the Minnesota utility regulations -- or comparable state regulations -- to stand would authorize a single state to establish default national rules for all VoIP providers, given the impossibility of isolating any intrastate-only component. Equally troubling is the prospect of subjecting providers of these innovative new services -- which are being rolled out on a regional, national, and even global scale -- to a patchwork of *inconsistent* state regulations. In short, failure to preempt state utility regulations would likely sound the death knell for many IP-enabled services and would deprive consumers of the cost savings and exciting features they can deliver.

As necessary as preemption may be, I want to underscore my view that our assertion of exclusive federal jurisdiction still [*95] permits states to play an important role in facilitating the rollout of IP-enabled services. To begin with, as the Order makes clear, states will continue to enforce generally applicable consumer protection laws, such as provisions barring fraud and deceptive trade practices. Moreover, I have often emphasized that, even where the FCC alone possesses the ultimate decisionmaking authority, this Commission and state regulators can and should collaborate in the development of sound policy -- much as

we have done through our Federal-State Joint Boards and Joint Conferences, the approval of Section 271 applications, and in other contexts. Indeed, I am encouraged that an increasing number of state commissioners agree that "preemption . . . does not preclude collaboration with States on key issues including public safety, consumer protection and reform of intercarrier compensation and universal service." n2 These state commissioners further note that "clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation." [*96] n3

n2 Letter of Gregory Sopkin, Chairman, Colorado Public Utilities Commission; Thomas Welch, Chairman, Maine Public Utilities Commission; Jack Goldberg, Vice-Chairman, Connecticut Department of Public Utility Control; James Connelly, Commissioner, Massachusetts Department of Telecommunications & Energy; Charles Davidson, Commissioner, Florida Public Service Commission; Susan Kennedy, Commissioner, California Public Utilities Commission; and Connie Murray, Commissioner, Missouri Public Service Commission, at 6 (November 2, 2004).

n3 *Id.*

I also want to acknowledge the concerns expressed by commenters who argued that the Commission should resolve outstanding questions about access to E911, the preservation of universal service, and other important policy matters before addressing this jurisdictional issue. Ideally, the Commission would have decided the jurisdictional issue in tandem with the various rulemaking issues. But the decision of several states to impose utility regulations on VoIP services, and the ensuing litigation arising from such forays, makes it imperative for the Commission to establish our exclusive jurisdiction as the first order of business. This Commission [*97] runs significant risks if we remain on the sidelines and leave it to the courts to grapple with such issues of national import without the benefit of the expert agency's views. n4 Looking ahead, I agree that the Commission should proceed with the rulemaking on IP-enabled services as expeditiously as possible. We should adopt rules to the extent necessary to ensure the fulfillment of our core policy goals, including access to E911, the ability of law enforcement to conduct lawful surveillance, access for persons with disabilities, and the preservation of universal service. And we should provide a thorough and careful analysis of whether IP-enabled services are information services or telecommunications services, given the potentially far-reaching implications of that classification.

n4 *Cf. Brand X Internet Service v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petition for cert. filed* (Aug. 27, 2004) (No. 04-281).

Finally, by the same token, I sympathize with parties who contend that the Commission should conclusively resolve the jurisdictional status of all VoIP services, rather than limiting our analysis to a subset of VoIP. I have endeavored to [*98] make our jurisdictional analysis as inclusive as possible, given the state of the record and the scope of the Declaratory Ruling Petition. This Order should make clear the Commission's view that all VoIP services that integrate voice communications capabilities with enhanced features and entail the interstate routing of packets -- whether provided by application service providers, cable operators, LECs, or others -- will not be subject to state utility regulation.

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order (WC Docket No. 03-211)

We all marvel at the tremendous and transformative potential of IP services. They have the power significantly to remake the telecommunications landscape by flooding the market with innovative new services and providers. But to unleash the full potential of this new technology and to ensure that these services succeed, we need rules of the road--clear, predictable and confidence-building.

Today's decision finds that VoIP services like Vonage's DigitalVoice have an undeniably interstate [*99] character. That's fine as far as it goes--but it doesn't go very far. Proclaiming the service "interstate" does not mean that everything magically falls into place, the curtains are raised, the technology is liberated, and all questions are answered. There are, in fact, difficult and urgent questions flowing from our jurisdictional conclusion and they are no closer to an answer after we act today than they were before we walked in here. So rather than sailing boldly into a revolutionary new Voice Over communications era, we are, I think, still lying at anchor. By not supplying answers, we are clouding the future of new technology that has the power to carry us over the horizon.

So I can only concur in today's decision. While I agree that traditional jurisdictional boundaries are eroding in our new Internet-centric world, we need a clear and comprehensive framework for addressing this new reality. Instead the Commission moves bit-by-bit through individual company petitions, in effect checking off business plans as they walk through the door. This is not the way we should be proceeding. We need a framework for all carriers and all services, not a stream of incremental decisions based [*100] on the needs of individual companies. We need a framework to explain the consequences for homeland security, public safety and 911. We need a framework for consumer protection. We need a framework to address intercarrier compensation, state and federal universal service, and the impact on rural America. But all I see coming out of this particular decision is . . . more questions.

The Commission's constricted approach denies consumers, carriers, investors and state and local officials the clarity they deserve. These are not just my musings. A growing chorus of voices is urging the Commission to stop its cherry-picking approach to VoIP issues. When the National Governors Association, the Association of Public Safety Communications Officials, the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the Communications Workers of America, AARP, the Independent Telephone and Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Western Telecommunications Alliance, the National Association of Regulatory Utility Commissioners, [*101] the National Association of Telecommunications Officers and Advisors, the National Consumers League and local directors of 911 service in cities and counties around the country all suggest that moving ahead in piecemeal fashion is irresponsible, I think we should take heed.

I want to point to language in this item--albeit it's in a footnote--that warns people not to draw unwarranted conclusions from the narrow jurisdictional finding that we make. What we do today should not be interpreted as anything more than it is. Yes, Vonage's DigitalVoice service has an interstate character. But what exactly that entails we do not say. All that important work lies ahead. Wouldn't it be sad if we were to let it go at this, pretending we have done something truly responsive to the questions that need to be answered, and then not proceed to tackle the related issues quickly and comprehensively? And wouldn't it be tragic if the blunt instrument of preemption was permitted to erode our partnership with the states? We have worked long and hard to nourish a common federal-state commitment to a procompetitive telecommunications environment. This is no time to abandon that

commitment.

Sometimes I wonder [***102**] what the strategy is in this Commission's approach to VoIP. Some warn that it may be a camel's nose under the tent strategy, proceeding inch-by-inch to far-reaching conclusions that a more straight-forward approach could not sustain. I hope that is not the case and this decision should not be so interpreted. What I hope this decision does is to force us finally to face up to the larger issues. We are, after all, face-to-face here with issues that go to the very core of our statutory responsibilities. These issues can't be ducked and they can't be dodged if we are truly serious about these technologies realizing their full transformative potentials. So I'll withhold my approval for that happy day when we step up to the plate and begin answering the hard questions about what these technologies and services are and how they fit into America's communications landscape.

CONCURRING STATEMENT OF JONATHAN S. ADELSTEIN

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, FCC 04-267 (2004).

While this Order rightly acknowledges the importance and unique qualities of Internet-based services, [***103**] including Voice over Internet Protocol (VoIP) services, I am concerned that the Commission overlooks important public policy issues that will impact consumers across our country, and particularly in Rural America.

I concur to this item because it appropriately recognizes the unique nature of many IP-enabled services and the importance of reducing barriers to entry for Internet-based services. Indeed, I share my colleagues' enthusiasm for the promise of Internet Protocol (IP)-enabled services. All indications are that IP is becoming the building block for the future of telecommunications and its use is integral to the explosion of choices for consumers. It is becoming increasingly apparent that IP-based services will play an important role in our global economic competitiveness, by enabling economic productivity, providing a platform for innovation, and driving demand for broadband facilities. Whether through PDA phones, voice through Instant Messaging, or countless other innovative services, this technology is giving customers far greater control over, and flexibility in the use of, their communications services. With that control, consumers can convert messages with ease from voice-to-text [***104**] and back, and can take their IP-services wherever they go. Though I am not comfortable with all of the analysis in this item, the Order reasonably reflects the unique qualities of Vonage's service and recognizes the challenges that this service poses for the Commission's traditional jurisdictional analysis.

Where this Order falls short is its failure to account in a meaningful way for essential policy issues, including universal service, public safety, law enforcement, consumer privacy, disabilities access, and intercarrier compensation, and the effect of our preemption here. In February of this year, we opened a VoIP-specific rulemaking proceeding to address not only the issue raised here, the jurisdiction of IP-based services, but to address the broader implications of VoIP services in a comprehensive and coordinated fashion. At that time, we acknowledged the social importance of these Congressionally-mandated policy objectives and the need to assess the potentially disparate impact of our decisions on particular communities. I am concerned that this Order may have dramatic implications for these Congressional objectives, yet we afford them no meaningful or comprehensive consideration [***105**] here. I am also concerned that our inability to specify the exact parameters of the services at issue and the breadth of our preemption will have unintended effects, including effects on incentives for investment in these technologies, that could have been avoided with a more comprehensive approach. I highlight, below, two of the most pressing concerns -- universal service and public safety.

The Act charges this Commission with maintaining universal service, which is crucial in

delivering communications services to our nation's schools, libraries, low income consumers, and rural communities. Universal service has been the cornerstone of telecommunications policy for over 70 years and has enabled this country to enjoy unparalleled levels of access to essential communications services. That access has improved our economic productivity and our public safety in immeasurable ways and has been vital in fostering economic development in rural and underserved areas. The Act also expressly permits States to adopt consistent approaches to preserve and advance universal service. At least 24 States have answered that call, disbursing over \$ 1.9 billion annually from their own universal service [*106] programs. Many of those States and other commenters express legitimate concern that our decision here could increase pressure on the federal universal service mechanisms and could potentially lead to rate increases for rural and low income consumers. With those reasons in mind, I've called for the Commission to quickly convene a universal service solutions summit modeled after the ones we've held for other public policy issues. Regrettably, this item does not acknowledge its potential impact on those programs, nor does it propose any solutions, or even make firm commitments to resolving these issues. We are left to hope that these unaddressed issues do not gridlock or curtail the full reach of the promised IP superhighway.

I also have reservations about our preemption of a State's efforts to ensure the public safety of its citizens, based here on the linkage of the 911 requirement with a State certification. Our approach of overriding States' public safety efforts without clear federal direction takes us into a dangerous territory in which consumers may come to rely on services without the benefit of the critical safety net that they have come to expect.

Ultimately, I cannot fully [*107] endorse an approach that leaves unanswered so many important questions about the future of communications services for so many Americans. Rural and low-income Americans, the countless governmental and public interest groups who have expressed concern about our piecemeal approach, and the communications industry, itself, all deserve more from this Commission. If this Commission is to ensure that innovative services are widely available and also achieve the important public policy goals that Congress has articulated, the Commission must begin to wrestle in earnest with difficult issues that are largely ignored this Order. We simply cannot afford to slow roll these issues.

**APPENDIX:
APPENDIX LIST OF COMMENTERS**

Comments in WC Docket No. 03-211

Comments	Abbreviation
8x8, Inc.	8x8
Alliance for Public Technology	APT
Association of Public-Safety Communications Officials	APCO
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
CenturyTel, Inc.	CenturyTel
Cinergy Communications Company	Cinergy
Cisco Systems, Inc.	Cisco
Dr. Robert A. Collinge	Collinge

Communications Workers of America	CWA
DJE Teleconsulting, LLC	DJE Teleconsulting
Frontier and Citizens Telephone Companies	Frontier/Citizens
The High Tech Broadband Coalition	High Tech Broadband Coalition
ICORE, Inc.	ICORE
Independent Telephone and Telecommunications Alliance	ITTA
Iowa Utilities Board	Iowa Commission
Level 3 Communications, LLC	Level 3
MCI CompTel	MCI/CompTel
Metropolitan 911 Board	Metropolitan 911 Board
Minnesota Attorney General's Office	Minnesota AG
Minnesota Department of Commerce	Minnesota Department of Commerce
Minnesota Independent Coalition	Minnesota Independent Coalition
Minnesota Public Utilities Commission	Minnesota Commission
Minnesota Statewide 911 Program	Minnesota Statewide 911 Program
Montana Independent Telecommunications Systems	Montana Independent Telecommunications Systems
Montana Telecommunications Association	MTA
Motorola, Inc.	Motorola
National Association of State Utility Consumer Advocates	NASUCA
National Exchange Carrier Association	NECA
National Telecommunications Cooperative Association	NTCA
New York State Department of Public Service	New York Commission
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
PAETEC Communications, Inc.	PAETEC
Public Utilities Commission of Ohio	Ohio Commission
Qwest Communications International Inc.	Qwest
Rural Iowa Independent Telephone Association	RIITA
SBC Communications Inc.	SBC
Sprint Corporation	Sprint

/

SureWest Communications	SureWest
Telcom Consulting Associates, Inc.	TCA
Texas Commission on State Emergency Communications and Texas Emergency Communications Districts	Texas 911 Agencies
Texas Coalition of Cities for Utility Issues	TCCFUI
Time Warner Telecom, Inc.	Time Warner Telecom
USA DataNet	USA DataNet
U.S. Department of Justice Federal Bureau of Investigation	USDOJ/FBI
United States Telecom Association	USTA
The Verizon Telephone Companies	Verizon
The Voice on the Net Coalition	VON Coalition
Warinner, Gesinger & Associates, LLC	WG&A
Washington Enhanced 911 Program [*108]	Washington E911 Program

Replies in WC Docket No. 03-211

Replies

Abbreviation

8x8, Inc.	8x8
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Earthlink, Inc.	Earthlink
GVNW Consulting, Inc.	GVNW
Inclusive Technologies	Inclusive Technologies
Iowa Utilities Board	Iowa Commission
MCI CompTel	MCI/CompTel
Michigan Public Service Commission	Michigan Commission
Minnesota Public Utilities Commission	Minnesota Commission
Montana Telecommunications Association	MTA
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Association of Telecommunications Officers and Advisors	NATOA et al.
National League of Cities	
The National Association of Counties	
The Alliance for Community Media	

National Emergency Number Association	NENA
Attorney General of the State of New York	New York State AG
Oregon Telecommunications Association	OTA/WIT
Washington Independent Telephone	
PacWest Telecom, Inc.	PacWest/RCN
RCN Corporation	
Pennsylvania Public Utility Commission	Pennsylvania Commission
Sprint Corporation	Sprint
Telecommunications for the Deaf, Inc.	TDI
Texas Coalition of Cities for Utility Issues	TCCFUI
U.S. Department of Justice	USDOJ/FBI
Federal Bureau of Investigation	
The Verizon Telephone Companies	Verizon
Vonage Holdings Corp.	Vonage
[*109]	

Source: [Legal](#) > [Area of Law - By Topic](#) > [Communications](#) > [Multi-Source Groups](#) > **Federal Communications Cases & Federal Communications Commission Decisions** 

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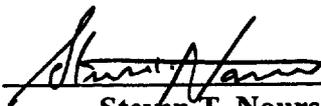
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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this day caused copies of this "Petition for Review," with Attachment A (FCC Order being appealed), and the Docketing Statement, to be served by first-class mail to all known parties in the underlying proceeding, as indicated on the attached service list.

Dated in Columbus, Ohio, this 7th day of January, 2005.



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