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Federal Communications Commission
Office of the Secretary

Chairman Kevin Martin
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20544

Re: *In the Matter of IP-Enabled Services, WC Docket No. 04-36; Universal Service Contribution Methodology, WC Docket No. 06-122; Federal-State Joint Board on Universal Service, CC Docket No. 96-45*

Dear Chairman Martin:

In the last several years, the Commission has done much to further the national goal of broadband deployment. By establishing a procompetitive, deregulatory framework for the deployment of broadband facilities, the Commission has unleashed investment in facilities that, in turn, have enabled a wave of IP-based services with the potential to provide consumers innovative capabilities and to generate enormous consumer welfare.

Chief among these IP-based services is VoIP,¹ which is already giving customers unprecedented control over the way they communicate, and which promises further innovation as the service is more broadly deployed. In the last three years, the Commission has taken a number of steps to facilitate that result, by establishing certainty over the rules that apply to VoIP. A key component of that effort was the *Vonage Order*,² which articulated the importance of a procompetitive, deregulatory environment for the provision of VoIP and concluded that legacy state common-carrier regulation is incompatible with the federal interest in permitting competitive forces to drive the development and deployment of the service. The Commission

¹ As used herein, "VoIP" refers to interconnected VoIP service, as the Commission has defined the term, see 47 C.F.R. § 9.3. The term "VoIP providers," in turn, refers to interconnected VoIP providers.

² Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), petitions for review denied, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) ("*Minnesota PUC*").

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has also required VoIP providers to comply with E911 and other public safety requirements,³ to contribute to the federal universal service fund,⁴ and to support disabilities access.⁵

Importantly, however, although the Commission has thus taken significant steps to create certainty over the rules that apply to VoIP, the job remains unfinished. The Commission released the *Vonage Order* in November 2004. Yet, more than three years later, interested parties continue to profess uncertainty over the scope of the Commission's decision and, in particular, whether the preemption principles articulated in that decision foreclose state entry and tariff regulation of facilities-based VoIP service.⁶ In addition, disputes – including at least one that has spawned litigation in federal court⁷ – remain over whether and the extent to which states retain jurisdiction to impose universal service and Telecommunications Relay Services (“TRS”) contribution requirements on VoIP providers.

The ongoing existence of these disputes is having a significant adverse effect on consumers. As the Commission has observed, VoIP, in addition to benefiting from broadband deployment, is central to the Commission's goal of driving that deployment.⁸ Yet the service remains mired in uncertainty – not just over the rules that will apply, but over which entities –

³ See First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (2005) (“*VoIP E911 Order*”), petitions for review denied, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); First Report and Order and Further Notice of Proposed Rulemaking, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (2005), petitions for review denied, *American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

⁴ See Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (“*Interim Contribution Order*”), petitions for review granted in part and vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

⁵ See Report and Order, *IP-Enabled Services; Implementation of Sections 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*, 22 FCC Rcd 11275 (2007) (“*VoIP TRS Order*”).

⁶ See, e.g., Final Decision, Application of Time Warner Cable Information Services (WI), LLC to Expand Certification as an Alternative Telecommunications Utility, No. 5911-NC-101, at 11 (Wisc. Pub. Serv. Comm'n May 9, 2008) (ruling that a “fixed” VoIP service offered by Time Warner “is not a nomadic form of IP-enabled voice service . . . and is therefore not preempted by the FCC's *Vonage Order*”); Report and Order, Staff of the Pub. Serv. Comm'n of Missouri v. Comcast IP Phone, LLC, Case No. TC-2007-0111 (Mo. Pub. Serv. Comm'n Nov. 1, 2007) (ruling that Comcast's facilities-based VoIP service must comply with legacy state common-carrier regulations); Order Opening Investigation and Notice of Prehearing Conference, *Investigation into Regulation of Voice over Internet Protocol (“VoIP”) Services*, Docket No. 7316 (Vt. Pub. Serv. Bd. May 16, 2007) (initiating investigation into, *inter alia*, the “extent to which federal law preempts Vermont law with regard to VoIP services”).

⁷ See *infra* p. 11.

⁸ See *Vonage Order*, 19 FCC Rcd at 22427, ¶ 36 (VoIP “driv[es] demand for broadband connections, and consequently encourag[es] more broadband investment and deployment consistent with the goals of section 706.”).

state or federal – will establish those rules. There is no justification for permitting such uncertainty to stall deployment. The technology is available, yet the prospect of legacy common-carrier regulation, coupled with uncertainty over the applicability of other specific rules, is undermining the case for deployment of VoIP and frustrating the ability of consumers to obtain innovative services.

The Commission should act promptly to create the certainty necessary to facilitate the continued development and deployment of robust VoIP services. As explained in detail below, that means, first, confirming that, as the Commission foreshadowed in the *Vonage Order*, VoIP service provided by *all* providers, including facilities-based providers, is subject to this Commission's jurisdiction, and that legacy economic common-carrier regulation, including entry and tariff regulation, is inimical to federal policy and is therefore preempted. But that also means making clear that, in respect to certain discrete social policy regulations – in particular, universal service and TRS – VoIP providers should be expected to contribute on the same basis as other comparable service providers.

I. The Commission Should Confirm that State Economic Regulation of VoIP Conflicts with Federal Policy and Is Preempted

The *Vonage Order* made unmistakably clear that the same preemption principles that the Commission applied in that case to foreclose state common-carrier regulation of nomadic VoIP apply equally to VoIP provided on a facilities basis. As the Commission put it, although its specific preemption holding was confined to the nomadic service that was before it, “to the extent other entities,” including facilities-based providers “such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.”⁹ That conclusion flows directly from decades of preemption precedent from this Commission and the federal courts and is correct as a matter of law and sound federal policy.

A. The *Vonage Order* arose out of the efforts of the Minnesota Public Utilities Commission (“Minnesota PUC”) to require Vonage to comply with legacy state common-carrier regulation, including in particular requirements to obtain a “certificate of public convenience and necessity” and to file a tariff. In the fall of 2003, the Minnesota PUC issued an order purporting to subject Vonage's “DigitalVoice” service to such requirements. Vonage filed a petition seeking a declaration that the Minnesota PUC's order was preempted, which the Commission granted in November 2004.

The Commission began its analysis by emphasizing that § 2(b) of the Communications Act reserves regulatory authority over intrastate communications to the states.¹⁰ The Commission assumed, moreover, that VoIP services are “jurisdictionally mixed,” meaning that they include both interstate and intrastate communications.¹¹ As a result, VoIP's intrastate component could in theory be subject to state regulation, *provided that* the state regulation could

⁹ *Id.* at 22424, ¶ 32 (footnote omitted).

¹⁰ *See id.* at 22412, ¶ 16 (citing 47 U.S.C. § 152(b)).

¹¹ *Id.* at 22414, ¶ 18 & n.63.

coexist with federal policy. Relying on decades of precedent involving federal preemption of “jurisdictionally mixed” services, the FCC thus identified the operative question as whether the state regulation, while purportedly confined to the intrastate component of Vonage’s service, would nonetheless impede federal regulatory authority over interstate services, in which case it would be preempted.¹²

The Commission concluded that application of Minnesota’s state common-carrier regulations to VoIP would impede federal jurisdiction over interstate service, and it therefore held that the regulations were preempted. The Commission explained that, regardless of how VoIP is classified as a statutory matter, state regulation would conflict with the Commission’s procompetitive, deregulatory framework for the provision of the service: If VoIP were classified as an “information service,” state entry and tariff regulation would conflict with the Commission’s “long-standing national policy of nonregulation of information services.”¹³ By the same token, if VoIP were regulated as a “telecommunications service,” the Minnesota PUC’s certification requirement would contradict the Commission’s decision to “completely eliminat[e] interstate market entry requirements,” which “could stifle new and innovative services.”¹⁴ Likewise, the Minnesota PUC’s tariffing requirement would conflict with the Commission’s decision to prohibit the tariffing of “most interstate, domestic, interexchange services” in order to “promote competition and the public interest.”¹⁵ The Commission thus made clear that, however the service is classified, it would be subject to the Commission’s procompetitive, deregulatory framework – a framework that does not countenance traditional state common-carrier regulation.

The Commission then explained that, although the Minnesota PUC might purport to restrict common-carrier regulation to the intrastate portion of Vonage’s service – i.e., to communications that originate and terminate in Minnesota – it was inevitable that such regulation would also reach the interstate portion of the service over which this Commission exercises jurisdiction. The Commission stressed that there were no “practical means” to separate the interstate and intrastate components of Vonage’s VoIP service to “enabl[e] dual federal and state regulations to coexist.”¹⁶ Subscribers using IP-based services, the Commission stressed, can “utilize multiple service features that access different websites or IP addresses during the same communication session and [can] perform different types of communications simultaneously,”¹⁷ thus making “jurisdictional determinations” about Vonage’s VoIP service – and IP-based services sharing the basic characteristics of Vonage’s service – “based on an end-

¹² *Id.* at 22413-15, ¶¶ 17, 19 (citing *Public Serv. Comm’n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citing *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 429-31 (D.C. Cir. 1989))); *see id.* at 22412, ¶ 15.

¹³ *Id.* at 22416, ¶ 21.

¹⁴ *Id.* at 22415-16, ¶ 20.

¹⁵ *Id.* at 22416, ¶ 20.

¹⁶ *Id.* at 22418, ¶ 23.

¹⁷ *Id.* at 22419, ¶ 25.

point approach difficult, if not impossible.”¹⁸ That simple reality, the Commission concluded, renders tracking and separating out the “intrastate” portion of Vonage’s service impracticable.¹⁹

Critically for present purposes, moreover, the Commission made clear that this conclusion follows *irrespective of whether the VoIP service in question is nomadic or facilities-based*. Although Vonage’s DigitalVoice service is nomadic, the Commission stressed that the “integrated capabilities and features” of VoIP “are . . . inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers.”²⁰ The Commission thus explained that *all* services, including facilities-based services, sharing Vonage’s “basic characteristics” – including “a requirement for a broadband connection from the user’s location; a need for IP-compatible [customer premises equipment]; 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” – would be equally exempt from state regulation.²¹ Notably, none of those “basic characteristics” turns on whether the VoIP service at issue is nomadic or facilities-based.

Finally, the Commission emphasized that preempting state regulation was necessary to further statutory objectives. Section 230 of the 1996 Act, the Commission noted, states that “[i]t is the policy of the United States . . . 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.”²² Section 706 of the 1996 Act directs the Commission “to encourage the deployment” of broadband through measures that “‘promote competition’” and remove “‘barriers to infrastructure investment.’”²³ Preemption would serve both statutory objectives, the Commission emphasized, by furthering “Congress’s clear preference for a national policy” of limited regulation of the Internet and by forestalling “multiple disparate attempts to impose economic regulations on DigitalVoice that would thwart its development.”²⁴

B. Although the *Vonage Order* itself involved a nomadic VoIP service, the same principles that the Commission applied in that order likewise compel preemption of state common-carrier regulation of facilities-based VoIP service. Again, the Commission stressed that preemption would extend to state regulation of all services having the same “basic characteristics” as Vonage’s DigitalVoice service. And, again, those “basic characteristics” do *not* include Vonage’s nomadic capability. On the contrary, the Commission emphasized that, “to the extent other entities,” including facilities-based providers “such as cable companies, provide

¹⁸ *Id.* at 22419, ¶ 24 & n.93.

¹⁹ *Id.* at 22421, ¶ 26.

²⁰ *Id.* at 22420, ¶ 25 n.93.

²¹ *Id.* at 22424, ¶ 32.

²² *Id.* at 22425, ¶ 34 (quoting 47 U.S.C. § 230(b)(2)).

²³ *Id.* at 22426-27, ¶ 36 (quoting 47 U.S.C. § 157 note).

²⁴ *Id.* at 22425, 22427, ¶¶ 34, 36.

VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.”²⁵ As the Commission pointedly explained, “[a]llowing Minnesota’s order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on” Vonage’s VoIP service, which in turn could “risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet.”²⁶ That critical observation is true regardless of whether the VoIP service in question is nomadic, as when provided by Vonage, or is instead facilities-based.²⁷

Moreover, the *Vonage Order* – and, in particular, the Commission’s explanation that the principles applied there compel preemption of state regulation of facilities-based VoIP service – flows from decades of uniform precedent making clear that state regulation, including state regulation purportedly directed solely at intrastate services, must give way where it impedes federal policy. Thus, for example, three decades ago, the Commission established a federal policy promoting competition in the manufacture of customer premises equipment. In furtherance of that policy, the Commission preempted a North Carolina regulation that prohibited the use of competitively supplied equipment for *intrastate* calls. In the landmark *NCUC* cases, the Fourth Circuit affirmed, on the theory that, although the regulation was nominally directed to intrastate service, it would as a practical matter limit the use of competitively supplied equipment for interstate service as well, and thereby conflict with Commission policy.²⁸ The same is true here. VoIP is quintessentially an “any-distance” service: it “enable[s] subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of

²⁵ *Id.* at 22424, ¶ 32 (footnote omitted); *see id.* at 22420, ¶ 25 n.93 (noting that the “integrated capabilities and features” that warranted preemption “are not unique to DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers”).

²⁶ *Id.* at 22427, ¶ 37; *see also id.* at 22426, ¶ 35 (“we cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations . . . on DigitalVoice and still meet our responsibility to realize Congress’s objective” in § 230).

²⁷ *Dicta* in *Minnesota PUC* is not to the contrary. *See* 483 F.3d at 575 (observing that, with facilities-based VoIP, “the geographic originating point of the communications can be determined,” and asserting that, as a result, “when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished”). As explained in the text and discussed further below, the geographic indeterminacy of VoIP stems from the fact that it “enable[s]” simultaneous communications with “different websites or IP addresses during” a single session. *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25. The geographic location of the end user of an individual call is “only one clue to a jurisdictional finding”; because it is in most cases “difficult or impossible to pinpoint” the “‘termination’ of the communication” – i.e., the different websites and IP addresses with which the user is communicating – VoIP is inseverable irrespective of whether the provider can determine the location of the calling and/or called party. *Id.*

²⁸ *See North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787, 791 (4th Cir. 1976); *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977); *see also Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (citing *NCUC* cases with approval).

communications simultaneously.”²⁹ It follows that requiring a VoIP provider to obtain a certificate or to file a tariff for the service – even for the purportedly “intrastate” portion of the service – would affect the provision of the *entire* service, including the interstate portion, and would accordingly conflict with the procompetitive, deregulatory policy articulated in the *Vonage Order*.³⁰

Indeed, that conclusion follows even where the VoIP provider offers a service that purports to differentiate between “local” and “long-distance” voice calls.³¹ Again, the voice calls enabled by VoIP are only one capability of a multi-faceted service that “enable[s] subscribers to utilize multiple service features” *simultaneously*, each of which can *simultaneously* “access” different termination points – i.e., “different websites or IP addresses.”³² As noted above, as the Commission itself has stressed, even where a provider is able to determine the end points of a *voice* communication, that provides “only one clue to a jurisdictional finding,” because it is in most cases “difficult or impossible to pinpoint” the termination points of the *other* simultaneous communications enabled by the service – i.e., the different websites and IP addresses with which the user is communicating.³³ Under the *Vonage Order* and established Commission precedent, the entire integrated VoIP *service* is therefore inseverable, even where it is theoretically possible to discern the end-points of individual voice communications.

²⁹ *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

³⁰ Other precedent likewise confirms that state regulation of jurisdictionally mixed services is preempted when, as here, it would necessarily conflict with federal policy. For example, in *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the Ninth Circuit upheld the Commission’s preemption of a state regulation that required Bell companies to provide enhanced services through a separate affiliate. Because “it would not be economically feasible for the [Bell companies] to offer the interstate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion,” the state regulation would necessarily reach the interstate portion of the service and thereby impeded the Commission’s policy. *Id.* at 932-33; *see also, e.g.*, Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992) (preempting state regulation of a voicemail service that customers used for both intrastate and interstate services); *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982) (affirming Commission preemption of state regulation of customer premises equipment used for both intrastate and interstate services).

³¹ Both cable-based and nomadic VoIP providers offer services that purport to differentiate between “local” and long-distance calling. *See, e.g.*, Comcast, *Comcast Digital Voice Service: Residential Pricing List (Effective: March 19, 2008)*, <http://www.comcast.com/MediaLibrary/1/1/About/PhoneTermsOfService/PDF/DigitalVoice/StatePricingLists/California/California%20pricing%20list.pdf> (“Local with More” plan offers unlimited local calling and calling features, with usage charges “for calls to . . . non-local terminating numbers.”); Cox Roanoke, *Digital Telephone: Pricing*, <http://www.cox.com/roanoke/telephone/plans.asp> (“Basic Line” and “Simply 3” plans include unlimited local calling but do not include local toll or long-distance calling); BroadVoice, *Rate Plans*, http://www.broadvoice.com/rateplans_unlimited_state.html (plan with unlimited outbound calls to in-state telephone numbers, with additional per-minute charges to out-of-state numbers).

³² *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

³³ *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

C. As the above discussion points out, the Commission sent a clear message in the *Vonage Order* that, under the bedrock preemption principles articulated and applied in that decision, state entry and tariff regulation of both nomadic and facilities-based VoIP is preempted. In proceedings since that decision, however, proponents of state regulation of VoIP have emphasized that, on review of the *Vonage Order*, the Eighth Circuit rejected as unripe a challenge to the Commission's assertion that it would preempt state regulation of facilities-based VoIP. In addition, they have pointed to a statement in the *Interim Contribution Order* that, they assert, removes facilities-based VoIP from the sweep of the *Vonage Order's* analysis. Neither argument diminishes the force of the Commission's analysis in the *Vonage Order* or its statement that the same analysis applied in that order would result in the preemption of state regulation of facilities-based VoIP.

First, the Eighth Circuit's ripeness holding reflects nothing more than the application of ordinary principles of judicial review. As noted above, the specific service at issue in the *Vonage Order* was Vonage's DigitalVoice service, and the question presented there was whether the Minnesota PUC could lawfully apply traditional state common-carrier regulation to that service. Accordingly, although, as explained, the Commission in the course of resolving that question took pains to provide the industry with guidance, it did not formally preempt the application of any other state's regulations, as applied on any other service provider's service. Unsurprisingly, then, the Eighth Circuit, describing the Commission's statement that it "would preempt [state regulation of] fixed VoIP services" as a "prediction," concluded that a challenge to that prediction was not ripe.³⁴

The Eighth Circuit's unremarkable holding on this point, however, does nothing to undercut the Commission's express statement that, *if and when* a state seeks to impose comparable regulation on facilities-based providers, the same preemption principles applied in the *Vonage Order* compel the conclusion that such regulation is preempted. In fact, the Commission's Office of General Counsel made this point expressly in its brief in the Eighth Circuit. After explaining that the Commission had in the *Vonage Order* only addressed the precise service before it – and thus that complaints about the Commission's treatment of facilities-based service were premature – the Commission defended its conclusion that the principles applied in that case would likewise preempt state regulation of other services, including facilities-based services, sharing the same characteristics: Regardless of whether a VoIP provider offers fixed or nomadic service, the Commission explained, "IP technology enables service providers to offer and subscribers to access and use features that are housed in distant locations . . . during a single [call] 'session,'" which means that a single VoIP call session, nomadic or otherwise, will often "carry[] intrastate components and interstate components . . . simultaneously."³⁵ It necessarily follows that state regulation of that "single VoIP call session" will regulate interstate components and thereby frustrate federal deregulatory

³⁴ *Minnesota PUC*, 483 F.3d at 582-83 (emphasis added).

³⁵ See Brief for Respondents the FCC and United States at 64, *Minnesota Pub. Utils. Comm'n v. FCC*, Nos. 05-1069 *et al.* (8th Cir. filed Dec. 1, 2005) (internal quotation marks omitted).

policy, regardless of whether the call session is enabled by a facilities-based or nomadic provider.³⁶

The *Interim Contribution Order* likewise does nothing to undercut the Commission's statement that state entry and tariff regulation of VoIP, including facilities-based VoIP, is preempted. In that order, in discussing VoIP providers' obligations to contribute to universal service (discussed below), the Commission stated:

[A] fundamental premise of our decision to preempt Minnesota's regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage's customers stay within or cross state boundaries. . . . [W]e note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.³⁷

This statement in no way suggests that the *Vonage Order* was limited to nomadic VoIP. As explained above, the Commission's discussion of the difficulties in tracking the jurisdictional end points of VoIP calls did not turn simply on the difficulty of locating the subscriber when making a call. Rather, that discussion emphasized the "inherent capability" of all "IP-based services" to "enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."³⁸ As the Commission stressed, it is because VoIP enables the subscriber to perform numerous functions and to reach numerous destinations simultaneously – not simply because the end user may be located somewhere other than his home or office – that "the provider has [no] means to separately track or record" the jurisdictional end points of the array of communications enabled by the service.³⁹ The key point, then, is that, *where* the provider has not severed its service into discrete intrastate and interstate components, and where it has not deployed the technology to track the end points of the individual communications enabled by its service, state common-carrier regulation conflicts with federal policy and is therefore preempted.

Nothing in the FCC's *Interim Contribution Order* calls that basic observation – which, as discussed above, reflects decades of standard preemption analysis – into question. Rather, as the Commission's Office of General Counsel itself subsequently observed in a letter that puts to rest any suggestion that the *Interim Contribution Order* undermines the *Vonage Order*'s preemption analysis,⁴⁰ the *Interim Contribution Order* merely observed that, *if* a VoIP provider were to

³⁶ See *id.* at 64-65.

³⁷ *Interim Contribution Order*, 21 FCC Rcd at 7546, ¶ 56.

³⁸ *Vonage Order*, 19 FCC Rcd at 22419, ¶ 25.

³⁹ *Id.* at 22419-20, ¶ 25.

⁴⁰ See Letter from Nandan M. Joshi, Office of General Counsel, FCC, to Michael E. Gans, Clerk, United States Court of Appeals for the Eighth Circuit, at 2, Nos. 05-1069 *et al.* (8th Cir. filed July 11, 2006) ("[T]he possibility that *some* VoIP providers might develop the technological capability for accurately

deploy the technology to track the end points of its customers' multi-faceted communications, then its service "would no longer qualify for the preemptive effects of [the] *Vonage Order*."⁴¹ That point is utterly unremarkable. It reflects the basic tenet of communications law that, where a service *has been* separated into discrete intrastate and interstate components, state regulation *can be* confined to intrastate communications without affecting interstate service and, therefore, without impeding federal policy. As noted above and at the outset of the *Vonage Order*, such state regulation is preserved by § 2(b) of the Communications Act.

That is not to say, however, that a VoIP provider can be *compelled* to sever its service into discrete intrastate and interstate components – or to deploy the capacity to track the end points of individual IP-based communications – solely to permit the state to regulate the intrastate portion of its service. In its order affirming the *Vonage Order*, the Eighth Circuit left no doubt on this point, stressing that VoIP "[s]ervice providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate."⁴² Indeed, such compulsion would itself squarely conflict with federal policy, by forcing VoIP providers to alter the nature of their service in a way that would directly harm consumers: As the Commission observed, "[f]orcing such changes . . . would greatly diminish the advantages of the Internet's ubiquitous and open nature that inspire the offering of services such as [VoIP] in the first instance."⁴³ Moreover, even apart from compromising the any-distance nature of the service, forcing a provider to sever its service into discrete intrastate and interstate components would also harm consumers by creating enormous inefficiencies, as the provider "would have to change multiple aspects of its service operations that are not nor were ever designed to incorporate geographic considerations, including modifications to systems that track and identify subscribers' communications activity and facilitate billing; the development of new rate and service structures; and sales and marketing efforts."⁴⁴ Requiring providers to undertake these efforts "just for regulatory purposes," where there is "no service-driven reason" to do so, would impose significant costs and thereby conflict with the federal interest in the rapid deployment of robust and innovative IP-based services in a national procompetitive, deregulatory framework.⁴⁵

In sum, the standard preemption principles applied by the Commission in the *Vonage Order* compel the conclusion that state entry and tariff regulation of facilities-based VoIP is preempted, no less than such regulation is preempted insofar as it applies to nomadic service. As it did in the *Vonage Order*, the Commission should make that point expressly, thereby eliminating any remaining uncertainty on the issue.

distinguishing interstate and intrastate communications does not call into question the FCC's authority to preempt state regulation of VoIP providers that do not have that capability.").

⁴¹ *Interim Contribution Order*, 21 FCC Rcd at 7546, ¶ 56.

⁴² *Minnesota PUC*, 483 F.3d at 578.

⁴³ *Vonage Order*, 19 FCC Rcd at 22422, ¶ 29.

⁴⁴ *Id.*

⁴⁵ *See id.* (emphasis removed); *see also id.* at 22425-27, ¶¶ 33-37 (articulating federal policies favoring widespread deployment of VoIP in a national framework unfettered by state regulation).

II. The Commission Should Authorize State Commissions To Impose Universal Service Contribution Requirements on VoIP Providers that Complement the Requirements of the *Interim Contribution Order*

The above discussion makes clear that, under the principles articulated and applied in the *Vonage Order*, legacy state common-carrier regulation of VoIP is preempted. It does not necessarily follow, however, that *all* state regulation of VoIP should be foreclosed. The question, as the Commission itself recognized in the *Vonage Order*, is whether the state regulation in question would, if applied to VoIP, impede federal policy. That question, moreover, is of considerable urgency, as numerous states have issued rules imposing universal service payment obligations on VoIP providers or have proposed doing so, which in turn has led to federal court litigation.⁴⁶ In the *Vonage Order* itself, the Commission included, among the regulations that were at issue in the case, a state provision requiring contributions to universal service.⁴⁷ Although the citation of this provision may suggest that the Commission viewed state universal service contribution requirements on VoIP as incompatible with federal policy, the Commission did not discuss universal service in the *Vonage Order*, and it need not embrace that result going forward. Whereas, for the reasons explained above, state economic regulation of VoIP (such as entry and tariff regulation) would undeniably frustrate federal policy, state universal service contribution requirements, if authorized by the Commission and structured consistently with the Commission's rules, could be consistent with federal policy.

First, the 1996 Act identifies universal service as a core federal policy objective, and it specifically authorizes states to take steps "to preserve and advance universal service."⁴⁸ As the

⁴⁶ Nebraska, New Mexico, and Nevada have issued orders requiring VoIP providers to contribute to state universal service. Missouri has enacted legislation preempting state regulation of VoIP but requiring VoIP providers to contribute to the state's universal service fund. The District of Columbia has also adopted similar legislation. Similarly, Kansas enacted legislation directing VoIP providers to contribute to the Kansas state fund. Other states, including Connecticut, Oklahoma, South Carolina, and Vermont, have proposed requiring VoIP providers to contribute to state universal service either via state commission efforts and/or state legislation. The Nebraska order led to a federal court complaint and a preliminary injunction ruling enjoining the assessment. *See, e.g., Verified Complaint for Declaratory and Injunctive Relief, Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, Case No. 4:07-CV3277 (D. Neb. filed Dec. 20, 2007) (challenging state commission decision to require VoIP providers to contribute to state universal service fund); *see also Memorandum and Order, Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, Case No. 4:07-CV3277 (D. Neb. Mar. 3, 2008) (granting preliminary injunction against state universal service fund assessment), *appeal pending* No. 08-1764 (8th Cir.). That district court decision, in turn, led the Colorado legislature to strip language from a bill that would have required interconnected VoIP providers to pay into state universal service. *See State Telecom Activities, Communications Daily* (Mar. 19, 2008). The New Mexico state commission filed suit against Vonage in federal court to enforce its contribution rules. *See Complaint for Declaratory Judgment, New Mexico Pub. Reg. Comm'n v. Vonage Holdings Corp.*, 6:08-cv-00607-CG-RHS (D. N.M. filed June 27, 2008).

⁴⁷ *See Vonage Order*, 19 FCC Rcd at 22408, ¶ 10 & n.28 (identifying Minn. Stat. § 237.16, subdivision 9 of which directs the Minnesota state commission to administer a universal service fund, as among the state regulations at issue).

⁴⁸ 47 U.S.C. § 254(f).

Commission recognized in the 2006 *Interim Contribution Order*, the migration of wireline voice service to VoIP, and the accompanying decline in wireline revenues, was placing considerable pressure on traditional universal service support mechanisms.⁴⁹ That pressure was pushing contribution factors upwards, which was increasing the costs of traditional wireline service and was giving VoIP providers an artificial regulatory advantage in the marketplace. That result, in turn, was leading customers to favor non-contributing services, which meant fewer revenues to support universal service funding, leading to a need to increase the contribution factor still further to make up for the difference. Although the *Interim Contribution Order* addressed these issues to some degree at the *federal* level – by requiring VoIP providers to contribute directly to the federal universal service – there remain serious questions at the *state* level about the long-term sustainability of any provider-funded universal service model that does not include VoIP. Authorizing states to impose state universal service contribution requirements on VoIP would help address this concern and thereby further the federal policy interest in enabling states to administer sustainable universal service support mechanisms.

Second, a regime in which VoIP providers are free from state universal service assessments that apply to other competing carriers undermines the principle of competitive neutrality, which the Commission has identified as a policy underlying the 1996 Act.⁵⁰ That principle applies with considerable force in the context of universal service. Congress' directive to the states "to preserve and advance universal service" is expressly conditioned on states doing so "on a competitively neutral basis."⁵¹ State universal service assessment of VoIP would further competitive neutrality and would in that respect conform to federal policy.

Third, the federal policy objectives that the Commission emphasized in the *Vonage Order* are unlikely to be threatened by a state universal service assessment on VoIP. As discussed in detail above, the *Vonage Order* identified four basic federal objectives that, in its view, were threatened by the application of state commission regulation: first, Commission efforts to deregulate long distance, through the elimination of market-entry requirements and mandatory detariffing;⁵² second, and relatedly, long-standing FCC findings that "economic regulation of information services would disserve the public interest because these services lack . . . monopoly characteristics";⁵³ third, Congress's directive, in § 230 of the 1996 Act, "to

⁴⁹ See *Interim Contribution Order*, 21 FCC Rcd at 7541, ¶ 44.

⁵⁰ See, e.g., Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶¶ 48-49 (1997) ("[C]ompetitively neutral rules will ensure that . . . disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."); see also *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1243-44 (D.C. Cir. 2007) (reversing Commission decision on pre-approval of traffic studies in universal service context where it failed to offer rationale for treating wireless and VoIP providers differently).

⁵¹ 47 U.S.C. § 253(b).

⁵² *Vonage Order*, 19 FCC Rcd at 22415-16, ¶ 20.

⁵³ *Id.* at 22417, ¶ 21.

preserve the vibrant and competitive free market that presently exists for the Internet”;⁵⁴ and, fourth, Congress’s mandate, in § 706 of the 1996 Act, to promote broadband deployment.⁵⁵ Considered together, these objectives stand for the proposition that the FCC favors a deregulatory policy for VoIP, and that intrusive regulation of VoIP is therefore disfavored. State universal service assessments, however, are not necessarily intrusive. Typically, they involve a contribution on the basis of intrastate revenue attributable to customers in the state. Assuming a state structures its contribution requirement in a manner that does not interfere with federal contribution requirements – a topic discussed further below – it is unlikely that such a requirement would force a VoIP service provider to alter its service, nor would it otherwise threaten the federal policy interests that the Commission identified as paramount in the *Vonage Order*.

Indeed, in this respect, the Commission’s own *Interim Contribution Order* – in which, as noted, the Commission relied on its permissive authority under § 254 to impose federal universal service obligations on VoIP – is instructive.⁵⁶ That order strongly suggests that the Commission does not view universal service contribution obligations themselves as contrary to its procompetitive VoIP policy; otherwise, it would not have exercised its federal authority to impose such obligations.⁵⁷ Given that both state and federal assessments serve the same purpose (affordable service) and typically take the same form (financial contributions based on a percentage of revenues), it would seem to follow that state universal service assessments on VoIP – no less than federal assessments – are consistent with federal policy.⁵⁸

It is accordingly clear that, although the *Vonage Order* itself indicates that states do not at present have the authority to impose universal service contribution requirements on VoIP, the Commission has the discretion to reach the opposite result.⁵⁹ The Commission should exercise that discretion to make clear that state universal service contribution requirements on VoIP are

⁵⁴ *Id.* at 22425, ¶ 34 (quoting 47 U.S.C. § 230).

⁵⁵ *See id.* at 22426-27, ¶¶ 36-37.

⁵⁶ The FCC also exercised its ancillary jurisdiction under Title I to extend universal service contribution obligations to interconnected VoIP providers. *See Interim Contribution*, 21 FCC Rcd at 7552-54, ¶¶ 46-49.

⁵⁷ *See generally id.*, 21 FCC Rcd at 7542-53, ¶¶ 47-48 (explaining that requiring VoIP providers to contribute directly to federal universal service fund furthers federal interest in equitable and nondiscriminatory funding of universal service).

⁵⁸ The Commission’s express endorsement of state 911 funding requirements on interconnected VoIP providers, *see VoIP E911 Order*, 20 FCC Rcd at 10275, ¶ 52, confirms that state social policy assessments can further federal policy and are permissible when authorized by the Commission.

⁵⁹ Although, as noted, the *Vonage Order* included a state universal service provision among the regulations at issue in the case, that order itself does not prevent the Commission from concluding that state assessments are consistent with federal policy and therefore lawful, provided the Commission gives a reasoned explanation for its decision. *See, e.g., Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (“[a]n agency is free to discard precedents or practices it no longer believes correct” provided it “suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”) (internal quotation marks omitted).

consistent with federal policy and therefore lawful. As noted, the absence of such requirements at present creates an uneven playing field that not only distorts competition but also threatens the stability of state universal service funds. And, as VoIP gains increasing acceptance – and as customers continue to migrate to VoIP – those trends will accelerate, leading to ever higher contribution rates for traditional providers, which in turn will skew the playing field even more dramatically towards IP-based providers. The Commission itself has already recognized these points in the federal context. “[P]roviders of interconnected VoIP services,” the Commission has explained, “benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms.”⁶⁰ As a result, it is only fair that VoIP providers be required to pay their fair share. Moreover, the Commission “do[es] not want contribution obligations to shape decisions regarding . . . technology . . . or to create opportunities for regulatory arbitrage.”⁶¹ Absent Commission action, the result will be unsustainable and inequitable state universal service mechanisms. The Commission should act promptly to prevent that result.

To be sure, there are important limits to which state universal service requirements must adhere. First, it is settled that a state assessment may not burden a *federal* universal service support mechanism.⁶² As a result, where a VoIP provider avails itself of the safe harbor established by the *Interim Contribution Order*⁶³ – and as a result pays federal universal service on 64.9% of its revenue – states that utilize a revenues-based contribution methodology may not assess universal service on more than the inverse of the safe harbor (i.e., 35.1% of revenue attributable to customers in the state).⁶⁴ Likewise, if and when the Commission adopts a telephone number-based contribution methodology, any corresponding state mechanism would not be permitted to burden the federal mechanism.⁶⁵ Second, principles of competitive neutrality

⁶⁰ *Interim Contribution Order*, 21 FCC Rcd at 7540, ¶ 43.

⁶¹ *Id.* at 7541, ¶ 44.

⁶² 47 U.S.C. § 254(f); *AT&T Communications Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1124 (D. Ore. 2001) (holding that Oregon’s assessment of a provider’s interstate and international telecommunications revenues, which are also assessed by the FCC, burdened the federal universal service support mechanisms and, thus, violated section 254(f)). *See also AT&T Corp. v. Public Util. Comm’n of Texas*, 373 F.3d 641, 646-47 (5th Cir. 2004) (holding that Texas’s assessment of a provider’s interstate and international telecommunications revenues violates section 254(f) because it is inequitable and discriminatory).

⁶³ *See Interim Contribution Order*, 21 FCC Rcd at 7545, ¶ 53 (establishing a safe harbor pursuant to which interconnected VoIP providers can, for purposes of federal universal service requirements, assume that 64.9% of telecommunications revenue is interstate).

⁶⁴ Where the VoIP provider relies on approved traffic studies or deploys the capability to track the jurisdictional confines of the communications enabled by its service, *see id.* at 7546, ¶ 56, those same mechanisms could be used to calculate the revenue attributable to the intrastate jurisdiction. *See also supra* pp. 9-10 (explaining that the availability of these alternatives does not alter the fact that, where providers have not deployed the technology to track the jurisdiction of customer communications, state economic regulation is preempted under the principles set out in the *Vonage Order*).

⁶⁵ The use of a telephone number-based methodology, for purposes of calculating universal service contributions, would not alter the preemptive effect of the *Vonage Order*. *See Vonage Order*, 19 FCC

– which, as explained above, require that VoIP providers contribute on the same basis as comparable wireline providers – likewise compel the result that *all* VoIP providers, including both nomadic and facilities-based providers, be treated the same for purposes of state universal service. At the state level no less than at the federal, there is no theory under which a universal service mandate that applied to one class of VoIP providers but not the other could be characterized as “equitable and nondiscriminatory” as mandated by the 1996 Act or consistent with the Commission-adopted principle of “competitive neutrality.”⁶⁶ Third, as in the wireless context, because certain VoIP providers cannot pinpoint the location of end users at all times, VoIP providers must be permitted to make reasonable assumptions to calculate the revenues (or telephone numbers) associated with a given state, so that no revenue (or telephone number) is assessed universal service fees by more than one state. For example, a VoIP provider may associate customers with states on the basis of the customer’s service address, or the area code of his or her number. In this respect, providers must be permitted to use reasonable assumptions for this purpose, taking into account the capabilities of their billing and operating systems, and provided that their processes ensure the assignment of all applicable revenues (or telephone numbers). These limits, however, go to *how* states can assess VoIP, not *whether* they can do so. To reduce uncertainty, the Commission should, at the same time that it authorizes states to require VoIP providers to contribute to state universal service, make clear that in doing so the states must adhere to these important limitations.

III. The Commission Should Also Authorize States To Require VoIP Providers to Contribute to State TRS Funds

For many of the same reasons discussed immediately above, the Commission should also authorize states to require VoIP providers to contribute to state TRS funds. Such contribution requirements would likewise be consistent with federal policy, and, provided they are not accompanied by substantive TRS obligations that exceed or differ from those the Commission has put in place, they would not raise the concerns that led the Commission to preempt in the *Vonage Order*.

As it has in connection with universal service, the Commission has already articulated the relevant federal policy in this area. VoIP services, the Commission has explained, “are increasingly used to replace analog voice service,” “consumers reasonably perceive them as substitutes for analog voice service,” and VoIP providers “benefit from their interconnection with the PSTN and from the expanded network-wide subscribership that is made possible” by TRS.⁶⁷ As in the universal service context, it follows that VoIP providers should be required to

Rcd at 22421-23, ¶¶ 26, 27, 29 & n.98 (explaining the “poor fit” of proxies for providing a basis for states to regulate VoIP). See also *Petition of AT&T, Inc. for Interim Declaratory Ruling and Waivers Regarding Access Charges and the “ESP Exemption,”* WC Docket No. ___ (filed July 17, 2008) (explaining that the use of rating mechanisms to assess intrastate access charges (or reciprocal compensation) does not alter the Commission’s conclusion that state regulation of VoIP is preempted).

⁶⁶ 47 U.S.C. § 254(f); see *Interim Contribution Order*, 21 FCC Rcd at 7541, ¶ 44 (discussing importance of “competitive neutrality” in connection with the imposition of federal universal service contribution requirements on interconnected VoIP providers).

⁶⁷ *VoIP TRS Order*, 22 FCC Rcd at 11292, ¶ 33.

contribute their fair share to state TRS funds. That result would help to “ensure[] that providers of competing services are subject to comparable regulatory obligations,” and it would further the federal statutory interests in “mak[ing] available to ‘all’ individuals in the United States a rapid, efficient nationwide communication service” and “‘increas[ing] the utility of the telephone system’ in the United States.”⁶⁸

Any state authorization to require contributions to TRS funds must, however, be subject to the same limitations that would apply in the universal service context: First, as in the universal service context, the Commission has authorized VoIP providers to contribute to the federal TRS fund on the basis of a safe harbor that classifies 64.9% of revenues as interstate.⁶⁹ Any state contribution requirement that is calculated as a percentage of revenue must be limited to the balance (35.1%).⁷⁰ Likewise, non-revenue-based state TRS assessments, such as a flat fee per telephone number, would not be permitted to burden the federal mechanism.⁷¹ Second, any TRS contribution requirement must be competitively neutral, applying across-the-board not just to VoIP providers and wireline providers alike, but also to *all* VoIP providers, including both nomadic and facilities-based providers. Third, providers that are unable to pinpoint the location of their users at a given time must be permitted to make reasonable assumptions in order to associate customer revenue (or telephone numbers) with particular states.

Finally, none of this is to suggest that states have authority to impose substantive TRS obligations beyond those required by the Commission. On the contrary, the imposition of such additional requirements would contradict federal policy for the same reasons state legacy common-carrier regulation does: by requiring VoIP providers to alter the nature of the service, such requirements would impose costs and thereby conflict with the federal interest in the rapid deployment of robust and innovative IP-based services.⁷²

* * *

VoIP holds enormous potential. But it is being constrained by regulatory uncertainty. The Commission can and should act to end that uncertainty. For the reasons explained above, that means confirming that the procompetitive, deregulatory principles set out in the *Vonage Order* apply across-the-board, to nomadic and facilities-based carriers alike. And it also means creating certainty in the realm of social policy obligations, by authorizing states to impose

⁶⁸ *Id.* at 11292-93, ¶¶ 33, 35 (quoting 47 U.S.C. § 225(b)(1)).

⁶⁹ *See id.* at 11295, ¶ 40.

⁷⁰ VoIP providers that calculate their federal assessment on the basis of approved traffic studies or tracking jurisdiction, *see id.*, could be required to do the same at the state level without interfering with federal policy.

⁷¹ As in the universal service context, the use of a safe harbor or number-based methodology to calculate TRS contribution requirements would not alter the Commission’s conclusion that state regulation of VoIP is preempted. *See supra* n.66.

⁷² *See supra* p. 10; *Vonage Order*, 19 FCC Rcd at 22422, ¶ 29.

Chm. Martin
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universal service and TRS contribution requirements on a competitively neutral basis and in a manner that will further the compelling federal interest in these critical programs.

Sincerely,

Robert W. Quinn, Jr.

cc: Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Daniel Gonzalez
Amy Bender
Scott Deutchmann
Scott Bergmann
Greg Orlando
John Hunter