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July 31, 2008

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Vonage Holdings Corporation Ex Parte Comments
Federal-State Joint Board on Universal Service, CC Docket No. 96-45
Universal Service Contribution Methodology, WC Docket No. 06-122
High-Cost Universal Service Support, WC Docket No. 05-337**

Dear Ms. Dortch:

Vonage Holdings Corporation ("Vonage") electronically files its ex parte comments in the above-referenced proceedings. These comments are filed in response to the Federal Communications Commission's News Release on May 2, 2008 that solicited comments and updates to the Commission's outstanding proceedings on Universal Service Fund ("USF" and "Fund") reform.

In the attached comments, Vonage recommends that the Commission modify the Fund's distribution mechanisms to permit interconnected VoIP providers to apply for eligible telecommunications carrier status and receive high cost and low income USF support. Making interconnected VoIP providers eligible to receive these funds is becoming more urgent as there is an ever growing effort on the state level to expand contribution obligations to state funds. For example, as the Commission is aware, the State of Nebraska continues its effort to force Vonage and other similar interconnected VoIP providers to contribute to state universal service funds and has indicated its intent to file a petition for declaratory ruling with the Commission on this issue. In addition, AT&T recently urged the Commission to authorize the states to collect state universal service contributions from interconnected VoIP providers. Vonage therefore asks for expedited action to reform eligibility for disbursement from the Fund. Such revisions are necessary to ensure that interconnected VoIP providers do not suffer competitive harm through their ever increasing fund contribution obligations while remaining ineligible to receive and use funds available to their direct competitors.

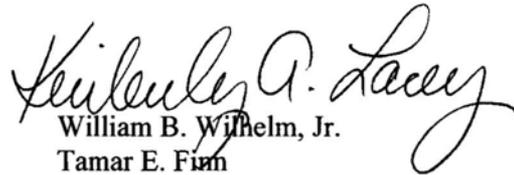
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Please do not hesitate to contact us if you have any questions regarding this filing.

Respectfully submitted,

A handwritten signature in black ink, reading "Kimberly A. Lacey". The signature is written in a cursive style with a large, looping "K" and "L".

William B. Wilhelm, Jr.
Tamar E. Finn
Kimberly A. Lacey

Counsel for Vonage Holdings Corp.

Enclosure

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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EX PARTE COMMENTS OF VONAGE HOLDINGS CORPORATION

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Dated: July 31, 2008

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SUMMARY

Vonage Holding Corporation (“Vonage”), through its undersigned attorneys, files these comments to refresh and supplement the record on Universal Service Fund (“USF” or “Fund”) reform. Specifically, Vonage requests the Federal Communications Commission (“FCC” or “Commission”) forbear from the “common carrier” restriction that prevents interconnected Voice over Internet Protocol (“IVP” or “interconnected VoIP”) service providers from being designated as Eligible Telecommunications Carriers (“ETC”).

The Commission has the authority to forbear from the enforcement of the “common carrier” requirement. Forbearance from this provision meets the statutory requirements as it is not necessary to ensure just and reasonable rates, is not needed to protect consumers, and is consistent with the public interest. The current limitations on ETC designations are anti-competitive and anti-consumer and should be revised to reflect new technologies. Inclusion of interconnected VoIP service providers as designated ETCs will not impact the high cost fund and will support the dual goals of increased competition and expansion of broadband access. For all of these reasons, Vonage urges the Commission to forbear from enforcement of the “common carrier” requirement and allow interconnected VoIP providers to apply for ETC designations.

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EX PARTE COMMENTS OF VONAGE HOLDINGS CORPORATION

I. INTRODUCTION

Vonage Holdings Corporation (“Vonage”), through its undersigned attorneys, files these ex parte comments to refresh and supplement the existing record supporting Universal Service Fund (“USF” or “Fund”) reform.¹ Under the current regime, interconnected Voice over Internet Protocol (“IVP” or “interconnected VoIP”) providers contribute to USF support but are not eligible to receive USF funding. This treatment of interconnected VoIP service providers is anti-competitive, inconsistent with the Commission principle that USF should be competitively neutral and anti-consumer. To remedy this situation, Vonage requests the Federal Communications Commission (“FCC” or “Commission”) lift the “common carrier” restriction on eligible telecommunications carrier (“ETC”) designations and allow qualifying interconnected VoIP service providers to receive USF distributions.

¹ Interim Cap Clears Path for Comprehensive Reform, FCC News Release (rel. May 2, 2008); *see also High-Cost Universal Service Support*, Order, 45 CR 1, FCC 08-122, (May 1, 2008) (“USF Cap Order”).

II. BACKGROUND ON UNIVERSAL SERVICE FUND

As part of the Telecommunications Act of 1996, Congress established policies and rules for the federal Universal Service Fund. The FCC's 1997 USF order established the framework and operational parameters for USF.² The purpose of the Fund was to ensure that all "consumers in all regions of the Nation ... have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas."³ Specifically, the program provides for financial distributions to common carriers to support telecommunications services for rural and high costs areas,⁴ Lifeline and Link-up programs for low-income customers,⁵ as well as support provided to schools and libraries for the provision of telecommunications services.⁶

Vonage has contributed to USF since it began providing service in the United States in October 2002. At first, it contributed indirectly through surcharges paid to competitive local exchange carriers that provided Vonage with telecommunications services used in the provision of interconnected VoIP service. In 2006, citing a declining contribution base and resultant growth in the USF contribution factor, the Commission made interim revisions to the USF program to include IVPs in the contributor base.⁷ For the purposes of this interim revision, the Commission determined that IVPs could choose to use a safe harbor that treats 64.9 percent of IVP revenue as interstate and assessable for the purpose of federal USF.⁸ Vonage has made USF

² *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) ("1997 USF Order").

³ 47 U.S.C. § 254(b).

⁴ 47 C.F.R. §§ 54.101 and 54.411.

⁵ 47 C.F.R. § 54.407.

⁶ 47 C.F.R. § 54.501.

⁷ *See Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ("2006 USF Order").

⁸ *See id.* at ¶ 53.

contributions based on the safe harbor. This safe harbor is much higher than the safe harbor used for other types of carriers.⁹

In order to receive monies from USF under the current system, a common carrier may seek designation as an “eligible telecommunications carrier” by either a state public utility commission (“PUC”) or by the FCC. Any carrier with an ETC designation must “offer the services that are supported by the Federal universal services support mechanisms ..., either using its own facilities or a combination of its own facilities and resale of another carrier’s services ...; and advertise the availability of such services and the charges therefor using media of general distribution.”¹⁰ Pursuant to Section 214(e)(2), state PUCs may issue ETC designations for a common carrier in its service area. The FCC’s role is to designate ETC providers for interstate purposes in unserved areas.¹¹ Additionally, if a state PUC has refused jurisdiction over the carrier, such as wireless service providers, the carrier may petition the FCC for an ETC designation in that geographic area.¹² A carrier filing such a petition must commit to timely responses to customers, provide service to customers in the service area but outside current network coverage in a reasonable time period, develop and submit a five-year plan describing planned improvements, certify that it can maintain services during emergencies, certify that it meets the appropriate consumer protection and safety requirements, and make certain equal access certifications.¹³

Some of these requirements make it essentially impossible for IVPs to obtain ETC status. The most significant obstacle to IVPs obtaining ETC status is the common carrier requirement.

⁹ For example, in the same Report and Order, the Commission increased the wireless safe harbor from 28.5 percent to 37.1 percent. *See id.* at ¶ 23.

¹⁰ 47 U.S.C. § 214(e)(1)(A)-(B).

¹¹ 47 U.S.C. § 214(e)(3).

¹² 47 U.S.C. § 214(e)(6).

¹³ 47 C.F.R. § 54.202(a).

A common carrier is closely related to a telecommunications carrier under the Act.¹⁴ The Commission has not determined whether interconnected VoIP providers are telecommunications carriers or information service providers,¹⁵ which largely forecloses any opportunity for IVPs to be considered common carriers. This creates a situation where IVPs are forced to subsidize traditional wireline and wireless providers with whom IVPs compete in the voice services market.¹⁶

As the USF program reaches its tenth anniversary, the FCC has launched a monumental effort to reform and modernize the system. On May 1, 2008, the FCC announced an interim cap on high-cost payments to competitive ETCs as a necessary first step to “halt the rapid growth of high-cost support that threatens the sustainability of the universal service fund.”¹⁷ Even with the establishment of an interim cap, the FCC remains committed to a significant revision of the USF program in order to ensure its substantiality in the future.¹⁸ The FCC’s reform of the USF system should ensure the continued viability of the program and modernize it to account for new and innovative technology developed in the last decade. To that end, Vonage requests revision of the regulations to include qualified IVPs as ETCs.

¹⁴ See 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services....”). See also *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 923 (D.C. Cir. 1999) (“In other words, whether a carrier will be subject to common carrier regulation pursuant to §153(44) turns on whether it offers ‘telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.’” (citing 47 U.S.C. § 153(46) (definition of telecommunications service))).

¹⁵ See, e.g., *Vonage Holdings Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶ 14 (2004) (“We reach this decision irrespective of the definitional classification of DigitalVoice under the Act, i.e., telecommunications or information service, a determination we do not reach in this Order.”); *Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order, 22 FCC Rcd 6927, ¶ 54 (2007) (“[W]e have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, nor do we do so today....”).

¹⁶ Vonage does not object to contributing to USF and does not disagree that it benefits from the network effect of having a large network. See 2006 USF Order at ¶ 43. Its competitors, however, receive this indirect benefit plus the direct benefit of being able to receive USF funds.

¹⁷ USF Cap Order at ¶ 10.

¹⁸ See *id.* at ¶ 37.

III. EXCLUSION OF INTERCONNECTED VOIP PROVIDERS FROM RECEIPT OF USF FUNDING IS ANTI-COMPETITIVE AND ANTI-CONSUMER

A. The “Common Carrier” Requirement Results In A Government Endorsed, Anti-competitive Marketplace.

Fundamental principles support extending ETC status to IVPs so that the customers they serve may participate in universal service. The Act requires that universal service support be specific, predictable, and sufficient.¹⁹ The Commission and the courts have interpreted these words to require: (1) “*explicit* universal service subsidies--government grants that cause no distortion to market prices”²⁰; (2) portable subsidies; and (3) “sufficient funding of *customers*, not *providers*.”²¹ The FCC is also required to “encourage the provision of new technologies and services to the public”²² while not harming competition in the telecommunications service market.

When Congress established the federal Universal Service Fund, it simultaneously established deregulatory policies to encourage the growth of local telephone service providers. Both policies are essential.²³ As part of its implementation and continuing management of the Universal Service Fund, the FCC must balance the policies and needs of the Fund with the Commission’s duty to promote competition and non-discrimination. Thus, beginning with the very origination of the Fund, the Commission adopted competitive neutrality as a guiding principle. The principle was defined as:

Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither

¹⁹ 47 U.S.C. § 254(b)(5).

²⁰ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000).

²¹ *Id.* at 620.

²² 47 U.S.C. § 157(a).

²³ *See Alenco v. FCC*, 201 F.3d at 615 (“The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other.”) (emphasis in original).

unfairly advantage or disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another.²⁴

This principle was the FCC's basis for the "policies for the preservation and advancement of universal service."²⁵ As the *Alenco* Court recognized, "the program must treat all market participants equally ... so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers."²⁶ Current ETC eligibility criteria, which exclude IVPs, violate this fundamental principle.

The Commission relied upon the competitive neutrality principle to impose universal service obligations on IVPs. It found that principle supported including IVPs as contributors to the USF in order to prevent any unfair advantage they may have over traditional voice providers who were already required to contribute.²⁷ Yet the FCC has ignored the competitive neutrality principle with respect to IVPs' universal service rights, namely, the FCC failed to ensure that the USF distribution mechanism was equally competitively neutral. While IVPs are eligible for e-rate funding, they do not have access to any other USF program distributions. As such, under current FCC rules and regulations, wireline and wireless carriers are given an unfair advantage. More importantly, consumers who choose new VoIP technologies are denied the benefits of USF support. Contrary to Congressional intent to benefit the customer and promote new technologies and services, the ineligibility of IVPs for various ETC distributions disfavors voice over IP customers and technology and favors circuit-switched wireline and wireless customers and technology.

²⁴ 1997 USF Order at ¶ 47.

²⁵ *Id.* at ¶ 46.

²⁶ *Id.* at 616.

²⁷ See 2006 USF Order at ¶ 44 ("Moreover, we do not want contribution obligations to shape decisions regarding technology that interconnected VoIP providers use to offer services to customers or to create opportunities for regulatory arbitrage. The approach we adopt today reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations. We therefore find that the principle of competitive neutrality is served by extending universal service obligations to interconnected VoIP service providers.").

While IVPs are ineligible to receive funds from most USF programs, they remain obligated to contribute to the Fund. This policy means that IVPs are forced to fund their competitors – those traditional wireline and wireless companies that compete with IVPs to provide voice services. At the same time, USF distribution policies works to distort competition for voice services by allowing ETC providers to reduce the price of their voice services thereby creating an unfair price advantage against the IVPs operating in their market. This protection from competition is “the very antithesis of the Act.”²⁸

Vonage acknowledges that the Commission has previously found that some carriers who are required to contribute to the Fund may, nevertheless, not be authorized to receive distributions from the Fund. For example, the FCC has previously held that paging providers, private telecommunications carriers, and non-common carrier satellite providers must contribute to but may not receive distributions from USF.²⁹ However, unlike those services, the voice service provided by IVPs is significantly different. IVPs compete against the wireline and wireless carriers who currently receive universal service funds.³⁰ The absence of competition between the other telecommunications services required to contribute (paging, private telecommunications carriers, and non-common carrier satellite providers) and the voice services that both contribute and receive distributions (wireline and wireless voice service providers) may justify the denial of ETC status and receipt of funds. However, the direct competition that exists

²⁸ *Alenco v. FCC*, 120 F.3d at 622.

²⁹ *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶¶ 794-800, 805 (1997); *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, ¶¶ 262, 289 (1997).

³⁰ *See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol Subscriber Data*, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89, 45 CR 349, ¶ 26 (2008) (“Interconnected VoIP service subscribers represent an important and rapidly growing part of the U.S. voice service market, and interconnected VoIP services are becoming increasingly competitive with other forms of local telephone service.”).

between wireline and wireless services and IVP services, the substitutability of VoIP for wireline and wireless services, and the principle of competitive neutrality compels a different result here. The FCC should find that IVPs are eligible to apply for ETC designation and receive funds.

B. The “Common Carrier” Requirement Results In An Anti-consumer Marketplace.

The Commission has clearly held that consumers are best served by technology-neutral policies that eliminate artificial distinctions among competing voice service platforms. By restricting ETC designations to circuit switch-based wireline and wireless providers, however, the Commission is harming the consumer by creating artificial distinctions. These policies and restrictions distort consumer choices. They artificially limit the voice services available to consumers who are eligible for federal USF assistance, such as the Lifeline and Link-up programs. In addition, they cause prices for traditional wireline and wireless services to remain low, thereby forcing price-sensitive consumers to restrict their choices to older technologies. There is no advantage or benefit to consumers from denying IVPs the opportunity to receive ETC distributions. To the contrary, permitting IVPs to apply for ETC status would create advantages and benefits for consumers by encouraging additional competitive alternative

IV. THE COMMISSION MUST RESTORE THE BALANCE OF COMPETITION AS PART OF ANY COMPREHENSIVE UNIVERSAL SERVICE REFORM

A. Revised FCC Policy Must Account For New Technologies And Services Not Anticipated By The 1996 Act.

In the six years since it signed up its first residential customer, Vonage has grown to over two and a half million customers worldwide.³¹ Between 2003 and 2005, the number of VoIP subscribers grew from approximately 150,000 to 4.2 million customers.³² In 2005, Forbes

³¹ See Vonage About Us Page, available at, http://www.vonage.com/corporate/index.php?lid=footer_corporate&refer_id=WEBAU0706010001W1 (last visited on July 23, 2008).

³² See 2006 USF Order at ¶ 3.

magazine called VoIP the “hottest acronym in the converging communications market” and new challengers to Vonage’s start-up service were beginning to enter the market.³³ Such competition would result in more choices and lower prices.³⁴ Currently, it is estimated that there are 15.9 million VoIP users and subscriber numbers could reach 32.3 million by 2011.³⁵ Moreover, this phenomenal growth in VoIP usage has resulted in a corresponding decrease in the use of traditional telephone services.³⁶ In short, VoIP is the substitute service that the Joint Board and the Commission envisioned when creating the portable support rule.³⁷

When writing the Telecommunications Act of 1996 (“Act”), Congress did not, and could not have, anticipated the emergence and success of voice services provided over broadband. While it was clearly Congress’ intent to support the development and implementation of new telecommunications technologies, the Act did not anticipate VoIP. It would have been difficult for Congress to impose regulations and policies on an emerging service that was just coming into existence in 1996. In fact, Vonage, the leading VoIP provider, did not begin providing service to its first residential customer until late 2002,³⁸ more than six years after the Act was passed. Since that time, the FCC has strived to determine the proper regulations for IVPs while trying

³³ See John Delaney, *Landmines for Landlines: The Growth of VoIP*, Forbes.com, July 21, 2005, available at http://www.forbes.com/2005/07/21/timewarner-mediacom-voip-cx_0721findsvpvoip.html (last visited on July 23, 2008).

³⁴ See *id.*

³⁵ See Tom Burton, *Twenty Percent Annual Growth for VoIP*, FierceVoIP.com, Feb. 25, 2008, at <http://www.fiercevoip.com/story/twenty-percent-annual-growth-for-voip/2008-02-25> (citing the Telecom Industry Association’s 2008 Market Review & Forecast) (last visited on July 23, 2008).

³⁶ See 911 Modernization and Public Safety Act of 2007, H.R. Rep. No. 110-442 at 6 (2007) (“Today, more than 9 million consumers in the United States use VoIP service as a substitute for traditional telephony.”). See also Tom Burton, *VoIP Booms While Telecoms Struggle*, FierceVoIP.com, Feb. 21, 2008, at <http://www.fiercevoip.com/story/voip-booms-while-telecoms-struggle/2008-02-21> (citing a 31% increase in VoIP sales while finding a corresponding 20% decrease in the sale of traditional telephone equipment) (last visited on July 23, 2008).

³⁷ See USF Cap Order at ¶19; see also 2006 USF Order at ¶ 36 (“[W]e recognize that the definition of interconnected VoIP services may need to expand as new VoIP services increasingly substitute for traditional phone services”), ¶ 52 (“VoIP services are often marketed as a substitute for wireline toll services.”) and ¶ 55 (“[T]he record reflects that interconnected VoIP service is often marketed as an economical way to make interstate and international calls, as a lower-cost substitute for wireline toll service.”).

³⁸ See Vonage Timeline, available at http://www.vonage.com/corporate/images/vonage_timeline.pdf (last visited on July 23, 2008).

not to stifle innovation and new services. It must continue to do so as part of the USF reform process.

B. Commission Should Use Its Authority Under Section 160(a) To Forbear From “Common Carrier” Requirement Of Section 214(e).

The Act requires eligible telecommunications carriers to be common carriers.³⁹ However, the Commission has the authority to forbear from enforcing this requirement and open up ETC designation to IVP services that compete against traditional wireline and wireless services that receive distributions from USF. The Commission has previously exercised its authority, on its own motion, to forbear from the enforcement of statutory and regulatory provisions that cause obstacles to competition and it can do so in this case.⁴⁰

Congress granted the FCC forbearance authority as part of the Telecommunications Act of 1996. Section 160(a) provides that “the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service” if it finds that such:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴¹

³⁹ 47 U.S.C. § 214(e).

⁴⁰ *See Policies and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, ¶ 21 (1996) (using Section 106(a) forbearance authority to implement mandatory detariffing of long distance services and finding that “market forces will generally ensure that the rates, practices and classifications of nondominant interexchange carriers for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory.”). *See also 1998 Biennial Regulatory Review - Repeal of Part 62 of the Commission’s Rules*, Report and Order, FCC 99-163, 16 CR 626, ¶ 26 (1999) (holding that the Commission will forbear from the application of the interlocking directorate limitations in Section 212 and finding that such restrictions were no longer necessary).

⁴¹ 47 U.S.C. § 160(a).

Vonage acknowledges that the FCC’s authority under Section 160(a) is limited to forbearance from “applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service”⁴² and Vonage is not currently classified as a telecommunications carrier. However, while the FCC has not classified interconnected VoIP as either an “information service” or a “telecommunications service,”⁴³ it has imposed multiple obligations upon the voice service that are similar to requirements for telecommunications carriers.⁴⁴ Moreover, the FCC has noted numerous times that IVPs provide a viable competitive alternative to traditional voice service providers.⁴⁵

The FCC has previously extended its authority under Section 160(a) to forbear from the application of regulations to *non-telecommunications* carriers and it should do so again here. Specifically, in 2003, the FCC was seeking ways to enhance and increase efficiency in the secondary markets for radio spectrum and utilized its forbearance authority to remove multiple regulatory hurdles and requirements to spectrum leases that involved common carriers.⁴⁶ The FCC went on to suggest that market efficiency may be even further increased and discrimination between carrier and non-carriers could be decreased if the FCC could extend its forbearance to non-telecommunications carriers and services.⁴⁷ After further proceedings, the FCC found that while forbearance was not directly applicable to spectrum leases involving non-telecommunications carriers, it was, nevertheless, in the public interest to streamline the

⁴² 47 U.S.C. § 160(a).

⁴³ See 2006 USF Order at ¶ 35 (“The Commission had not yet classified interconnected VoIP services as ‘telecommunications services’ or ‘information services’ under the definitions of the Act. Again here, we do not classify them.”) (“USF VoIP Order”). See also *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007) (finding that the Commission had deferred its classification of VoIP as either a telecommunications or an information service).

⁴⁴ See 2006 USF Order at ¶¶ 15 (discussing the imposition of 911 emergency calling capabilities and Communications Assistance for Law Enforcement Act requirements upon interconnected VoIP providers).

⁴⁵ See USF Cap Order at ¶ 19. See also 2006 USF Order at ¶¶ 36, 52, 55; *supra* notes 27-30.

⁴⁶ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003).

⁴⁷ See *id.* at ¶¶ 275-277.

processing of those spectrum leases “in order to place substantially similar wireless spectrum leasing transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination.”⁴⁸

Similar to those non-telecommunications spectrum lease holders, it is in the public interest for the FCC to forbear from the application of the Section 214(e) “common carrier” requirement to interconnected VoIP providers seeking ETC status so that “substantially similar” voice service providers may be placed on a “comparable basis” and to reduce “regulatory discrimination.” As discussed further below, forbearance from the “common carrier” requirement of Section 214(e) meets the forbearance requirements of Section 160(a) and is in the public interest. It is also clearly in the public interest to extend the forbearance to voice service providers that, while not technically defined as common carriers, provide voice services over advanced technological systems as a competitive alternative to current ETC providers.

1. Enforcement Is Not Necessary To Ensure Just And Reasonable Rates.

The “common carrier” requirement in Section 214(e) is not necessary to ensure that prices and terms for IVP or common carrier voice services are just and reasonable and not unjustly or unreasonably discriminatory. To the contrary, forbearance from this requirement would promote non-discriminatory pricing. First, opening ETC eligibility to IVPs, on the same terms and conditions as currently provided to wireline providers and other intermodal competitors, will help ensure that there is no unfair competitive advantage across platforms, either by IVPs or wireline providers. Also, forbearance will eliminate the current competitive advantage enjoyed by wireline providers who receive ETC distributions. Those providers, who generally use older voice platforms, currently enjoy a government-conferred advantage over

⁴⁸ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, ¶ 41 (2004).

IVPs who have developed and use newer technologies. That advantage results in a price differential that benefits the traditional, older wireline services. Without such discriminatory policies preventing IVPs from ETC designations, such a price differential would not exist. The removal of the “common carrier” requirement for IVPs would eliminate this discriminatory policy and allow these newer services to provide competitive prices and terms similar to those offered by wireline and wireless competitors who receive ETC distributions. Forbearance from the “common carrier” requirement will redress the existing discrimination in rates and terms that are kept in place by Section 214(e). As the “common carrier” requirement is not necessary to ensure just and reasonable rates, Section 160(a)(1) is satisfied and the FCC should forbear from its enforcement against IVPs.

2. *Enforcement Is Not Necessary To Protect Consumers.*

To the extent that interconnected VoIP services are ineligible to receive ETC distributions, the “common carrier” requirement in Section 214(e) does not protect consumer interests. Instead, it harms consumers by artificially impacting rates and hindering competition. The IVP ineligibility for ETC support, which is accessible and used by their competitors, results in unjustifiable discrimination among different voice service platforms, and, therefore, undermines consumer interests by distorting the market. As the Commission has clearly established, consumers are best served by technology-neutral policies that eliminate artificial distinctions among competing voice service platforms and has repeatedly found that its decisions must be technology-neutral to ensure that the marketplace, and not government, determines the best provider of services.⁴⁹

⁴⁹ See e.g. *Biennial Regulatory Review - Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, 23 FCC Rcd 5319, ¶ 13 (2008) (“[T]he Commission seeks to promulgate rules that are ‘technology neutral’ because we believe that ideally it is in the public interest for competing telecommunications technologies to succeed or fail in the marketplace on the basis of their merits and

Currently, wireline and wireless networks are subsidized in many geographic areas, while neither interconnected VoIP service nor the broadband networks over which they operate are eligible for ETC distributions. The Universal Service Fund is not immune to the benefits of technology neutrality, and it is the basis of the Commission’s competitive neutrality policy that “universal service support mechanisms and rules [may not] unfairly favor or disfavor one technology over another.”⁵⁰ Therefore, as a telephone-replacement service providing competitive voice service products subject to many of the same obligations as their common carrier competitors, IVPs should be eligible for the same support mechanisms as their competitors. Because the “common carrier” requirement is not needed to protect consumers, Section 160(a)(2) is satisfied and the FCC should forbear from its enforcement against IVPs.

3. Forbearance Is Consistent With The Public Interest.

To the extent that it renders interconnected VoIP ineligible to receive ETC distributions, the “common carrier” requirement is not in the public interest. Section 160(b) requires the FCC to consider, in the course of its public interest inquiry, whether forbearance will promote competitive market conditions. As discussed extensively above, forbearance from the “common carrier” requirement would clearly help competition in the voice services market. By removing an artificial distinction between voice service providers, forbearance will force those providers to compete based on the merits of their offerings and will permit customers to make choices based on the service’s features and cost. This development will enhance consumer choice and make the voice service market more competitive.

other market factors, and not primarily because of government regulation.”) (internal quotation marks omitted); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, ¶ 11 (2005) (interpreting the term “switching” in the CALEA statute to be “technology-neutral” and hence apply to traditional switched wireline service providers as well as IP-based broadband voice networks.).

⁵⁰ 1997 USF Order at ¶ 47.

In addition, forbearance from the “common carrier” requirement would drive an increase in broadband deployment and thereby further the Commission’s mandate under Section 706 of the Act. Congress directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by using regulatory measures that “remove barriers to infrastructure investment” and specifically cites “regulatory forbearance” as a tool to meet its broadband expansion directive.⁵¹ In fact, the Commission has an extensive history of using its forbearance authority to promote broadband deployment.⁵² As the Commission has recognized, the use of applications and services that require broadband facilities and infrastructure is a primary driver promoting broadband deployment. At this time, the U.S. rate of broadband deployment is significantly lagging behind that of other industrialized countries⁵³ and many rural consumers have no high-quality competitive choice for broadband access.⁵⁴ The FCC should use every option at its disposal to encourage its growth. By removing the regulatory roadblocks to expanded use of interconnected VoIP, forbearance would support and contribute to this critical policy objective.

Forbearance from the “common carrier” requirement will also support the Commission’s public safety and homeland security goals. The absence of a sufficiently redundant

⁵¹ Section 706(a) of Telecommunications Act of 1996.

⁵² See e.g., *Petition for Forbearance of Verizon Telephone Companies Pursuant to 47 U.S.C. 160(c)*; *SBC Communication’s Petition for Forbearance Under 47 U.S.C. 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. 160(c)*; *BellSouth Telecommunications, Inc., Petitions for Forbearance Under 47 U.S.C. 160(c)*, 19 FCC Rcd 21496 (2004) (citing Section 706 as a basis for forbearance from Section 271 requirements that Bell Operating Companies provide access to broadband facilities).

⁵³ See Testimony of FCC Commissioner Michael J. Copps, U.S. Senate Committee on Small Business and Entrepreneurship, “Improving Internet Access to Help Small Business Compete in a Global Economy,” Sept. 26, 2007 (citing several studies ranking U.S. broadband access between 11th and 25th in the world). “We need a strong statement, combined with serious commitment from the very top ... that broadband is a national priority. We need to make sure all the departments of government are cooperating to encourage broadband deployment...” including specific efforts and tasks that can be undertaken by the FCC to promote broadband deployment. See *id.*

⁵⁴ See *Ex Parte Comments*, filed by National Telecommunications Cooperative Association, WC Docket No. 01-92, at 16 (July 11, 2008) (“In many rural areas, consumers have only one quality alternative for broadband Internet access and that is the rural LEC’s affiliated ISP. As applications migrate to IP platforms, the affiliated ISP becomes the Internet lifeline for many rural consumers.”).

communications network has been a concern to the government and FCC for many years. This lack of redundancy was highlighted after the Hurricane Katrina disaster. Specifically, the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks found that insufficient redundancy in existing networks was a chief factor behind the communication's failures that happened in the wake of the storm.⁵⁵ The 2005 Hurricane Katrina disaster was not the first time the Commission realized that greater redundancy in communications networks was essential to emergency communications. After the September 11, 2001 terrorist attacks, the FCC started requiring more detailed reporting on the telephone networks engineering standards for redundancy, and found that such diversity was necessary to promote a strong infrastructure.⁵⁶ Forbearance would support these necessary and valuable policy goals by promoting the deployment of redundant network facilities and expanded use of packet-switched communications that would be capable of routing around disaster-induced outages. Although this forbearance decision would not directly subsidize last-mile broadband facilities, it would drive demand for those links and facilitate internal network facility deployments and upgrades. Forbearance from the "common carrier" requirement will stimulate broadband deployment and hence is in the public interest, therefore, Section 160(a)(3) is satisfied.

Forbearance from the "common carrier" requirement is consistent with the requirements in Sections 214 and 254 of the Act. In order to receive ETC distributions, IVPs will be required

⁵⁵ See *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Notice of Proposed Rulemaking, 21 FCC Rcd 7320, App. B at 13-14, 23 (2006) ("Katrina Report"). See also Katrina Report, Statement from Commissioner Copps ("[T]his report is a shocking indictment of the disaster readiness of our existing communications networks. Put simply, it concludes that both our public safety and commercial networks ... are not designed with sufficient redundancy.").

⁵⁶ *New Part 4 of the Communication's Rules Concerning Disruption to Communications*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830, ¶¶ 6, 10 (2004) ("In an era in which networks are increasingly interconnected and in which there is heightened concern that a failure of one network could conceivably cause the failure of other, interconnected networks, we find it important in this manner to facilitate analysis of the extent to which lack of diversity causes or contributes to significant network outages.").

to submit a petition to the FCC that complies with the certification rules and regulations. In addition, granting IVPs the right to apply for ETC designations will further the explicit, predictable and sufficient principles of the Universal Service Fund as required by Section 254(b)(5) and thereby support and further the FCC’s fundamental principle to promote competition.⁵⁷

The grant of this forbearance request would also advance that core goal of “encourage[ing] the provision of new technologies and services to the public.”⁵⁸ As such, providing an avenue for Vonage and similarly situated IVPs to receive ETC designations would serve the primary USF goal of deployment of new technologies and expanded reach and services to the public.

C. Forbearance Would Not Impact The Size Of The High Cost Fund.

Forbearance from the “common carrier” requirement and inclusion of IVPs as recipients of ETC funds would not impact or affect the size of the high cost fund. The new interim cap is fixed on a state-by-state basis and will remain in place regardless of the number of ETCs designated.⁵⁹ The states will need to divide the funding between existing and new ETCs. With its institution of an interim cap on the USF high cost fund, the FCC has made clear its intent to control the size of the Fund and ensure it remains a viable resource until such time as the Commission can complete its overhaul of the USF program.⁶⁰ However, the new cap does not restrict the ability of traditional wireline or wireless carriers to receive ETC status⁶¹ and it should not impact the Commission’s consideration of ETC status for IVPs.

⁵⁷ See e.g. 47 U.S.C. § 157(a).

⁵⁸ 47 U.S.C. § 157(a).

⁵⁹ See USF Cap Order at ¶ 26. The FCC established limited exceptions to the interim cap for ETCs providing service in tribal lands or within the Alaska Native region. *Id.* at ¶ 1.

⁶⁰ See USF Cap Order.

⁶¹ *Id.* at ¶ 39 (“Although the interim cap that we adopt today applies only to the amount of support available to competitive ETCs, it does not restrict the number of competitive ETCs that may receive support.”).

The Fund would not be adversely affected because any interconnected VoIP providers that receive new ETC designations would be subject to the high-cost cap. Even with a cap on those funds, the ability of a carrier to apply for and receive an ETC designation has its own intrinsic value. The Commission found that “there are advantages to obtaining and maintaining an ETC designation regardless of whether a competitive ETC receives high-cost support” such as the ability to receive Lifeline support.⁶² Therefore, forbearance from the “common carrier” requirement should be based on the specific statutory requirements of Section 160(a) and should not be based upon any incorrect perception that distributions to IVPs would negatively affect the size of the Fund.

D. Commission Should Make Other Changes To Its ETC Rules.

In connection with the forbearance requested above, Vonage recommends the following three additional revisions to the ETC rules.

- (1) The FCC should exercise sole jurisdiction over ETC designations for IVPs.

The Commission has previously determined that it is not practicable to separate the intrastate and interstate portions of voice service provided by VoIP providers⁶³ and that federal jurisdiction is necessary to prevent possible conflicting regulations that may harm the interstate portion of those services.⁶⁴ The Commission has also clearly stated that it has regulatory authority over voice over IP services and such authority supersedes any regulation by state commissions.⁶⁵ Based on the federal jurisdiction of the Commission, the mixed intrastate and interstate composition of IVP service, and existing provisions allowing the FCC to issue ETC

⁶² *Id.* at ¶ 30.

⁶³ *See Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶ 14 (2004).*

⁶⁴ *See id.* at ¶ 19.

⁶⁵ *See id.* at ¶ 1.

designations, Vonage requests the FCC assert sole jurisdiction over the ETC process for interconnected VoIP providers.

(2) The FCC should clarify that the service area may be limited to areas in which broadband service is available for an over-the-top IVP.

Current FCC regulations require an ETC to provide service within a reasonable time period to a customer located within its designated service area even though the customer may be located outside the current existing network coverage.⁶⁶ Compliance with this requirement may entail certain build out requirements to reach the potential customer.⁶⁷ However, over-the-top IVPs do not provide the last-mile connections. As such, it is not possible for these types of IVPs to extend their service to customers that are physically located outside the existing wireline broadband footprint. Therefore, Vonage requests the Commission determine that this requirement is not applicable to over-the-top IVPs.

(3) The FCC should adopt the relevant sections of the consumer protection and service quality standards for IVPs.

Currently, wireless telecommunication carriers receiving ETC designations are required to certify compliance with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Services ("Code").⁶⁸ Vonage supports the extension of this requirement to interconnected VoIP providers requesting ETC designations. In applying the Code to IVPs, however, Vonage notes that several sections are inapplicable to interconnected VoIP providers and should be excluded from the required certification as not relevant. These sections are:

- Section 2 (service maps);
- Section 5(f) (peak and off-peak calling periods);

⁶⁶ See 47 C.F.R. § 54.202(a)(1)(i)(B).

⁶⁷ See 47 C.F.R. § 54.202(a)(1)(i)(B)(1)-(6).

⁶⁸ 47 C.F.R. § 54.202(a)(3).

