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October 15, 2008

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

RE: Implementation of the New and Emerging Technologies 911 Improvement Act of 2008, WC Docket No. 08-171; In the Matter of IP-Enabled Services, WC Docket No. 04-36.

Dear Ms. Dortch:

On October 14, 2008, Kathleen Grillo and Leslie Owsley of Verizon and Scott Angstreich of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. met with Nick Alexander, Legal Advisor to Commissioner Robert McDowell. The purpose of the meeting was to discuss the above-referenced proceedings.

Verizon stated that since the Commission issued its VoIP 911 rules in 2005, today E911 service is available to more than 98 percent of customers of interconnected VoIP services. Given the success of the Commission's VoIP 911 rules, and the very tight timeframe specified by Congress for adopting rules to implement the NET 911 Act, Verizon stated that the Commission should adopt a straightforward rule requiring that, if an entity provides 911 capabilities to CMRS providers, it must also make such capabilities available to VoIP providers on the same rates, terms, and conditions, and should not adopt rules beyond those required by the Act.

Verizon also discussed its Verizon's August 6, 2007 letter (attached), which urged the Commission to confirm that all VoIP services are subject to exclusive federal jurisdiction — regardless of the technology or provider. Verizon stated that the Commission should ensure that all VoIP providers, regardless of platform, compete on a level playing field, and that none are saddled with legacy regulations designed for different services in a different era. In addition, we discussed legal principles related to the Commission's authority over jurisdictionally interstate traffic consistent with Verizon's comments in the record.

Please contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads "Kathleen Grillo".

Attachment

cc: Nick Alexander



Susanne A. Guyer
Senior Vice President
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Michael E. Glover
Senior Vice President & Deputy General Counsel

August 6, 2007

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Martin:

As a direct result of this Commission's broadband policy agenda, the communications industry has undergone dramatic changes in recent years. The industry has invested billions of dollars in broadband and IP technologies; consumers are the winners, reaping the benefits of higher speeds, lower prices, and innovative services. VoIP, cable, wireless, and wireline companies are competing head to head and consumers have more options than ever and are embracing these new technologies in unprecedented ways.

It is time for the Commission to take the natural next step and to confirm that the same pro-competitive, pro-investment principles that it has applied to broadband also apply equally to all VoIP services and providers. The Commission has already clarified much of the regulatory framework for VoIP, establishing E911, CALEA, Universal Service Fund, and disabilities access obligations for interconnected VoIP providers. The Commission also ruled in the *Vonage Order*¹ that "over the top" VoIP services are interstate services and subject to the Commission's exclusive jurisdiction.

Now that the Eighth Circuit has affirmed the Commission's authority and denied petitions for review of the *Vonage Order*, the Commission should use that authority to confirm that all VoIP services — regardless of the technology or provider — are interstate services, subject to the same rules and regulations. Just as the Commission, following the Supreme

¹ Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404, ¶ 20 (2004) ("*Vonage Order*"), petitions for review denied, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

Court's *Brand X*² decision, placed all broadband services under the same Title I regime that applied to cable modem service, the Commission should reaffirm its exclusive jurisdiction over all VoIP services. This will ensure that all VoIP providers compete on a level playing field, and that none are saddled with regulations designed for different services in a different era. More importantly, as the Commission previously concluded, ensuring that VoIP services are not hampered by 50 sets of economic regulation will facilitate consumer choice, spur technological innovation and the deployment of broadband infrastructure, and will promote the use of broadband services and the Internet.

A. The Commission's *Vonage Order*

In preempting state regulation of Vonage's VoIP service, the Commission's *Vonage Order* made five key findings.

First, the Commission recognized the geographic indeterminacy of Vonage's service; Vonage "has no means of directly or indirectly identifying the geographic location" of its customers when they place or receive calls.³ That is a function of two different features of Vonage's service that each independently results in that indeterminacy. One is that the service "is fully portable," so that "customers may use the service anywhere in the world where they can find a broadband connection."⁴ The other is that, "in marked contrast to traditional circuit-switched telephony," Vonage assigns telephone numbers to customers that are "not necessarily tied to" the user's usual or "home" location.⁵ The Commission determined that the customer's telephone number is not a reliable proxy for determining an end point of the communication or for permitting state regulation of "intrastate" calls. Because a customer may have a telephone number associated with one state, but actually be located in different state, permitting states to regulate calls that appear intrastate based on the telephone numbers involved means that states would, in fact, impermissibly regulate interstate communications. The Commission found that this fact, by itself, is sufficient to justify preemption of state regulation.⁶

Second, the Commission relied on the integrated nature of Vonage's service, which is integrated in two respects. First, it offers consumers any-distance calling without distinguishing "local" and "long-distance" minutes of use.⁷ Second, Vonage's service offers a "suite of integrated capabilities and features" with that any-distance calling, including the "multidirectional voice functionality" and "online account and voicemail management" that allows customers to access their accounts to an Internet web page to configure service features, play voicemails back through a computer, or receive or forward them in e-mails with the actual

² *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

³ *Id.* ¶ 23; *see id.* ¶¶ 26-27.

⁴ *Id.* ¶ 5.

⁵ *Id.* ¶ 9.

⁶ *See id.* ¶ 26.

⁷ *See id.* ¶ 27.

message attached as a sound file.⁸ “These functionalities in all their combinations,” the Commission stressed, “form an integrated communications service designed to overcome geography, not track it.”⁹ As a result, the Commission found that its end-to-end analysis does not readily apply to communications sessions using integrated IP-based services. Because those services have the “inherent capability . . . 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,”¹⁰ they cannot be meaningfully sliced up into individual components and the end points cannot all be separately tracked or recorded. Therefore, “[e]ven . . . if” information “identifying the geographic location of a [Vonage] subscriber” were “reliably obtainable,” that is far from the only information that would matter under the end-to-end analysis; one would also need to know the location of the myriad databases, servers, and websites utilized during the communication session. As the Commission found, these integrated services and functionalities render Vonage’s service “too multifaceted for simple identification of the user’s location to indicate jurisdiction.”¹¹

Third, the Commission recognized that, whether or not it is technologically possible to carve out a purely intrastate service is not the standard for determining jurisdiction. Instead, the question is whether a “practical means to separate the service” exists and whether compelling providers to do so would conflict with federal policy.¹² The Commission found that such separation is not practical, because it would require the substantial redesign of Vonage’s service at significant cost to try to disaggregate and track all of the individual components of Vonage’s service. Vonage would have to change multiple aspects of its service operations to track, record, and process geographic location information, 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.”¹³ As the Commission recognized, it has “declined to require” providers to bear the costs of such separation in the past where the provider has “*no service-driven reason*” to do so, because such a requirement “would impose substantial costs . . . for the sole purpose” of enabling state regulation.¹⁴

Fourth, mandating that Vonage undertake such changes and bear such costs would conflict with the Commission’s policies in favor of promoting innovative services in general, and the development and deployment of broadband in particular. As the Commission put it, VoIP “facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet” — all of

⁸ *Id.* ¶ 7.

⁹ *Id.* ¶ 25.

¹⁰ *Id.*

¹¹ *Id.* ¶ 23.

¹² *Id.*; *see id.* ¶ 37.

¹³ *Id.* ¶ 29.

¹⁴ *Id.* (emphasis in original).

which is in furtherance of federal policy and strongly in the public interest.¹⁵ Forcing VoIP providers to incur the substantial costs and operational complexity of separating their integrated, any-distance services would substantially reduce the benefits of IP-based technologies and would discourage the development and deployment of innovative new services by increasing the cost and risk of rolling out those new services, contrary to the Commission's policies.

Fifth, the Commission recognized that its conclusions were not limited to Vonage's service, but applied to other VoIP services as well. As the Commission explained, the "integrated capabilities and features" characteristic of VoIP "are not unique to [Vonage's service], but are inherent features of most, if not all, IP-based services."¹⁶ Therefore, the Commission's conclusions about Vonage's service apply as well to "other types of IP-enabled services having basic characteristics similar to" that service — a class the Commission expressly recognized included "cable companies" and other "facilities-based providers" — and would "preclude state regulation to the same extent."¹⁷ And the Commission emphasized that a key characteristic warranting the same conclusion is a service offering with "a suite of integrated capabilities" that enables consumers to "originate and receive voice communications and access other features and capabilities."¹⁸ Tellingly absent from that list of "basic characteristics" is the portability Vonage offers, but that facilities-based providers often do not. Because the Commission did not have any services other than Vonage's before it, the Commission did not rule directly on those facilities-based services, but made clear that, as to any such services, it "would preempt state regulation" to the same extent.¹⁹

B. The Eighth Circuit's Decision in *Minnesota Public Utilities Commission*

The Eighth Circuit, rejecting a variety of challenges to the *Vonage Order*, addressed each of these key findings.

First, with regard to the geographic indeterminacy of VoIP services, the Eighth Circuit upheld both of the bases underlying the Commission's finding. The court recognized "the practical difficulties of determining the geographic location of nomadic VoIP calls."²⁰ And it also recognized "the practical difficulties" of using the assigned telephone number for "accurately determining the geographic location of VoIP customers when they place a phone

¹⁵ *Id.* ¶ 37.

¹⁶ *Id.* ¶ 25 n.93.

¹⁷ *Id.* ¶¶ 25 n.93, 32.

¹⁸ *Id.* ¶ 32.

¹⁹ *Id.*; *see id.* ¶ 1 (stating that it is "highly unlikely that the Commission would fail to preempt state regulation of [facilities-based] services to the same extent").

²⁰ *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 579.

call,” as the number may not match “the physical location at which they would first utilize [the] VoIP service.”²¹

Second, the court rejected challenges to the Commission’s determinations about the integrated nature of VoIP service. The court specifically upheld the Commission’s finding that “communications over the Internet [are] very different from traditional landline-to-landline telephone calls because of the multiple service features which might come into play during a VoIP call, *i.e.*, ‘access[ing] different websites or IP addresses during the same communication and [] perform[ing] different types of communications simultaneously, none of which the provider has a means to separately track or record [by geographic location].’”²²

Third, the court upheld the Commission’s finding that state regulation of VoIP should be preempted even assuming it were technically possible to carve out a separate, intrastate service. The court found that it was “proper” for the Commission to consider “the economic burden” that would be imposed on VoIP providers if they were required “to separate the[ir] service into . . . interstate and intrastate components.”²³ And the court recognized the long-standing rule — set out in precedents dating back at least to the 1970s — that service providers are not required to bear those costs and “develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate.”²⁴

Fourth, the court upheld the Commission’s determination that state regulation of VoIP would conflict with federal policies favoring the introduction of innovative services and the deployment and development of broadband. Indeed, the court had no difficulty affirming the Commission’s finding that “state regulation of VoIP service would interfere with valid federal rules or policies,” expressly finding that “[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.”²⁵ The court specifically upheld the Commission’s determinations that state regulation may “*harm consumers by impeding the development of vigorous competition*” and that it “conflicts with the federal policy of nonregulation” of broadband and information services, which permits those services to “flourish in an environment of free give-and-take of the market place.”²⁶

Fifth, the court recognized that the Commission, in the *Vonage Order*, found that, “if faced with the precise issue” of state attempts to regulate facilities-based VoIP services, the Commission “would preempt” state regulation of such “fixed VoIP services.”²⁷ But, because the

²¹ *Id.*

²² *Id.* at 578 (quoting *Vonage Order* ¶ 25) (alterations in original).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 580.

²⁶ *Id.* (internal quotation marks omitted; emphasis in original).

²⁷ *Id.* at 582.

Commission was not faced with that precise issue in the *Vonage Order*, the court found no need to reach claims that states can regulate the so-called “intrastate portion” of facilities-based VoIP services.²⁸

C. State Attempts to Regulate Facilities-Based VoIP Services Require Commission Action

Despite the Commission’s clear statements in the *Vonage Order*, its express intention to bring “regulatory certainty” to this area,²⁹ and its repeated reaffirmations of its “determination that interconnected VoIP services are properly classified as interstate,”³⁰ some continue to claim that legacy state regulations should apply to facilities-based, any-distance VoIP services. But the same policy considerations underlying the *Vonage Order* apply with equal force to *all* VoIP services, including so-called “fixed” VoIP services offered by facilities-based providers such as traditional wireline carriers and cable companies. Applying state regulations to those services would harm consumers, by impeding the development and deployment of innovative, integrated services that permit consumers to engage in a variety of different communications simultaneously. Such regulation would be contrary to Congress’s and the Commission’s policies of encouraging the development of such services free from the “burden[s] of rules, regulations and licensing requirements.”³¹

Subjecting facilities-based VoIP providers to state regulations designed for different services in a different era, moreover, would conflict with Congress’s and the Commission’s policies to encourage the development and deployment of broadband services, as set forth in Section 706 of the 1996 Act and in Commission decisions informed by that section, which have been upheld by the courts.³² The Commission has recognized the “nexus between VoIP services and accomplishing [those policy] goals,” finding that VoIP “driv[es] consumer demand for broadband connections, and consequently encourag[es] more broadband investment and deployment.”³³ Because facilities-based VoIP providers are also the ones investing in the deployment of next-generation broadband infrastructure, over which VoIP service can be provided by either the facilities-based provider itself or a third-party, “over the top” provider, such as Vonage, applying state regulations to those providers would harm consumers by “discourag[ing] the . . . building [of] next generation networks in the first place.”³⁴

²⁸ See *id.* at 583.

²⁹ *Vonage Order* ¶ 1.

³⁰ See, e.g., Report and Order, *IP-Enabled Services*, 22 FCC Rcd 11275, ¶ 37 (2007).

³¹ *Vonage Order* ¶ 21.

³² See, e.g., *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004).

³³ *Vonage Order* ¶ 36.

³⁴ Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) et al.*, 19 FCC Rcd 21496, ¶ 27 (2004), *aff’d*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

Applying such regulations only to facilities-based VoIP providers also would prevent the creation of “a regulatory level playing-field among broadband platforms,”³⁵ in conflict with federal policies that favor not only development of information services and deployment of broadband, but also competition on equal terms, so that consumers — and not regulators — are picking winners in the marketplace.³⁶

As the Commission recognized in its *Vonage Order*, facilities-based VoIP services offer consumers many of the same features as those that over-the-top services offer. For example, fixed VoIP providers are offering, or planning to offer, the ability for customers to choose phone numbers that are not associated with the customer’s geographic location. Other innovative features include Find Me/Follow Me services, which allow customers to instruct calls to be sent to a series of successive numbers (for example, the customer’s office, then the customer’s cell phone, and then the customer’s friend’s house) until the call is answered, and simultaneous ring services, where a call to the VoIP number rings simultaneously on several phones (again, potentially the customer’s office phone, her cell phone, and her husband’s cell phone), with the first device to answer being connected to the caller. As the Commission recognized, features like these mean that the VoIP customer’s telephone number is not a reliable proxy for determining the geographic end points of a call.³⁷ As discussed above, where telephone numbers do not serve as a reliable proxy for determining an end point of the communication, the Commission has concluded that state regulation is preempted for that reason alone because such regulation would impermissibly regulate interstate communications.

In addition, facilities-based VoIP providers also overwhelmingly market their services to consumers as any-distance, multi-function services, without a separate intrastate-only component. Consumers want these any-distance services, as is evident from the popularity of similar offerings from wireless carriers, CLECs, cable companies, and traditional wireline carriers. In this competitive arena, any-distance VoIP service has been immensely successful, with more than 10 million customers estimated as of the end of the first quarter of 2007, and more than 22 million customers estimated by the end of 2009.³⁸ Moreover, the use of IP enables facilities-based VoIP providers, as well as over-the-top providers, to integrate various capabilities seamlessly into these any-distance services — including voice, e-mail, call management and the like — thus enabling more efficient and effective communications. The Commission has long recognized that IP-based services that enable consumers, “[i]n a single . . . communication,” to access a variety of features in different locations “either sequentially or

³⁵ Written Statement of The Honorable Kevin J. Martin Before the Committee on Commerce, Science & Transportation, U.S. Senate (Sept. 12, 2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267390A1.pdf

³⁶ See, e.g., *Vonage Order* ¶ 29 n.108; Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, ¶ 2 (1998) (subsequent history omitted).

³⁷ *Vonage Order* ¶ 23; see *id.* ¶ 7 (noting that Vonage offers a simultaneous ring feature).

³⁸ See Craig Moffett *et al.*, BernsteinResearch, *VoIP: The End of the Beginning* at 1, 3, 7 (Apr. 3, 2007).

simultaneously” do “not necessarily have a point of ‘termination’ in the traditional sense” for jurisdictional purposes.³⁹

As the Commission has noted, this integration makes application of its traditional end-to-end analysis “difficult, if not impossible.”⁴⁰ Communications using integrated, feature-rich, facilities-based VoIP services do not involve “a continuous two-way transmission path from the caller location to” a single end-point,⁴¹ but instead reach multiple end-points in a single communication.⁴² Like Vonage, facilities-based VoIP providers have no economic or service-based reason to track and isolate, on a real-time basis, the multiple end-points that may be reached in a single communication session, and thereby to carve out a stand-alone, intrastate voice service from that integrated suite of services. Consumers are not demanding such stand-alone services. Imposing 50 different state regulatory regimes on VoIP services would thus pose “impediments [that] substantially affect both the conduct and development of interstate communications” and that justify preemption of state regulation of *all* VoIP services.⁴³

As a result, state regulation of facilities-based VoIP services is appropriately preempted for the same reasons the Commission preempted state regulation of Vonage’s over-the-top VoIP service. Confirming that state regulation of facilities-based VoIP services is preempted for the reasons explained in the *Vonage Order* is fully supported by the Eighth Circuit’s decision upholding that order. Moreover, the Commission’s and Eighth Circuit’s decisions themselves are fully consistent with a decades-long line of precedent from other courts upholding Commission decisions preempting state regulation to prevent interference with the Commission’s deregulatory objectives of promoting competition and innovation.

One closely analogous example is the Commission’s preemption of state regulation of information services under its *Computer Inquiry* orders. The Ninth Circuit upheld the Commission’s preemption of state regulation of information services (or enhanced services, as they were called at the time) that included integrated interstate and intrastate capabilities, based on the Commission’s determination “that it would not be economically feasible for the BOCs to offer the interstate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion.”⁴⁴ As a result, the “BOCs would be forced to comply with the state’s more stringent requirements, or choose not to offer certain enhanced services,” thereby “essentially negating the [Commission’s] goal of allowing integrated

³⁹ Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, ¶ 22 (1998).

⁴⁰ *Vonage Order* ¶ 24.

⁴¹ Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619, ¶ 9 (1992).

⁴² In implementing CALEA, the Commission has likewise determined that there can be “multiple origins, destinations, directions, and terminations in a call.” Order on Remand, *Communications Assistance For Law Enforcement Act*, 17 FCC Rcd 6896, ¶ 47 (2002).

⁴³ *NARUC v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (internal quotation marks omitted).

⁴⁴ *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994).

provision” of those services.⁴⁵ The court, moreover, recognized that the Commission’s preemption authority does not require the actual impossibility of separating out an intrastate service. The Ninth Circuit explained that, even if it were technically “possible to comply with both the states’ and the [Commission’s] regulations,” preemption was appropriate based on the Commission’s finding that it is “highly unlikely, due to practical and economic considerations,” that consumer reaction would enable such jurisdictional division to succeed. Thus, in that case, state regulation presented the same conflict with the same federal policies — increasing costs and burdens on providers, thereby deterring the development and deployment of innovative services the Commission wanted to encourage — as are presented by state attempts to regulate VoIP services here.

Another closely analogous example is the Commission’s preemption of state regulation of customer premises equipment (“CPE”), where the Commission similarly found that federal policies of promoting competition and innovation — the same policies at issue here — supported the preemption of state regulation that would frustrate those objectives. The D.C. Circuit upheld the Commission’s finding that consumers’ preference for “using CPE jointly for interstate and intrastate communication” would “unavoidably affect . . . federal policy adversely.”⁴⁶ As the court explained, because “consumers use the same CPE in both interstate and intrastate communications and generally wish to purchase both interstate and intrastate transmission services,” if “charges for intrastate transmission service” included CPE charges, that would “certainly influence the consumer’s choice of CPE” in conflict with federal policy.⁴⁷ And, in the *NCUC* decisions, the Fourth Circuit upheld the Commission’s preemption of state regulation of CPE on the ground that it was “not feasible, as a matter of economics or practicality of operation,” to have separate state and federal regulation of the CPE, despite the fact that the CPE in question was used 97 to 98 percent of the time for intrastate calls.⁴⁸ Similarly, in defending its preemption of state regulation of BellSouth’s voice mail service, the Commission explained that “absolute impossibility” is not the standard for justifying federal preemption, but instead that it was sufficient to preempt state regulation that “marketing realities effectively preclude[] the separate offering of interstate” and intrastate voice mail services.⁴⁹ The Eleventh Circuit found the Commission’s defense of its preemption decision so obviously correct that it affirmed the *MemoryCall Order* in a one-word, unpublished ruling.⁵⁰

All of these holdings apply here. Forcing facilities-based VoIP providers artificially to break apart their any-distance, integrated offerings solely to provide states with an intrastate

⁴⁵ *Id.* at 932-33.

⁴⁶ *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982).

⁴⁷ *Id.* at 215.

⁴⁸ *North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787, 791 (4th Cir. 1976); *see id.* at 796 (Widener, J., dissenting); *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036, 1044, 1046 (4th Cir. 1977).

⁴⁹ Brief of the FCC and the United States at 29-34, *Georgia Pub. Serv. Comm’n v. FCC*, No. 92-8257 (11th Cir. filed Feb. 8, 1993).

⁵⁰ *See Georgia Pub. Serv. Comm’n v. FCC*, No. 92-8257, 5 F.3d 1499 (Table) (11th Cir. Sept. 22, 1993).

communications component they can regulate would require VoIP providers to change multiple aspects of their service operations to comply with such a requirement, including creation of systems that track and identify the many types of communications activity that the integrated features make possible; modifications to billing systems; the development of new services, structures and associated rates; and new sales and marketing efforts for these new, artificial offerings, all of which would be done “just for regulatory purposes.”⁵¹ Because facilities-based VoIP providers offer integrated features — such as on-line account and voice mail management, simultaneous ringing, and non-geographically relevant numbers — that make telephone numbers a poor proxy for customer location, it would also be difficult, if not impossible, to offer an integrated, any-distance VoIP service that is not inadvertently provided in a manner that some “state may deem that communication to be ‘intrastate’ thereby subjecting [the facilities-based VoIP provider] to its economic regulations absent preemption.”⁵² Because imposing state regulation — much less 50 different sets of regulations — on facilities-based, any-distance, multi-function VoIP services would thus conflict with federal policies favoring the introduction of innovative services and the deployment of broadband, state attempts to regulate the so-called “intrastate” portion of such VoIP services are precisely the types of “costly and inefficient burdens on interstate communications which are sometimes imposed by state regulation” that the Commission is “free to strike down.”⁵³

In light of all of this, the Commission’s recent statement in the context of universal service contributions of VoIP providers — “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*”⁵⁴ — cannot refer merely to the capability of identifying the location of its customers when they place individual phone calls, which the Commission has emphasized is only “one clue” to the jurisdiction of the service.⁵⁵ Rather, the capability the Commission referenced must be the capability to assemble all of the remaining clues — such as the locations of the myriad databases, servers, and websites accessed during a communications session — that would be necessary to track jurisdiction under the end-to-end analysis where end users employ “multiple service features that access different websites or IP addresses during the same communication session.”⁵⁶ VoIP providers, moreover, would have to have the capability to identify and record all of those many points in real time, so that they do not, for example, inadvertently carry “intrastate” VoIP communications in a given state in conflict with that state’s particular regulations. But the capability to disaggregate and determine the end points of all the various components of an integrated, any-distance VoIP service does not now exist, there is no

⁵¹ *Vonage Order* ¶ 29.

⁵² *Id.* ¶ 30.

⁵³ *NARUC*, 746 F.2d at 1501.

⁵⁴ Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶ 56 (2006), *petitions for review granted in part, decision vacated in part, Vonage Holdings Corp. v. FCC*, Nos. 06-1267 & 06-1317, ___ F.3d ___, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

⁵⁵ *Vonage Order* ¶ 25.

⁵⁶ *Id.*

service-driven reason to develop it, and forcing facilities-based providers alone to do so would negate federal policies favoring the deployment of VoIP services (and the broadband infrastructure over which those services travel) in a uniform, national, de-regulatory environment. Moreover, the D.C. Circuit recently upheld the core of the Commission's determination to require interconnected VoIP providers to make USF payments, while continuing to defer the ultimate determination of the classification of VoIP as a telecommunications service or information service; that ruling reiterates the deference the courts give to Commission decisions that ensure competitive neutrality.⁵⁷

Finally, in addition to confirming that states are preempted from imposing regulations on facilities-based VoIP services, the Commission should also ensure that its own rules establish a level regulatory playing field for all VoIP services. Thus, there should be no entry or rate regulation of VoIP services, regardless of provider, and no provider should be required to offer a "local" or "long-distance" VoIP service on a stand-alone basis, or to provide equal access to a non-existent "local" component of an integrated VoIP offering. There is no reason to impose such regulation on any provider of any-distance VoIP services. Indeed, requiring the tariffing or separate offering of a "local" or "long-distance" component of a VoIP service would mandate the very same kind of separation of any-distance VoIP service as state tariff requirements applied to "local" VoIP service. Just as the states are preempted from requiring providers to break apart their VoIP services, the Commission should refrain from doing so itself. In addition, wireline carriers, alone, are currently subject to equal access, presubscription, and 1+ dialing parity requirements for their legacy, circuit-switched services. Carrying over those requirements, designed for a different era, to any-distance VoIP services would inhibit broadband deployment and skew competition, contrary to the Commission's goals of promoting such deployment and creating a level playing field. And, as it has in other related contexts, the Commission should find that extending the *Computer Inquiry's* "one-wire world" rules to any-distance VoIP offerings is not in the public interest and would be harmful to competition. As in the case of broadband services generally, applying those rules to VoIP providers would mean that they would either have to delay service offerings pending their redesign or have to offer consumers a package without all the features and services that can be integrated with VoIP; in either case, consumers lose.⁵⁸

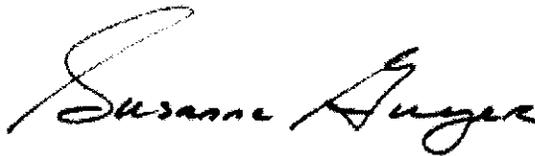
⁵⁷ See *Vonage Holdings Corp.*, 2007 WL 1574611 at 12-16.

⁵⁸ See, e.g., Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 65 (2005), petitions for review pending, *Time Warner Telecom Inc. v. FCC*, Nos. 05-4769 et al. (3d Cir. argued Mar. 16, 2007).

* * *

Now that the Eighth Circuit has affirmed the *Vonage Order*, the Commission should eliminate any remaining uncertainty by confirming that the same rules apply to all VoIP providers. Such clarification will further federal policies and benefit consumers by facilitating consumer choice, spurring technological innovation and the deployment of broadband infrastructure, and promoting the use of broadband services and the Internet.

Sincerely,



Susanne A. Guyer



Michael E. Glover

cc: Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Daniel Gonzelez
Ian Dillner
Scott Deutchman
Scott Bergmann
Chris Moore
John Hunter
Sam Feder
Matthew Berry
Thomas Navin
Marcus Maher
Randy Clarke
Nicholas Alexander
Christi Shewman