

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

In the Matter of:

High-Cost Universal Service Support

WC Docket No. 05-337

Federal-State Joint Board on Universal Service

CC Docket No. 96-45

Lifeline and Link Up

WC Docket No. 03-109

Universal Service Contribution Methodology

WC Docket No. 06-122

Numbering Resource Optimization

CC Docket No. 99-200

Implementation of the Local Competition  
Provisions in the Telecommunications Act of 1996

CC Docket No. 96-98

Developing a Unified Inter-carrier Compensation  
Regime

CC Docket No. 01-92

Inter-carrier Compensation for ISP-Bound Traffic

CC Docket No. 99-68

IP-Enabled Services

WC Docket No. 04-36

**COMMENTS OF VONAGE HOLDINGS CORPORATION**

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## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY .....	1
II.	THE COMMISSION SHOULD REITERATE ITS JURISDICTIONAL AUTHORITY OVER INTERCONNECTED VOIP .....	2
	A. Federal Law Preempts Traditional State Telephone Company Regulation of Interconnected VoIP, Including State USF Contribution Assessments.....	3
	B. The Commission Must Continue to Prevent Inconsistent Regulation of Interconnected VoIP and Other IP/PSTN Services .....	6
III.	CONSUMERS SHOULD HAVE ACCESS TO STANDALONE BROADBAND SERVICE IN SUPPORTED AREAS .....	8
IV.	CONCLUSION.....	11

## I. INTRODUCTION AND SUMMARY.

Vonage Holdings Corp. (“Vonage”) appreciates the opportunity to review and comment on the draft intercarrier compensation/universal service fund reform proposals (“Draft Proposals”) the Commission is considering as it continues its effort to comprehensively reform these programs. As the *Further Notice* demonstrates, the Commission has approached this difficult and complex subject in a thoughtful, deliberate manner, making substantial progress toward reform.<sup>1</sup> Vonage in particular applauds the Commission’s proposed classification of IP/PSTN services as information services and its continued preemption of state efforts to impose traditional telephone company regulations on IP/PSTN services.<sup>2</sup>

If the Commission proceeds with the proposals on which it has solicited comment, it should take two additional steps to further federal policies and goals and ensure broad availability of IP/PSTN and other advanced services. First, the Commission should reaffirm its jurisdictional authority over interconnected VoIP services. If the Commission then concludes that states can impose USF and TRS contribution obligations on interconnected VoIP providers (“IVPs”), it must also reiterate the Commission’s exclusive authority to make such determinations and clearly explain the specific circumstances in which state USF and TRS assessments would not conflict with federal policy. By harmonizing federal and state regulatory efforts in this way, the FCC will

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<sup>1</sup> *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, and CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 2008 FCC LEXIS 7792 (Nov. 5, 2008) (“*Further Notice*”).

<sup>2</sup> *Id.* at A-93-95 (¶¶ 209-211); C-91-93 (¶¶ 204-206).

both facilitate state efforts to collect USF and relieve IVPs and other IP/PSTN service providers from the threat of inconsistent regulatory obligations.

In addition, the Commission should require recipients of federal high cost universal service funds for broadband to offer their supported broadband services on a stand-alone basis. By taking this step, the Commission can help ensure that all Americans will benefit from the wide array of innovative IP/PSTN and other advanced services available over broadband networks.

## **II. THE COMMISSION SHOULD REITERATE ITS JURISDICTIONAL AUTHORITY OVER INTERCONNECTED VOIP.**

In its 2004 Memorandum Opinion and Order (“*Vonage Preemption Order*”), the Commission determined that interconnected VoIP is a jurisdictionally interstate service offering and preempted traditional state telephone company regulation of IVPs.<sup>3</sup> In its draft proposals, the Commission resolves the long-standing question of whether interconnected VoIP is an information service by concluding that IP/PSTN services are information services, reinforcing the need for a “single national policy” for these services.<sup>4</sup> Nevertheless, two Draft Proposals under consideration assert that “states are free to require contributions to state universal service or telecommunications relay service funds” as long as the contribution methodologies are consistent with federal policy.<sup>5</sup>

If the Commission now believes that it is possible for states to assess USF and TRS contributions on IVPs in a manner that is consistent with federal policy, it should

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<sup>3</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (“*Vonage Preemption Order*”), *aff’d sub nom. Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

<sup>4</sup> *Vonage Preemption Order* at 22425 (¶ 33).

<sup>5</sup> *Further Notice* at A-94-95 (¶ 211 & n. 536 ); C-93 (¶ 206 & n. 527).

explain the basis for this change in law.<sup>6</sup> It should also make clear that the FCC, not the states, has the authority to determine whether a particular state telephone company regulation can be imposed in a manner that does not conflict with federal policy. Finally, if the FCC does determine that states may assess USF and TRS contributions on IVPs, it should provide clear guidance to the states so that they can assess USF and TRS from IVPs in a manner that is consistent with federal policy and avoids unnecessary conflicts among the states. To do otherwise would all but guarantee the untenable regulatory environment that the Commission wisely sought to avoid four years ago.

**A. Federal Law Preempts Traditional State Telephone Company Regulation of Interconnected VoIP, Including State USF Contribution Assessments.**

When state public utility commissions first tried to regulate Vonage’s DigitalVoice interconnected VoIP service, the FCC declared that “this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice.”<sup>7</sup> This holding was not narrowly limited to any particular regulatory provision; rather, it preempted the application of Minnesota’s “traditional ‘telephone company’ regulations.”<sup>8</sup> Among the “traditional ‘telephone company’ regulations” that the Commission preempted in the *Vonage Preemption Order* was Minnesota Statute § 237.16 subd. 9, the statute that would have required Vonage to contribute to Minnesota’s universal service program.<sup>9</sup> Federal courts consistently have

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<sup>6</sup> The Commission could likewise explain the substantial federal policy grounds for concluding that states may, pursuant to Commission methodology, establish a single uniform termination rate for all traffic including VoIP traffic.

<sup>7</sup> *Vonage Preemption Order* at 22405 (¶ 1).

<sup>8</sup> *Id.* at 22404 (¶ 1).

<sup>9</sup> *Id.* at 22409 (¶ 10 & n. 28).

recognized the broad scope of the *Vonage Preemption Order*, including its express preemption of state authority to impose USF requirements.<sup>10</sup>

Since the *Vonage Preemption Order*, the Commission has exercised its exclusive authority to determine the telecommunications obligations of Vonage and other IVPs on a number of occasions. For example, the Commission has determined that IVPs must provide E911 service;<sup>11</sup> comply with the requirements of the Communications Assistance for Law Enforcement Act;<sup>12</sup> pay into the federal Universal Service Fund;<sup>13</sup> safeguard Customer Proprietary Network Information (“CPNI”);<sup>14</sup> satisfy disability access requirements;<sup>15</sup> meet the Commission’s regulatory fee obligations;<sup>16</sup> and comply with local number portability (“LNP”) requirements.<sup>17</sup> While decisions regarding some of

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<sup>10</sup> Indeed, every federal court to consider the scope of the *Vonage Preemption Order* has come out in favor of preemption of traditional state telephone company regulation of Vonage’s interconnected VoIP services, which would include the ability to assess and collect a state Universal Service Fee. See, e.g., *Vonage Holdings, Corp. v. Neb. Pub. Serv. Comm’n*, 543 F. Supp. 2d 1062, 1071 (D. Neb. 2008); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm’n*, No. 04 Civ. 4306, 2005 U.S. Dist. LEXIS 33121, at \*5 (S.D.N.Y. Dec. 14, 2005); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1001-02 (D. Minn. 2003), *aff’d* 394 F.3d 568, 569 (8th Cir. 2004); *New Mexico Pub. Regulation Comm’n v. Vonage Holdings Corp.*, Civ. No. 08-607 WJ/RHS, Magistrate Judge’s Proposed Findings and Recommended Disposition (D. N. Mex. Nov. 12, 2008).

<sup>11</sup> *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196, 20 FCC Rcd 10245 (2005) (“*VoIP E911 Order*”).

<sup>12</sup> *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865, 20 FCC Rcd 14989, 14991-92 (¶ 8) (2005).

<sup>13</sup> See *IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 04-36, 21 FCC Rcd 7518, 7520 (¶ 2) (2005) (“*VoIP USF Order*”).

<sup>14</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 and WC Docket No. 04-36, 22 FCC Rcd 6927 (2007).

<sup>15</sup> *IP-Enabled Services*, Report and Order, WC Docket No. 04-36, 22 FCC Rcd 11275 (2007).

<sup>16</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, MD Docket No. 07-81, FCC 07-140 at ¶¶ 11-20 (rel. Aug. 6, 2007) (“*2007 Regulatory Fees Order*”).

<sup>17</sup> *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, WC Docket No. 07-243, 22 FCC Rcd 19531 (2007) (“*LNP Report and Order*”).

these obligations – such as E911 and LNP – contemplate some regulation at the state level, states may act in these situations only because the Commission has explicitly granted them authority to do so.<sup>18</sup> Significantly, the Commission has never extended that authority to state USF and TRS contributions.<sup>19</sup>

The Commission risks adopting a legally unsustainable order by suggesting in a footnote that such assessments would be consistent with prior authority that explicitly preempted such assessments.<sup>20</sup> While the Commission is free to revisit its earlier decisions, administrative law requires the Commission to “supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”<sup>21</sup> Instead of attempting to recharacterize the plain language of the *Vonage Preemption Order* in a way that conflicts with a half-dozen federal court decisions, the Commission should explain the basis for any departure from existing law, including for any determination that state USF and TRS assessments may be reconciled with federal policy. Critically, to avoid unnecessary confusion, any statement addressing the scope of

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<sup>18</sup> See *VoIP E911 Order* at 10248 (¶ 5) (“In this Order, we take the necessary steps to promote cooperative efforts by state and local governments, public safety answering point (PSAP) administrators, 911 systems service providers, and interconnected VoIP providers that will lead to improved emergency services.”); *LNP Report and Order*.

<sup>19</sup> To the contrary, as the Commission explained in the *VoIP USF Order*, “[t]he *Vonage [Preemption] Order* made ‘clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities.’” *VoIP USF Order*, 21 FCC Rcd at 7526 (¶ 14). Under section 254(d) of the Communications Act, the FCC has authority to require providers of interstate telecommunications to contribute to the federal universal service program. See 47 U.S.C. § 254(d). States do not have similar authority to assess providers of telecommunications to support state universal service programs. See 47 U.S.C. § 254(f).

<sup>20</sup> Indeed, the AT&T ex parte letter that the Draft Orders cite for the proposition that states are free to require state USF and TRS contributions makes clear that “the *Vonage [Preemption] Order* itself indicates that states do not at present have the authority to impose universal service contribution requirements on VoIP,” and cautions that the Commission must explicitly provide “a reasoned explanation for its decision” if it wishes to conclude otherwise. Ex Parte letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Chairman Martin, WC Docket Nos. 04-36, 06-122, and CC Docket No. 96-45 at 13 & n. 59 (filed Jul. 23, 2008).

<sup>21</sup> *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006).

federal preemption of interconnected VoIP or IP/PSTN regulation should reiterate that “this Commission, not the state commissions, has the responsibility and obligation to decide” what regulations apply.<sup>22</sup>

**B. The Commission Must Continue to Prevent Inconsistent Regulation of Interconnected VoIP and Other IP/PSTN Services.**

If the Commission does conclude that state USF and TRS contribution obligations do not categorically conflict with federal policy, it should also clearly explain the steps states must take to ensure that their assessment mechanisms do not conflict with the federal mechanism or with one another.<sup>23</sup> Without clear guidelines, the Commission risks undermining its “single national policy”<sup>24</sup> for regulation of interconnected VoIP service and subjecting these and other IP/PSTN services to the inconsistent regulation that the Commission found would violate federal policy in the *Vonage Preemption Order*.<sup>25</sup> Moreover, because any mechanism that conflicts with federal policy will necessarily remain preempted, the Commission can facilitate the states’ efforts to collect USF and TRS by articulating clear national guidelines for permissible state assessments.

The Commission’s *Vonage Preemption Order* recognized the many ways in which services like Vonage’s “fundamental[ly] differ[]”<sup>26</sup> from traditional landline services, including the inability “to sever DigitalVoice into interstate and intrastate communications.”<sup>27</sup> The Commission’s imposition of federal USF contribution

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<sup>22</sup> *Vonage Preemption Order* at 22405 (¶ 1).

<sup>23</sup> *See, e.g., AT&T Corp. v. Pub. Util. Comm’n of Texas*, 373 F.3d 641, 645-47 (5th Cir. 2004) (rejecting state universal service program that would have subjected revenues to multiple universal service fund assessments).

<sup>24</sup> *Vonage Preemption Order* at 22425 (¶ 33).

<sup>25</sup> *See, e.g., Vonage Preemption Order* at 22427 (¶ 36).

<sup>26</sup> *Id.* at 22406 (¶ 4).

<sup>27</sup> *Id.* at 22423 (¶ 31).

obligations likewise recognized that “it is difficult for some interconnected VoIP providers to separate their traffic on a jurisdictional basis” and adopted a 64.9% interstate safe harbor to permit IVPs to contribute to the federal USF.<sup>28</sup> State assessment methods that do not permit IVPs to contribute on the basis of safe harbors or that mandate intrastate safe harbors that are greater than 35.1% would be inconsistent with federal policy and therefore would remain preempted. Looking ahead, state assessments will also have to adjust to significant changes in federal contribution methods, such as the proposed shift to a numbers-based contribution methodology.

Perhaps most critically, the Commission must clearly declare the basis for determining which state jurisdiction is eligible to collect USF for a particular customer to avoid assessment of the same contribution source by multiple states. As the Commission recognized in its 2004 *Vonage Preemption Order*, interconnected VoIP services are thoroughly independent of geography.<sup>29</sup> The same practical difficulties that prevent separation of interstate and intrastate traffic make it equally problematic to determine *which* state should be entitled to collect a USF surcharge for a given call or a given customer.

Vonage’s concern about conflicts in USF collection methodology among the states are far from hypothetical. A conflict already exists among the few states that have disregarded the *Vonage Preemption Order* and attempted to impose state USF obligations on IVPs. The Nebraska Public Utility Commission’s regulations would require IVPs to contribute to the state USF for all subscribers with Nebraska billing addresses. Kansas (which shares a 350-mile border with Nebraska) has not taken this approach, and has

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<sup>28</sup> *VoIP USF Order* at 7544 (¶ 53).

<sup>29</sup> *Vonage Preemption Order* at 22419-21 (¶ 25).

instead attempted to impose state universal service obligations on the basis of a subscriber's "primary physical service address,"<sup>30</sup> which frequently will *not* be the subscriber's billing address. A student who uses Vonage's DigitalVoice service while away at school but has the bill sent home, a businessperson who uses DigitalVoice from a home office but has the bill sent to the main office, a person who uses DigitalVoice "at the cabin" in another state; all these are situations where the subscriber's billing address would differ from his or her registered "primary physical service address."

If state universal service obligations are ever to be imposed on VoIP, the basis for each state's contribution assessment must be made at the federal level to avoid these sorts of regulatory conflicts. For example, the Commission could adopt a presumption that state assessments based on subscribers' "place of primary use"<sup>31</sup> would not conflict with federal policy. But whatever method the Commission selects, the conflicting attempts of certain states to enact state USF assessments on VoIP already illustrate why the Commission must clearly define the limited circumstances in which state regulation does not "negat[e] federal policy and rules."<sup>32</sup>

### **III. CONSUMERS SHOULD HAVE ACCESS TO STANDALONE BROADBAND SERVICE IN SUPPORTED AREAS.**

Vonage commends the Commission's proposal to further broadband deployment by requiring recipients of federal high-cost universal service support to offer broadband

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<sup>30</sup> *Investigation to Address Obligations of VoIP Providers with Respect to the KUSF*, Implementation Order Adopting Staff Report and Recommendation, Docket No. 07-GIMT-432-GIT, 2008 Kan. PUC LEXIS 1481 at \*10-12 (Sept. 22, 2008).

<sup>31</sup> Such an approach could be modeled on the Mobile Telecommunications Sourcing Act, which determines tax situs for mobile wireless customers. *See* 4 U.S.C. §§ 116-126.

<sup>32</sup> *Vonage Preemption Order* at 22418 (¶ 23).

Internet access service.<sup>33</sup> However, as currently described, the Commission’s proposals would not prevent USF recipients limiting consumer choice and competition by offering USF-subsidized broadband service only as part of a bundle with voice and/or other services. As Vonage previously has explained, requiring USF recipients to provide broadband on a standalone basis will ensure that customers in unserved and underserved have access to advanced services that are comparable to those available in urban areas, and will facilitate competition for all services that can be provided over a broadband connection.<sup>34</sup>

The Commission generally has subjected broadband service to a “light[] regulatory touch” because the market for broadband in many areas is subject to “vigorous” competition.<sup>35</sup> While Vonage agrees that this is often the correct approach, “vigorous competition” is by definition not present in areas where universal service support is needed for deployment of broadband Internet access services. In these cases, the Commission can and should regulate to ensure that critical policy goals – including advancing the public interest by ensuring that all Americans have comparable access to advanced and IP services – are met.

Imposing a standalone broadband requirement as a condition of federal subsidies is both lawful and reasonable. Indeed, specific service requirements for USF recipients have been the hallmark of the USF program since its inception.<sup>36</sup> Nor would such a requirement be particularly burdensome given that the Draft Orders already contain a

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<sup>33</sup> See *Further Notice* at A-17-40 (¶¶ 28-91); C-18-39 (¶¶ 28-87).

<sup>34</sup> See generally Reply Comments of Vonage Holdings Corp., WC Docket No. 05-337 and CC Docket No. 96-45 (filed Jun. 2, 2008).

<sup>35</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

<sup>36</sup> See 47 C.F.R. § 54.101(a).

number of requirements for entities that would use USF funds to provide broadband, including the establishment of minimum transfer rates, “always on” availability, and a prohibition on providing broadband via satellite.<sup>37</sup>

Such action would also be consistent with other federally funded broadband infrastructure programs. For example, the Rural Utility Service “Community Connect” Broadband Grant, which encourages broadband deployment to rural, low-income communities on a “community-oriented connectivity” basis, imposes a number of conditions on recipients. Among these obligations are a minimum time commitment, requirements to provide certain facilities with free broadband access, and an express prohibition on ILEC grantees using the financed facilities to provide local exchange service.<sup>38</sup> Similarly, the National Telecommunications and Information Administration Public Telecommunications Facilities Program (“PTFP”), which provides matching grants to assist in the planning and construction of public telecommunications facilities such as fiber optics and T1 interconnects for distance learning,<sup>39</sup> requires restrictions on fund recipients, including approval of equipment and supplies to be used and prohibitions on advertising.<sup>40</sup> These conditions are imposed to ensure that the grant program goals are met.

To ensure that consumers in rural and high cost areas have access to services that are reasonably comparable to those available in urban areas – including a choice of different providers for current and future IP-enabled services – the Commission should

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<sup>37</sup> See *Further Notice* at A-17-18, 37 (¶¶ 27-28, 82); C-17-18, 36 (¶¶ 27-28, 78).

<sup>38</sup> 7 C.F.R. §§ 1739.11(c), (e), 13(b).

<sup>39</sup> See generally NTIA: PFTP Nonbroadcast Policy, available at <http://www.ntia.doc.gov/ptfp/dlearn/ptfpnonbroad.htm>.

<sup>40</sup> See 15 C.F.R. §§ 2301.7, 2301.19(a)(5).

require all recipients of USF funds designated for the provision of broadband to offer those services on a standalone basis. Otherwise, as Vonage previously has explained, grantees will be free to use federal high-cost support to cross-subsidize their other services and thwart competition from other service providers. Simply put, requiring standalone broadband offerings will further the goals of the USF program, and should be adopted as a condition of receiving funding.

#### **IV. CONCLUSION.**

Vonage appreciates the substantial effort the Commission has undertaken to bring about comprehensive universal service reform, as well as the opportunity to review the Commission's reform proposals. By implementing the minor modifications to the proposals discussed above, the Commission can ensure the continued viability of interconnected VoIP and other innovative broadband services, to the benefit of all Americans.

Respectfully submitted,



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