

**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

**REPLY COMMENTS OF VONAGE HOLDINGS CORPORATION**

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## I. INTRODUCTION AND SUMMARY.

There is no question that services like Vonage's, which offer innovative features using a consumer's broadband connection, are fundamentally different than traditional circuit-switched telephony. As it explained in its initial comments, Vonage fully endorses 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>1</sup> There is much support for this decision, both in the comments and in the Commission's precedents and governing statute. Nonetheless, many commenters urge the Commission to ignore the fundamental differences between IP and legacy communications in a misguided effort to saddle emerging communications with an outdated regulatory framework. The record in this proceeding thus makes three things clear.

*First*, IP/PSTN services squarely fit the definition of information services, and the Commission's proposed classification of VoIP and other IP/PSTN services as information services makes sound regulatory and policy sense. *Second*, the factual and policy grounds for the *Vonage Preemption Order*<sup>2</sup> have not changed, and provide an ongoing basis for preemption of state efforts to regulate services like Vonage's. *Finally*, the Commission should proceed to classify IP/PSTN services as information services now to avoid subjecting these services to an untenable state regulatory regime even if action on intercarrier compensation and broader USF reform must wait. By taking these actions, the Commission will provide the certainty needed to allow interconnected VoIP

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<sup>1</sup> Comments of Vonage Holdings Corp. at 2-8 (filed Nov. 26, 2008) ("Vonage Comments").

<sup>2</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404 (¶ 4) (2004) ("*Vonage Preemption Order*"), *aff'd sub nom Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

and other IP/PSTN services to continue to thrive, enabling Americans to realize the full benefits of these technologies.

## **II. THE COMMISSION SHOULD CLASSIFY IP/PSTN SERVICES AS INFORMATION SERVICES.**

Vonage’s service, like other IP-based services, is “fundamental[ly] different[t]” than circuit switched telephone service.<sup>3</sup> In the *Vonage Preemption Order*, the Commission examined these differences and explained, at length, the multiple technical and policy grounds for its conclusion that the FCC must preempt “traditional ‘telephone company’ regulation” of Vonage’s service and instead adopt a “single national policy” to govern these services.<sup>4</sup> In two of its proposals, the FCC takes the logical next step in its careful construction of this “single national policy” by concluding that IP/PSTN services, including interconnected VoIP services like Vonage’s, are information services rather than telecommunications services.<sup>5</sup> Despite the sound technical, legal, and policy basis for this conclusion, a number of commenters object, and argue instead that IP/PSTN services should be classified as telecommunications services. These arguments are unavailing.

### **A. VoIP Services Transform Information by Facilitating a Net Protocol Conversion.**

As the Commission’s proposals recognize, IP/PSTN services undergo net protocol conversion – a key criterion used by the Commission to determine if an offering is an

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<sup>3</sup> *Vonage Preemption Order* at 22406 (¶ 4).

<sup>4</sup> *Id.* at 22404, 22435 (¶¶ 1, 33).

<sup>5</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 Inter-carrier Compensation Regime, Inter-carrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 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, 2008 FCC LEXIS 7792, Appendix A ¶ 209, Appendix C ¶ 204 (Nov. 5, 2008).

information service.<sup>6</sup> Nevertheless, some opponents of IP/PSTN information service classification maintain that the classification should not apply “when the information transmitted by voice is received by voice” because there is no net protocol conversion from the user’s perspective when the communications begin and end with sound waves.<sup>7</sup> However, humans do not communicate in electronic signals, and any means of electronic communication necessarily must have some means of converting speech (sound waves) or text (symbols on a video screen or piece of paper) into electronic form and to convert those electronic impulses back into a form that can be perceived by humans. In other words, because *all* electronic communications necessarily must involve “protocol conversion” for the end user, disregarding the form in which the information is transmitted over the network in favor of looking at how the user perceives that information would render the Commission’s net protocol conversion test a nullity.

As the Commission confirmed in the *Non-Accounting Safeguards Order*, “an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information,” rendering the service an information service.<sup>8</sup> In the case of Vonage’s services, the Vonage network<sup>9</sup> receives information from its customers in

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<sup>6</sup> *See id.*

<sup>7</sup> *See, e.g.*, Comments Submitted on Behalf of the Public Utilities Commission of Ohio (filed Nov. 26, 2008) at 9-11 (“PUCO Comments”); Initial Comments of the National Association of Regulatory Utility Commissioners at 13-16 (filed Nov. 28, 2008) (“NASUCA Comments”); Comments of the National Exchange Carrier Association, Inc. at 31-32 (filed Nov. 26, 2008); Comments of the Rural Independent Competitive Alliance at 10-11 (filed Nov. 26, 2008).

<sup>8</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21956 (¶ 104) (1996) (“*Non-Accounting Safeguards Order*”).

<sup>9</sup> The Vonage network is not a “network” in the traditional telecommunications carrier sense. The transport from the customer’s analog telephone adapter (“ATA”) to the Vonage gateway is over the

IP/packet mode format. This is after the sound waves from the customer's voice are converted into electronic signals by the customer's telephone and then into IP/packet mode format by the customer's analog telephone adaptor ("ATA"). Vonage's network then hands off this information to the terminating PSTN carrier in Time Division Multiplexing ("TDM") format. Simply put, as Vonage previously has explained, its business *is* net protocol conversion.<sup>10</sup>

Some parties have acknowledged that Vonage and others provide protocol conversion services, yet nevertheless maintain that the Commission should not classify these services as information services because protocol conversions are "part and parcel of any telecommunications network."<sup>11</sup> Such arguments ignore the distinction between *net* protocol conversion and the intermediate conversions that take place within a network. Indeed, without exception, the protocol conversions cited by these parties (*e.g.*, analog to digital, wireless to wireline, TDM to fiber optic) are conversions that occur *entirely within the PSTN*. Thus, the information ultimately enters and leaves the network in the same form.

For example, the Ohio Public Utilities Commission claims that the Commission's *AT&T IP in the Middle Decision* somehow stands for the broad proposition that "a service that undergoes a change in transmission protocol between its origination and

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public Internet. Thus, unlike a traditional wireline carrier, Vonage does not have a dedicated circuit connecting to the premises.

<sup>10</sup> Comments of Vonage Holdings Corp. at 25, WC Docket No. 04-36 (May 28, 2004).

<sup>11</sup> NASUCA Comments at 13-14. *See also* PUCO Comments at 10-11; Comments of the California Public Utilities Commission and the People of the State of California at 4 (filed Nov. 24, 2006) ("CPUC Comments"); Comments of the Public Service Commission of Wisconsin at 8 (filed Nov. 26, 2008) ("Wisconsin PSC Comments").

destination is still a telecommunications service.”<sup>12</sup> In fact, the Commission specifically made clear that its “order ... addresses only AT&T’s specific service, and that service does not involve a net protocol conversion.”<sup>13</sup> As the Commission explained, calls on the AT&T network at issue in the *IP in the Middle Decision* enter and leave that network as circuit-switched voice, and any protocol conversions “associated with AT&T’s specific service take place within its network.”<sup>14</sup> In contrast, information on Vonage’s network used to provide IP/PSTN services enters using one protocol (IP/packet mode) and exits in another protocol (TDM).<sup>15</sup> This reason alone justifies the classification of VoIP services such as Vonage’s as information services.

**B. In Addition to Transforming Information, VoIP Services Retrieve and Process Stored Information.**

VoIP services also indisputably meet the definition of information services because they store, process, and retrieve information.<sup>16</sup> The National Association of Regulatory Utility Commissioners and others have sought to avoid this conclusion by maintaining that VoIP services such as Vonage’s somehow do not involve provision of

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<sup>12</sup> PUCO Comments at 10 (citing *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457 (2004) (“*IP in the Middle Order*”).

<sup>13</sup> *IP in the Middle Order*, 19 FCC Rcd. at 7465 (¶ 13).

<sup>14</sup> *Id.* at (¶¶ 11-12).

<sup>15</sup> Vonage also provides customers with the ability to set up call forwarding to a regular landline or wireless phone. Under this scenario, a Vonage customer could receive a call from the PSTN, which would enter the Vonage network in TDM format. Vonage would convert to IP format while the call traversed the Vonage network. Finally, Vonage would convert the call back to TDM format for hand off to the terminating carrier. While Vonage provides this feature to ensure that its customers have the freedom and flexibility to use their Vonage services in ways that best meet their needs, the core of Vonage’s service is the provision of net protocol conversion for IP/PSTN services.

<sup>16</sup> See 47 U.S.C. § 153(20)(an “information service” consists of “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

“additional, different, or restructured information.”<sup>17</sup> As the record amply reflects, this is simply not so.

Most fundamentally, the core of Vonage’s service involves accessing and processing of information via telecommunications. When a PSTN user places a call to a Vonage customer, Vonage not only converts the call content into IP/packet mode, but also must resolve the IP address associated at that given moment in time with the Vonage customer who is being called. Vonage then encodes the information into a data stream so that the packetized data with the voice communications can travel the Internet to reach the customer. This process involves much more than transmitting data, and would not be possible without accessing and processing stored information.

The Commission has recognized that such functionality is a characteristic of information services. For example, in the *Cable Modem Ruling*, the Commission analyzed the capabilities provided by the Domain Name System (“DNS”) used to enable the translation of Internet domain names into IP addresses.<sup>18</sup> Because Internet traffic routing is based on IP addresses rather than domain names, DNS servers are necessary to enable packets set to a particular domain name to reach their destination.<sup>19</sup> The Commission found that DNS “constitutes a general purpose information processing and retrieval capability” that “encompasses the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

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<sup>17</sup> Comments of the National Association of Regulatory Utility Commissioners at 15-16 (filed Nov. 26, 2008) (“NARUC Comments”).

<sup>18</sup> See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice Of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Ruling*”).

<sup>19</sup> See *id.* at 4811 n. 74.

telecommunications.’”<sup>20</sup> Similarly, in the *Pulver Order*, the Commission found that the storage of member information – including assigned numbers associated with the member – and the processing of that information on the Pulver server to facilitate communications were among the computing capabilities that made the service an information service.<sup>21</sup>

Finally, some commenters have argued that because voice is one of the many features that can be delivered using IP applications and IP networks, and because the traditional PSTN likewise delivers voice communications, the Commission should not treat IP/PSTN communications as anything other than telecommunications service.<sup>22</sup> But this “quacks like a duck” argument again disregards the “fundamental differences” between IP/PSTN communications and traditional circuit switched telephony. While it is true that it is possible to use IP networks and applications to transmit voice, regulating on the basis of that capability alone ignores the rich integrated features made possible by the retrieval and processing of information.

As AT&T and others have explained, VoIP services increasingly provide consumers with a wide variety of Internet-enhanced features, including seamless integration with presence-based services such as instant messaging, substitution of traditional voice messaging with “sophisticated ‘talking’ email” applications, calling and contact management software, and availability of online applications users can access

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<sup>20</sup> *Id* at 4820, 4822 (¶¶ 37-38)(citing 47 U.S.C. § 153(20)).

<sup>21</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3314 (¶ 11-13) (2004).

<sup>22</sup> *See, e.g.*, Wisconsin PUC Comments at 10 (classification of IP/PSTN services as information services would result in an “artificial distinction” between such services and traditional telecommunications services); NARUC Comments at 13 (“To both end-users and the PSTN, [fixed VoIP services] are indistinguishable from other carriers currently subject to State oversight.”).

during the call.<sup>23</sup> For example, Comcast currently offers a web-based Digital Voice Center that enables users to access voicemails online, manage their accounts, and forward voicemail via email as an attachment.<sup>24</sup> Similarly, Vonage's service allows customers to access and listen to voicemail through a web portal, forward voicemails to an email address of the users' choosing, automatically route received voicemails to customers' email addresses, and transcribe voicemails to enable them to be received in text format.<sup>25</sup>

In addition, Vonage's service enables a number of innovative features, including:

- *Vonage Me.*<sup>26</sup> Vonage Me allows consumers to create a hypertext link for use with email signature blocks, web pages, and other Internet applications. When recipients click on the Vonage Me link, they are prompted to enter the phone number. The Vonage Me feature will then ring that phone and automatically connect the recipient to the Vonage customer.
- *Click-2-Call®.*<sup>27</sup> Vonage's Click-2-Call software enables customers to dial any telephone number on their computer screen (*e.g.* in Microsoft Outlook, a web page, or PDF document) simply by selecting the number and clicking a "place call" button or pressing a hot key on the computer keyboard. The Click-2-Call service will then ring the Vonage subscriber and connect him or her directly to the selected number.
- *Contact Center.*<sup>28</sup> Vonage Contact Center allows Vonage customers to control a wide range of Vonage features from a central web interface. For example, Contact Center allows customers to upload contacts from Microsoft Outlook or other sources, voice-dial those contacts simply by pressing \*44 on their telephone and saying the contact name, add or drop conference call participants in real time, and send "call blast" messages to multiple contacts at once.

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<sup>23</sup> Comments of AT&T, Inc. at 24 (filed Nov. 26, 2008) ("AT&T Comments").

<sup>24</sup> Comments of Comcast Corporation at 19 (filed Nov. 26, 2008) ("Comcast Comments").

<sup>25</sup> These features are completely integrated with the customer's CPE. Thus, if a Vonage customer accesses a voice message via her work computer, the new message indicator light on the CPE handset at home will no longer illuminate.

<sup>26</sup> See Vonage Me, available at <http://me.vonage.com>.

<sup>27</sup> See Vonage Click-2-Call®, available at [http://www.vonage.com/features.php?feature=click\\_2\\_call](http://www.vonage.com/features.php?feature=click_2_call).

<sup>28</sup> See Vonage Contact Center, available at <https://cb.beta.vonage.com/>

Each of these tightly integrated features involves the retrieval and processing of information. For example, Vonage’s voice messaging services allow customers to retrieve information and specify different forms and delivery methods for that information; Vonage Me and Click-2-Call take information transmitted over broadband networks and then use that information to establish a voice call; Contact Center allows customers to retrieve and process information they have uploaded to the Contact Center website simply by speaking the contact’s name; and Group Call, Click-2-Call, and call blast features allow customers to retrieve additional information available through the Contact Center and then use this information to enhance the functionality of the voice communications. None of these features are “functionally equivalent to existing phone service,”<sup>29</sup> and the Commission’s proposed conclusion that such services “are not mere changes to the underlying technology used for ‘existing’ basic services, but are entirely new services with characteristics in many ways distinct from pre-existing telephone services” is therefore entirely correct.<sup>30</sup>

**III. THE COMMISSION SHOULD CLARIFY ITS BASIS FOR PREEMPTION OF STATE REGULATION OF VOIP SERVICE.**

**A. The Commission Should Reiterate that it is Still Impossible to Separate the Interstate and Intrastate Components of the Regulatory Scheme for VoIP Services.**

In the *Vonage Preemption Order*, the Commission carefully considered whether there was a plausible approach to separating the interstate and intrastate components of Vonage’s service for purposes of enabling federal and state regulation without negating

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<sup>29</sup> NARUC Comments at 16.

<sup>30</sup> Appendix C at ¶ 205.

federal policy and specifically concluded that there was not.<sup>31</sup> Nothing in the record in this proceeding changes this analysis. Indeed, the primary claimed justification for state regulation cited by some commenters – that severability is a “non-issue” for fixed VoIP because regulators can rely on the physical location of the VoIP user<sup>32</sup> – already has been considered and rejected by the Commission.

As the Commission explained in the *Vonage Preemption Order*, even if geographic location information “were reliably obtainable, Vonage’s service is far too multifaceted for simple identification of the user’s location to indicate jurisdiction.”<sup>33</sup> Among the reasons the Commission found simple geographic location to be inadequate was “the inherent capability of IP-based services to enable subscribers to utilize multiple features that access different websites or IP addresses during the same communication session and to perform different types of communication simultaneously, none of which the provider has a means to separately track and record.”<sup>34</sup> The Commission extensively reviewed the tightly integrated features provided by Vonage, and concluded that those features “form an integrated communications service designed to overcome geography, not track it.”<sup>35</sup>

The integrated nature of VoIP services such as Vonage’s have not changed since the adoption of the *Vonage Preemption Order* four years ago. To the contrary, Vonage has continued to add capabilities that harness the advanced IP communications made possible through the Internet to enhance its service and access additional websites and

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<sup>31</sup> See generally *Vonage Preemption Order*.

<sup>32</sup> See, e.g., NARUC Comments at 21 and n. 48.

<sup>33</sup> *Vonage Preemption Order* at 22419 (¶ 23).

<sup>34</sup> *Id.* at 22419-20 (¶ 25).

<sup>35</sup> *Id.*

other network resources with IP addresses during the communications session. For example, many of the features discussed above, including Vonage Me and Contact Center, did not even exist when the Commission adopted the *Vonage Preemption Order*.

In addition, the non-geographic nature of the Vonage service has continued to evolve. For example, the Vonage Pro service enables Vonage customers to use both a softphone (such as the software on Vonage's V-Phone USB adaptor for personal computers) and an analog telephone adaptor to be associated with the same telephone number. Thus, one family member could make a call using a handset connected to an ATA at a residence in the U.S., while another family member could make a call at the same time while traveling in another country. If a party dials the telephone number associated with the Vonage Pro account, both the device connected to the ATA and the softphone would ring.

The foundation on which states seek to regulate – that the two end points of a communication are both within the same state – has become almost meaningless.<sup>36</sup> Together, the features identified above confirm that Vonage's VoIP service remains thoroughly independent of geography. The service requires a broadband connection, but it could be any broadband connection. It can be used at home, but it can also be used – even simultaneously – away from home. The area code may correspond to the user's billing address, but it may not. And the user's billing address may or may not be where the service is used. Vonage's service has, in short, no more connection to any given place than an email account has.

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<sup>36</sup> See *id.* at 22419 (¶ 24).

The Eighth Circuit unambiguously affirmed the Commission’s determinations in the *Vonage Preemption Order*, including the Commission’s findings regarding the integrated nature of Vonage’s service:

The end-to-end geographic locations of traditional landline-to-landline telephone communications are readily known, so it is easy to determine whether a particular phone call is intrastate or interstate in nature. Conversely, VoIP-to-VoIP communications originate and terminate at IP addresses which exist in cyberspace, but are tied to no identifiable geographic location. . . . Similarly, in VoIP-to-landline or landline-to-VoIP communications, known as “interconnected VoIP service,” the geographic location of the landline part of the call can be determined, but the geographic location of the VoIP part of the call *could be anywhere in the universe the VoIP customer obtains broadband access to the Internet*, not necessarily confined to the geographic location associated with the customer’s billing address or assigned telephone number.<sup>37</sup>

As set forth in Verizon’s comments, the *Vonage Preemption Order* and the Eighth Circuit’s affirmation of that order are further bolstered by numerous Commission decisions preempting state regulation even in cases where distinguishing interstate and intrastate communications was technically possible if doing so would negate federal policy.<sup>38</sup> The Commission’s impossibility determination in the *Vonage Preemption Order* is well established, and the Commission should reject this latest round of calls to undermine it. Instead, the Commission should reaffirm that it – and not state commissions – are responsible for determining which regulations apply to VoIP services.

**B. The Commission Should Expand Its Discussion of Preemption Based on Conflict with the Federal Policy of Non-Regulation of Information Services.**

Because of the near certainty of legal action – regardless of the determinations the Commission ultimately reaches – Vonage agrees with AT&T and others that the

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<sup>37</sup> *Minn. Pub. Utils. Comm’n*, 483 F.3d at 574-75 (citations omitted) (emphasis added).

<sup>38</sup> Comments of Verizon and Verizon Wireless at 12-16 (filed Nov. 26, 2008) (“Verizon Comments”).

Commission should set forth the reasoning for its preemption decision in detail.<sup>39</sup> To that end, Vonage notes that, in addition to the longstanding policy on non-regulation of information services cited in the proposals, preemption of state regulation of VoIP services also would be consistent with Sections 706 and 230 of the Communications Act. For example, as Comcast has explained, preemption would remove regulatory uncertainty and promote investment in and deployment of broadband infrastructure, furthering the goals of Section 706.<sup>40</sup> Moreover, preemption would help to preserve the vibrant and competitive free market that presently exists for the “Internet and other interactive computer services ... unfettered by Federal or State regulation,” as envisioned by Section 230.<sup>41</sup> These independent bases for Commission action further underscore the wisdom of the Commission’s proposed preemption of IP/PSTN services.

**IV. THE COMMISSION SHOULD ACT NOW TO FIND THAT VOIP SERVICES ARE INFORMATION SERVICES AND REAFFIRM THAT STATES ARE PREEMPTED FROM APPLYING STATE TELECOMMUNICATIONS REGULATIONS TO VOIP SERVICES.**

**A. There is No Need for State Telecommunications Regulation of VoIP Service.**

By and large, the telecommunications regulations states seek to impose on VoIP services are from a different era where there was little to no competition in the market for communications service. In the years prior to the 1996 Act and the explosive growth of the wireless industry (which is itself subject only to minimal state telecommunications regulations), the only option available to consumers for voice communication services was the RBOC. There were no cable operator interconnected VoIP services, no over-the-top interconnected VoIP services, and no other VoIP services. And while there were

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<sup>39</sup> See, e.g., AT&T Comments at 23-24; Verizon Comments at 5.

<sup>40</sup> Comments of Comcast Corp. at 20-21 (filed Nov. 26, 2008) (“Comcast Comments”).

<sup>41</sup> See *id.* (quoting 47 U.S.C. § 230(b)(2)).

wireless services available, they were more expensive, less ubiquitous, and less reliable than modern offerings. Today, companies like Vonage successfully compete with all of these carriers for the provision of voice services.

In this current competitive environment, there is no market failure, and no need to apply general state telecommunications regulations to VoIP providers.<sup>42</sup> And the states arguing against preemption fail to show that additional regulatory authority over VoIP providers is needed.

First, several comments have suggested that state telecommunications regulations are necessary to protect consumers.<sup>43</sup> This is simply not so. The *Vonage Preemption Order* was clear that the Commission was not preempting general state “laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices.”<sup>44</sup> Indeed, states already have applied consumer protection laws to Vonage in a number of instances consistent with the *Vonage Preemption Order*.

For example, Vonage has entered into Assurances of Voluntary Compliance with a number of state attorneys general on 911 and on consumer issues. These agreements impose requirements on how Vonage may operate in the relevant areas. Given the existing consumer enforcement authority enjoyed by state attorneys general (and their

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<sup>42</sup> See, e.g., AT&T Comments at 26-27 (explaining that pre-Internet era rules should not be applied to services that are subject to vigorous competition).

<sup>43</sup> See e.g., NASCUA Comments at 8-9; CPUC Comments at 4-5; Comments of the Massachusetts Department of Telecommunications and Cable at 10 (filed Nov. 26, 2008); Wisconsin PSC Comments at 10.

<sup>44</sup> *Vonage Preemption Order* at 22404 (¶ 1).

willingness to exercise that authority), there is simply no need for another state entity to oversee consumer issues for VoIP providers.<sup>45</sup>

In addition, a number of commenters argue that it would not be technologically or competitively neutral to classify IP/PSTN services as information services.<sup>46</sup> But this is a myopic and self-serving view of neutrality that would require the Commission to disregard genuine differences between services solely for the purpose of subjecting emerging services to ill-fitting regulatory schemes. Indeed, the Commission has already rejected this approach, declining in the *Vonage Preemption Order* to “mold[] new service into the same old familiar shape.”<sup>47</sup> As USTelecom recognizes, given the “highly competitive nature of VoIP service,” *federal* jurisdiction is necessary to “plac[e] all providers on an equal competitive footing.”<sup>48</sup> Perhaps more fundamentally, if the states’ concern is that VoIP providers will have an advantage over the traditional providers with whom they compete, the solution is not to apply ill-fitting legacy regulation to innovative new services, but instead to examine whether traditional providers should be subject to less regulation given the level of competition in the market.

Finally, unfettered state regulation would significantly impede the continued development of VoIP services. For example, Comcast has confirmed that its national service offering would simply be incompatible with 51 different and potentially

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<sup>45</sup> Even if the Commission feels that there is a need for a specific state PUC role on consumer issues, the Commission could simply find that this role would not conflict with federal policy of non-regulation for information services.

<sup>46</sup> See PUCO Comments at 47-48; Comments of Texas Office of Public Utility Counsel on Further Notice of Proposed Rulemaking at 3 (filed Nov. 26, 2008); Wisconsin PUC Comments at 10.

<sup>47</sup> *Vonage Preemption Order* 22421 (¶ 25).

<sup>48</sup> Comments of the United States Telecom Ass’n at 8 (filed Nov. 26, 2008).

conflicting sets of regulation.<sup>49</sup> As discussed in Vonage's opening comments, this concern is very real – a conflict *already* exists among the few states that have disregarded the *Vonage Preemption Order* and attempted to impose state USF obligations on interconnected VoIP providers.<sup>50</sup>

**B. Other Concerns Raised About the Proposed Information Service Classification Should Not Deter the Commission.**

The remaining questions raised by some comments regarding the Commission's proposed information services classification are easily addressed by the Commission and do not provide a basis for delaying the classification decision. First, commenters have objected that information services are not specifically included in the section of the Communications Act mandating USF contributions.<sup>51</sup> But the Commission's *VoIP USF Order*, which relies on the Commission's permissive authority to impose universal service obligations on providers of telecommunications, already addresses this concern.

Similarly, a number of parties maintain that classifying IP/PSTN services as information services would introduce uncertainty as to whether VoIP providers could lead carriers to deny interconnection to providers of VoIP services.<sup>52</sup> However, as several commenters have observed, the Commission can simply affirm that its information service finding does not impact the *Time Warner Interconnection Order* and similar precedent specifically contemplating that VoIP providers obtain interconnection

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<sup>49</sup> Comcast Comments at 20.

<sup>50</sup> Vonage Comments at 7-8.

<sup>51</sup> *See, e.g.*, California PUC Comments at 5 (citing 47 U.S.C. § 254(b)(4)).

<sup>52</sup> *See, e.g.*, New Jersey Division of Rate Counsel Comments at 23-26 (filed Nov. 26, 2008); California PUC Comments at 8.

to the PSTN through competitive carriers.<sup>53</sup> Such clarification would also provide the Commission with the opportunity to resolve the petition for declaratory ruling filed by the Vermont Telephone Company earlier this year seeking to “clarify” the scope of its interconnection obligations with respect to VoIP providers.<sup>54</sup>

**C. The Commission Should Make its Classification Decision Now, Even if It Determines that Broader ICC/USF Reform Must Wait.**

Finally, as AT&T and others have explained, it is vitally important that the Commission conclude that VoIP services are information services and reaffirm preemption of those services even if it does not move forward with broader reform.<sup>55</sup> The VoIP industry is projected to provide tremendous benefits for consumers. A leading business research firm lists VoIP services at the top of the industries it designates as “hot jobs,” estimating that VoIP services will see average annualized job growth of over 19% and average annualized wage growth of over 21% through 2012.<sup>56</sup> Indeed, the rate of job and wage growth for VoIP services far outpaced other job categories on the list. For example, wage growth VoIP services are expected to outperform the second best job category by almost four times.<sup>57</sup> Similarly, numerous comments make clear that VoIP competition could yield substantial efficiencies, saving consumers over \$110 billion and

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<sup>53</sup> See Comments of Time Warner Cable at 2-8 (filed Nov. 26, 2008) (citing *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd. 3513 (WCB 2007) (“*Time Warner Interconnection Order*”)); NCTA Comments at 6-8 (filed Nov. 26, 2008); Comments of the VON Coalition, CCIA, ITI, Net Coalition, TechNet, and TIA at 8-10 (filed Nov. 26, 2008); Comcast Comments at 16-17.

<sup>54</sup> *Vermont Telephone Company Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers*, WC Docket No. 08-56, at 1 (filed Apr. 11, 2008).

<sup>55</sup> See AT&T Comments at 23.

<sup>56</sup> Triangle Business Journal, Report: VoIP the Place to be for Jobs, Money (Apr. 2, 2008), available at <http://www.bizjournals.com/triangle/stories/2008/03/31/daily21.html>.

<sup>57</sup> See *id.*

businesses over \$16 billion in the next five years.<sup>58</sup> Thus, VoIP is projected to be one of the fastest growing job creators in the country.<sup>59</sup>

At a time when the country's work force and consumers are struggling with a recession likely to be the longest and worst since World War II,<sup>60</sup> the Commission should be especially cognizant of the potential erosion of benefits offered by VoIP at the hands of unnecessary legacy regulation. As set forth in Vonage's opening comments, states have continued to attempt to assert jurisdiction to apply telecommunications regulations to VoIP providers notwithstanding the *Vonage Preemption Order*.<sup>61</sup> These jurisdictional claims are driven by alleged uncertainty surrounding what obligations are preempted, who is covered, and whether VoIP traffic is inseverable. For example:

- Missouri recently has passed legislation attempting to apply traditional state telephone company regulations to all interconnected VoIP services notwithstanding the clear language of the *Vonage Preemption Order*.<sup>62</sup>
- A federal district court in Missouri denied Comcast's request to find that the Missouri PSC is without legal authority to classify Comcast's VoIP service as a telecommunications service, noting that "[i]f the FCC declared that all VoIP services were 'information services' and not 'telecommunications services,' then the MoPSC would have no jurisdiction over any VoIP service," including Comcast's service.<sup>63</sup>
- New Mexico has attempted to impose traditional telephone company regulations on Vonage, collaterally attacking the *Vonage Preemption*

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<sup>58</sup> See the Comments of the VON Coalition, CCIA, ITI, NetCoalition, TechNet, and TIA at 3-4.

<sup>59</sup> See generally Triangle Business Journal, supra note 56.

<sup>60</sup> See, e.g., Edmund L. Andrews, Officials Vow to Act Amid Signs of Long Recession, N.Y. TIMES, p. A1 (Dec. 2, 2008).

<sup>61</sup> Vonage Comments at 7-8.

<sup>62</sup> See generally §392.550 RSMo 2008 (Cum. Supp.).

<sup>63</sup> *Comcast IP Phone of Missouri, LLC v. Mo. Pub. Serv. Comm'n.*, No. 06-4233, 2007 U.S. Dist. LEXIS 3628 at \*14 (W.D. Mo. Jan. 18, 2007).

*Order* and claiming that “factual issues” regarding the inseverability of VoIP traffic entitle it to act unilaterally.<sup>64</sup>

- Nebraska seeks to require interconnected VoIP providers to contribute to the state Universal Service Fund for all subscribers with a Nebraska billing address.<sup>65</sup>
- Kansas (which shares a 350-mile border with Nebraska) has attempted to impose state universal service obligations on the basis of a subscriber’s “primary physical service address.”<sup>66</sup> As Vonage has explained, this address frequently will *not* be the subscriber’s billing address, and such regulation would inevitably result in conflicting state assessments if allowed to proceed.<sup>67</sup>

As NARUC’s comments make clear, these inconsistent efforts to apply state telecommunications regulation are unlikely to end any time soon. Notwithstanding the clear language of the *Vonage Preemption Order*, NARUC insists that fixed VoIP services are severable and subject to state regulation, and that the Commission also should reexamine its determination that nomadic VoIP services are inseverable.<sup>68</sup> Given the actions of certain state regulators to date, it is likely that state efforts that would result in inconsistent telecommunications regulation for VoIP will only accelerate absent clear Commission action. The continued attempts by states to apply unnecessary, legacy regulations on VoIP providers that operate in a competitive market threatens to undermine the tremendous job growth and consumer benefits that can be delivered by VoIP services. For these reasons, now is the appropriate time for the Commission to act.

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<sup>64</sup> See *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>65</sup> See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 543 F. Supp. 2d 1062, at 1071 (D. Neb. 2008), *appeal pending* *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, No. 08-1764 (8th Cir.)

<sup>66</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>67</sup> See Vonage Comments at 7-8.

<sup>68</sup> See NARUC Comments at 20-22.

**V. CONCLUSION.**

The record in this proceeding confirms both that VoIP and other IP/PSTN offerings are information services, and that additional Commission action will be essential for the public to realize the full potential of these technologies. By taking the actions set forth above, the Commission will provide the regulatory certainty needed to allow Vonage and other companies to continue to bring the benefits of these services to the communications marketplace.

Respectfully submitted,



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