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ATTORNEYS AT LAW

August 3, 2010

Ex Parte

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

Re: *Nebraska Public Service Commission and Kansas Corporation Commission Petition for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, WC Docket 06-122 (filed July 16, 2009)*

Dear Ms. Dortch:

On August 2, 2010, Brendan Kasper, Senior Regulatory Counsel of Vonage Holdings Corp. (“Vonage”), and Joseph Cavender and the undersigned of Wiltshire & Grannis LLP, met with Christine Kurth, advisor to Commissioner McDowell; Christi Shewman, advisor to Commissioner Baker; Zachary Katz, advisor to Chairman Genachowski; and Nicholas Degani, Lisa Gelb, Sharon Gillett, Rebekah Goodheart, and Vicki S. Robinson of the Wireline Competition Bureau. Vonage discussed the above-captioned petition and made the points below.

Vonage does not object to paying state universal service fees. State USF fees are currently preempted, however, and if the Commission wishes to change the law to permit the states to impose such fees it may do so only prospectively. When and if the Commission does so, it should explain how states may impose state USF obligations consistent with federal policy, including resolving the current conflict between the two petitioners as to how a customer’s revenues should be allocated.¹

In contrast, declaring that states have retroactive authority to impose state USF fees would be unlawful. The Commission is not permitted “under the guise of interpreting a

¹ See Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 3-4 (filed Sept. 9, 2009) (“Vonage Comments”) (explaining that Nebraska would require VoIP providers to contribute for all subscribers with Nebraska billing addresses while Kansas would require contributions based on a subscriber’s “primary physical service address”).

regulation, to create *de facto* a new regulation.”² Yet that is what a retroactive declaration would do. The Commission’s 2004 *Vonage Preemption Order*³ was clear: states’ “telephone company regulations” were preempted, while “general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices” were unaffected by the order.⁴

To ensure there would be no confusion as to what qualified as “telephone company regulations” the Commission defined the term precisely in the order. In footnote 30, the Commission explained that Minnesota’s commission had issued an order asserting that Vonage must comply with a number of requirements, which the FCC listed specifically in footnote 28.⁵ The Commission said, “We will refer to these requirements, collectively, throughout this Order as either ‘telephone company regulations’ or ‘economic regulations.’”⁶ In other words, the Minnesota commission’s order—which the *Vonage Preemption Order* specifically preempted⁷—had identified certain statutes and rules as being applicable to Vonage. Footnote 28, which listed those statutes, is thus a list of provisions that are explicitly preempted.⁸ Among those provisions was Minnesota Statute § 237.16, which would have permitted Minnesota to impose state universal service obligations on Vonage.⁹ While the Commission may reconsider its 2004 decision, it may not, “under the guise of interpreting” that decision, reverse it.¹⁰

Petitioners have suggested a narrower reading of the *Vonage Preemption Order*, but that reading cannot be squared with the actual language of the order or even of the FCC’s own

² *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

³ Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*Vonage Preemption Order*”).

⁴ *Id.* at 22404-05 ¶ 1 (internal quotation marks omitted).

⁵ *Id.* at 22409 ¶ 11 n.30.

⁶ *Id.*

⁷ *Id.* at 22433 ¶ 47 (“IT IS ORDERED ... [that] the *Minnesota Vonage Order* IS PREEMPTED”).

⁸ The Commission noted that, in addition, any Minnesota statutes not enumerated in footnote 28 that were imposed on certificated entities would also be preempted. *See id.* at 22409 ¶11 n.30.

⁹ *Id.* at 22408-09 nn. 28, 30 (footnote 30 defining “telephone company regulations” for the purposes of the order as the statutes listed in footnote 28, and footnote 28 identifying Minn. Stat. § 237.16 as being preempted; Minn. Stat. § 237.16 Subd. 9 is the statute that would have provided Minnesota authority to impose state USF obligations on Vonage).

¹⁰ A complete list of the provisions identified in footnote 28, along with a description of what they included, is set out in Attachment 1 hereto. In addition to entry requirements, these provisions include requirements to collect various fees, including 911 fees, fees for the Minnesota supplement to the Lifeline program, and fees to support state telecommunications relay services.

interpretation of the order in its 2004 brief to the Eighth Circuit in the Minnesota litigation.¹¹ Moreover, this question has been repeatedly litigated, and every court to consider the question has sided with Vonage. As Vonage said in those cases, the *Vonage Preemption Order* preempts state USF authority. If the states wanted to impose such fees, their proper recourse was to request a change in the law from the Commission. The courts have uniformly agreed. As the Eighth Circuit put it:

Vonage contends the language of Vonage Preemption Order clearly states the FCC intended to preempt all state regulation of nomadic interconnected VoIP service providers. It concedes the FCC could implement a universal service fund surcharge on both interstate and intrastate VoIP traffic, but argues only the FCC has the authority to impose such an obligation.¹²

And, after quoting from the *Vonage Preemption Order* and discussing the district court's conclusion that it preempted state USF,¹³ the court of appeals declared that it agreed. "[W]hile a universal service fund surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied."¹⁴

Similarly, when the New Mexico state commission sued Vonage in federal court seeking a declaration that it had authority to impose state USF obligations on Vonage, the district court rejected the attempt. The district court adopted the magistrate judge's opinion, which explained the problem in clear language:

In this Court's opinion the main issue is whether this Court is the proper forum for litigating the technical factual issues surrounding whether intrastate traffic can be separated from interstate traffic as alleged in the [state commission's] complaint and whether, even if such traffic could be separated, such a finding would negate the broad preemption determination found in the *Vonage Preemption Order*. This Court thinks it is not. The FCC's order was not narrow. A return to the FCC for a review of that order or a direct court challenge to the FCC relative to its order would be the proper method to address the issue. In this technologically complicated area, control over which has been vested by Congress in the FCC, it would seem inappropriate to allow separate lawsuits in every state against telecommunication companies by state regulatory agencies attempting to overturn or avoid the effect of prior orders of the FCC. Even if the [state commission] is correct that the traffic can be separated and even if it is

¹¹ See Vonage Comments at 17-19 (discussing the 2004 FCC brief). The FCC's 2004 brief is attached hereto as Attachment 2.

¹² *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900, 904 (8th Cir. 2009).

¹³ The district court granted Vonage's request for a declaratory ruling, declaring that the Nebraska PSC's "assertion of state jurisdiction over [Vonage] to force them to contribute to the Nebraska Universal Service Fund is unlawful as preempted by the Federal Communication[s] Commission." *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 543 F. Supp. 2d 1062, 1071 (D. Neb. 2008).

¹⁴ *Vonage*, 564 F.3d at 905.

correct that this technological fact would destroy the foundation for the FCC policy, the proper approach is to have the FCC reevaluate the issue¹⁵

The district court went further, emphatically rejecting the state's argument that the *Vonage Preemption Order* was "limited to state entry regulations and tariff requirements and does not include state universal service fees."¹⁶ The court said that the Eighth Circuit's decision discussed above "undercuts all of Plaintiff's [the state commission's] arguments in this category."¹⁷ The New Mexico commission did not appeal the district court's decision.

Moreover, the Commission should not want to issue a declaration with retroactive effect. The Commission should be particularly concerned, as it considers altering the regulatory treatment of broadband services, that regulated companies and the public know that when the Commission promises regulatory certainty, such a promise can be relied upon. But to declare now, in 2010, that the Commission's 2004 *Vonage Preemption Order* did not mean what it said, or that the Commission sometime later *sub silentio* altered the 2004 order, would undercut the Commission's ability to provide regulatory certainty in the future.

Indeed, the Commission in 2004 said it was providing "regulatory certainty" in the *Vonage Preemption Order*.¹⁸ If the Commission now, six years later, attempts to retroactively undo that order, it will have shown that the 2004 promise of regulatory certainty provided no such thing. Especially at a time when the Commission is trying to encourage investment by promising regulatory certainty, the Commission should refrain from demonstrating that those who rely on a promise of regulatory certainty do so at their own peril.

¹⁵ *N.M. Pub. Reg. Comm'n v. Vonage Holdings Corp.*, 640 F. Supp. 2d 1359, 1370 (D.N.M. 2009) (emphasis added). The magistrate judge also commented on the 2008 amicus brief which petitioners here attempt to rely on: "The FCC's amicus brief ... contradicts the FCC's own *Vonage Preemption Order*. While this Court does not pretend to understand the motives of the agency in filing an amicus brief which appears to go against its previous order, the filing of a brief in a separate lawsuit does not change the legal effect of the *Vonage Preemption Order* and is not persuasive." *Id.*

¹⁶ *Id.* at 1367.

¹⁷ *Id.*

¹⁸ *Vonage Preemption Order*, 19 FCC Rcd at 22404 ¶ 1.

If you have any questions or require any additional information, please do not hesitate to contact me at (202) 730-1346.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'BDS' followed by a long horizontal stroke.

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cc: Nicholas Degani
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Attachment 1

**Statutory Provisions Identified as “Telephone Company” Regulations
in the *Vonage Preemption Order* and Accordingly Preempted**

Footnote 28 of the *Vonage Preemption Order* identified the regulatory provisions that the Minnesota order asserted that Vonage must comply with: Minnesota Statutes §§ 237.07; 237.16, 237.49, and 237.74(12), and Minnesota Rules §§ 7812.0200(1) and 7812.0550(1). Those provisions imposed the following requirements:

Minn. Stat. § 237.07. This provision contains two subdivisions:

- Subdivision 1 requires providers to file tariffs.
- Subdivision 2 provides that when a carrier offers both competitive and non-competitive services, it must provide separate pricing for them. It also requires that services be offered on a non-discriminatory basis.

Minn. Stat. § 237.16. This provision contains the following subdivisions:

- Subdivision 1 requires providers to obtain state authority to offer service or to construct lines.
- (Subdivision 2 was repealed before the *Vonage Preemption Order* was issued).
- Subdivision 3 requires providers to file a territorial map in accordance with rules of the state commission.
- Subdivision 4 governs the process for altering the terms of a certificate of authority to operate.
- Subdivision 5 provides for certain penalties if the carrier does not provide “reasonably adequate telephone service” within its service area, “failure to meet the terms and conditions of its certificate,” “intentional violation of the commission’s rules or orders” or intentional violation of state or federal law relating to telecommunications.
- Subdivision 6 declares that phone companies are not required to offer service outside the area defined on their map (and thus are not subject to penalty under subdivision 5 if they do not).
- Subdivision 7 declares that state authorization in effect prior to August 1, 1995 continued in effect thereafter.
- Subdivision 8 required the state commission to establish rules for carriers that either were required to obtain a certificate or actually did obtain a certificate defining minimum standards for providing “high-quality telephone services.” Those rules were, *inter alia*, to define standards for quality of service, preserve universal and affordable local telephone service, and require carriers to provide emergency telephone operations.
- Subdivision 9 provides authority to impose state universal service obligations.
- Subdivisions 10 and 11 provide certain interim rules while the state commission establishes rules governing the other requirements.
- Subdivision 12 applies to interexchange carriers and grants them general authority to extend their lines.
- Subdivision 13 requires certification before a carrier is permitted to offer service, but exempts carriers from rate-of-return regulation.

Minn. Stat. § 237.49. This provision requires telephone companies to collect the so-called combined local access surcharge from their subscribers. The combined local access surcharge collects amounts that fund various enumerated programs, including:

- the “Telecommunications access Minnesota fund” under Minn. Stat. § 237.52, which, *inter alia*, funds equipment for deaf and hard-of-hearing individuals and persons with mobility impairments and covers a portion of the expenses of the Minnesota Department of Commerce;
- the “telephone assistance plan” under Minn. Stat. § 237.70, which provides a credit for consumers eligible to receive federal Lifeline telephone service support; and
- 911 fees under Minn. Stat. § 403.11.

Minn. Stat. § 237.74(12). This provision has 13 subdivisions, but the Commission only declared one to be preempted. Subdivision 12 requires carriers to have state certification to be permitted to operate.

Minn. Rule § 7812.0200(1). This rule contains several subparts, and it sets out the procedure for obtaining certification. Subpart 1 is the part that requires carriers to have a certificate of authorization.

Minn. Rule § 7812.0550(1). This rule requires carriers to submit a 911 plan to the state commission.

Attachment 2

**2004 Supplemental Brief of the Federal Communications Commission in
Vonage Holdings Corp. v. Minnesota Public Utilities Commission,
394 F.3d 568 (8th Cir. 2004)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VONAGE HOLDINGS CORPORATION,

Plaintiff - Appellee

MCI WORLDCOM COMMUNICATIONS, INC.; MCI METRO ACCESS
TRANSMISSION SERVICES, INC.,

Intervenor Plaintiffs - Appellees

v.

THE MINNESOTA PUBLIC UTILITIES COMMISSION; LEROY KOPPENDRAYER;
GREGORY SCOTT; PHYLLIS REHA; R. MARSHALL JOHNSON, in their official capacities
as the Commissioners of the Minnesota Public Utilities Commission and not as individuals,

Defendants - Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE
FEDERAL COMMUNICATIONS COMMISSION AS *AMICI CURIAE*

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ARGUMENT

The United States and the Federal Communications Commission (FCC) submit this supplemental brief in response to the Court's order of November 17, 2004. For reasons presented below, the FCC's recently released declaratory order appears to have eliminated any justiciable controversy between Vonage and the Minnesota Public Utilities Commission (MPUC), and this Court should vacate the judgment below on that ground. If the Court nevertheless concludes that the controversy is justiciable, the judgment should be affirmed on the basis of the declaratory order, which provides an alternative ground for the injunction issued by the district court.

I. THE FCC'S DECLARATORY ORDER APPEARS TO HAVE RENDERED VONAGE'S CLAIM AGAINST THE MPUC NONJUSTICIABLE

1. The declaratory order adopted by the FCC represents an exercise of the agency's settled authority "to preempt state regulation of telecommunications where it is not possible to separate the interstate and intrastate aspects of a communications service, and where the Commission concludes that federal regulation is necessary to further a valid federal regulatory objective." *Qwest Corp. v. Scott*, 380 F.3d 367, 372 (8th Cir. 2004). The FCC determined that, regardless of how Vonage's service is classified under the Communications Act, the MPUC's assertion of regulatory authority over Vonage conflicts with the FCC's own deregulatory rules and policies. See Declaratory Order ¶¶ 20-22. The FCC further determined that the MPUC's

assertion of regulatory jurisdiction over Vonage, while nominally directed at intrastate communications, unavoidably reaches the interstate components of the DigitalVoice service that are subject to exclusive federal jurisdiction. *Id.* ¶¶ 23-32. Based on these determinations, as well as others (see *id.* ¶¶ 33-41), the FCC's order preempts the MPUC's jurisdictional order and disables the MPUC from "requir[ing] Vonage to comply with [Minnesota's] certification, tariffing or other related requirements as conditions for offering DigitalVoice in that state." *Id.* ¶¶ 46-47.

Two features of the FCC's declaratory order are particularly important for present purposes. First, the order places the same limitations on the MPUC's regulatory authority as does the injunction sought by Vonage and granted by the district court. In the proceedings below, Vonage moved to enjoin the MPUC from enforcing its jurisdictional order, and the district court granted that relief.¹ Vonage did not seek, and the injunction does not impose, any other restraint on the MPUC. Accordingly, while the FCC's order and the district court's injunction rely on different reasoning,

¹ Vonage's motion asked the district court for "injunctive relief from the [M]PUC's 'Order Finding Jurisdiction and Requiring Compliance' * * * ." Vonage accompanied the motion with a proposed order that provided for the MPUC to be "enjoined from enforcing its Order Requiring Compliance * * * ." In turn, the district court's injunctive order provides that "Vonage's motion for preliminary injunction, which the Court considers a motion for permanent injunction, is hereby GRANTED." 290 F. Supp. 993, 1004. The district court's order does not expressly recite the terms of the injunction, but the order makes clear that the district court meant to grant the injunctive relief sought by Vonage.

the relief that they provide to Vonage from Minnesota's regulatory power is coextensive. There is no gap between the FCC's order and the district court's injunction; the order does not permit the MPUC to do anything that the injunction prohibits.

Second, the FCC's order is not simply an abstract declaration of the rights and obligations of the MPUC and Vonage. Instead, it is a binding order that places legally enforceable federal limitations on the MPUC's regulatory authority. Section 401(b) of the Communications Act provides that "[i]f any person fails or neglects to obey any order of the Commission other than for the payment of money," the FCC or the United States, or "any party injured thereby," "may apply to the appropriate district court of the United States for the enforcement of such order." 47 U.S.C. § 401(b). If the order is procedurally proper and is not being obeyed, "the court shall enforce obedience to such order by a writ of injunction or other proper process * * * ." *Ibid.*; see *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 738 F.2d 901, 904-909 (8th Cir. 1984), *vacated on other grounds*, 476 U.S. 1167 (1986). There is, of course, no reason to imagine that the MPUC would choose to violate the FCC's order.² But in the unlikely event that it did so,

² We note that the MPUC entered an order on November 30 that stays its jurisdictional order against Vonage "until such time, and to the extent, that the FCC Order is subsequently modified by Congress, the FCC, or by a Court of appropriate jurisdiction pursuant to * * * the Hobbs Act."

compliance could and would be compelled. In short, the MPUC is not free to do what the FCC's order prohibits it from doing.

2. Prior to the release of the FCC's declaratory order, a justiciable controversy clearly existed between Vonage and the MPUC. However, the MPUC is no longer at liberty to enforce its jurisdictional order against Vonage, because that order and the state law obligations that it embodies have now been preempted by the FCC. In our view, the fact that the MPUC is now bound by an independent federal administrative order means that this case no longer presents a justiciable controversy under Article III. That is so regardless of whether the MPUC does or does not seek judicial review of the FCC's order under the Hobbs Act.

If the MPUC chooses not to seek judicial review of the declaratory order, then the order clearly renders the controversy between Vonage and the MPUC moot. As explained above, the declaratory order precludes the MPUC from enforcing its own jurisdictional order against Vonage, whether or not the district court's injunction remains in place. There is no reason to believe that the MPUC will violate the FCC's order, particularly if the MPUC chooses not to avail itself of the opportunity to challenge the order. This is not a case in which the MPUC has simply discontinued its effort to regulate Vonage, but rather one in which it has been compelled to do so by a legally binding order that precludes any attempt to enforce the MPUC's own

jurisdictional order. Even voluntary cessation of challenged conduct will moot a controversy when, under the circumstances, the conduct "could not reasonably be expected to recur." *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000). *A fortiori*, the controversy is mooted when the cessation is *involuntary*, and when there is no prospect that the independent barrier to the conduct will be lifted. Federal courts do not sit to enjoin actions that cannot and will not take place in any event.

The Fifth Circuit addressed a similar mootness issue in *AT&T Communications of the Southwest, Inc. v. City of Austin*, 235 F.3d 241 (5th Cir. 2000). In *Austin*, AT&T brought suit to enjoin a municipality from enforcing an ordinance requiring the payment of certain franchise fees. AT&T claimed that the fees were preempted by the 1996 Act. The district court found the fees to be preempted and entered an injunction. While the case was on appeal, the state legislature enacted a statute that effectively precluded the municipality from enforcing the fee ordinance, and the municipality proceeded to repeal the ordinance. The Court of Appeals concluded that the enactment of the state statute rendered the case moot. 235 F.3d at 243. The Court attributed the mootness to the action of the state legislature in enacting the statute, rather than the action of the municipality in repealing its ordinance, because the legislation "ma[de] Austin's repeal of the ordinance a *fait accompli*." *Id.* at 244.

Assuming that the MPUC does not seek review of the FCC's order under the Hobbs Act, this case closely resembles *Austin*. In both cases, an injunction is entered to restrain a governmental body from regulating a communications provider, then another entity (the Texas legislature in *Austin*, the FCC here) imposes an independent and coextensive restriction on the governmental body's power to regulate. As a consequence, the prospect that the governmental body will enforce its regulatory measure, even in the absence of the injunction, disappears, and the controversy over the measure therefore becomes moot.

A closer question is presented if the MPUC decides to seek judicial review of the declaratory order under the Hobbs Act. If the MPUC does so, then it is possible – although, for obvious reasons, the federal government regards it as unlikely – that the MPUC ultimately will be relieved of the restriction imposed on it by the FCC. If that ever happens, the MPUC would be free at that point (absent any other intervening legal developments) to renew its efforts to regulate Vonage, and Vonage would presumably then want the shelter of injunctive relief.

However, even if the MPUC seeks Hobbs Act review, it cannot enforce its jurisdictional order against Vonage until and unless it actually prevails in that proceeding. Whether it will prevail is highly uncertain. And even if it does, given the customary pace of Hobbs Act proceedings, it is unlikely to obtain judicial relief

for many months. Thus, the risk to Vonage is purely speculative in the long term, and virtually non-existent in the short term.

In these circumstances, Vonage's claim for injunctive relief against the MPUC does not appear to be *presently* justiciable, whether or not it might become justiciable again at some point in the future. To establish a justiciable case or controversy under Article III, a plaintiff must show that he "ha[s] suffered an 'injury in fact,'" and the injury must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A claim is "not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Here, it is entirely "conjectural [and] hypothetical" whether the MPUC will ever be freed from the restraint imposed on it by the FCC's order. And even if it is assumed for the sake of argument that the MPUC has a genuine prospect of success under the Hobbs Act, that outcome can hardly be described as "imminent."

If a Court of Appeals eventually invalidates the FCC's declaratory order under the Hobbs Act, Vonage may *then* be faced with a real and imminent prospect of injury in the Article III sense. Then, and only then, a federal court will have jurisdiction under Article III to entertain a claim by Vonage to enjoin the MPUC from enforcing its jurisdictional order. But until and unless that happens – and, to repeat, it is

speculative at best whether it ever will happen – Vonage does not face a concrete threat of injury from the MPUC, because the FCC's order removes that threat. Without that threat, this case does not now appear to present a justiciable controversy.

When a case becomes moot or otherwise nonjusticiable on appeal for reasons that are beyond the control of the appellant, the customary practice is for the appellate court to vacate the lower court's judgment and remand for dismissal of the suit. See *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482, 486 (8th Cir. 1998). Accordingly, if the Court agrees that the FCC's declaratory order has eliminated the original controversy between Vonage and the MPUC, the Court should vacate the injunction and remand for dismissal of the complaint, without prejudice to reinstatement of the suit in the event that the MPUC eventually obtains relief from the declaratory order under the Hobbs Act.

II. IF VONAGE'S CLAIM IS JUSTICIABLE, THE FCC'S ORDER PROVIDES AN ALTERNATIVE GROUND FOR AFFIRMANCE

If the Court concludes that Vonage's claim for injunctive relief remains justiciable, then the appropriate disposition of this appeal would be to affirm the district court's injunction on the basis of the FCC's declaratory order. Here, the FCC's declaratory order provides an alternative ground for affirming the district court's injunction. See, e.g., *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir.), *cert. denied*, 498

U.S. 823 (1990). For the reasons given above, the declaratory order is legally binding on the MPUC, and it supports the precise relief ordered by the district court – an injunction prohibiting the MPUC from enforcing its jurisdictional order against Vonage. Moreover, as the MPUC acknowledged at oral argument, the Hobbs Act precludes any collateral attack on the declaratory order in this proceeding. See, *e.g.*, *United States v. Any and All Radio Station Transmission Equipment*, 207 F.3d 458, 459-63 (8th Cir. 2000); *United States v. Naset*, 235 F.3d 415, 418-21 (8th Cir. 2000). The order therefore provides a conclusive basis for affirming the injunction entered below.

The Court can and should affirm without addressing whether Vonage is providing an information service. The FCC found that the MPUC's exercise of regulatory authority over Vonage was subject to federal preemption regardless of whether Vonage is providing an information service or a telecommunications service, and therefore found it unnecessary to decide the classification of Vonage's service under the Communications Act. See Declaratory Order ¶¶ 14 & n.46, 20-22. The FCC is likely to address that issue in its forthcoming decision in the IP-enabled services proceeding. But because that issue has no bearing on the FCC's present declaratory order, this Court need not await the FCC's resolution of the issue.

The Court also can and should affirm without addressing other issues, such as E911 and universal service. These issues are currently before the FCC in the IP-enabled services proceeding. See Declaratory Order ¶ 14 nn.46 & 49. In particular, the declaratory order makes clear that the FCC intends to "work cooperatively with our state colleagues and industry to determine how best to address 911/E911-type capabilities for IP-enabled services in a comprehensive manner" in that proceeding. *Id.* ¶ 45. If the FCC adopts rules regarding E911 or universal service that are inconsistent with the existing terms of the district court's injunction, the MPUC will be entitled to corresponding modifications of the injunction under Rule 60(b). See, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 215 (1997). Accordingly, affirmance will not impair Minnesota's ability to exercise whatever authority it may ultimately enjoy as a result of future actions by the FCC.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the complaint dismissed without prejudice. Alternatively, the judgment should be affirmed on the basis of the FCC's declaratory order.

Respectfully submitted,

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December 1, 2004

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2004, I filed and served the foregoing SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS *AMICI CURIAE* by causing the required number of copies of the brief to be filed with clerk of the court and served on the following counsel by overnight mail:

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