

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

In the Matter of	
Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Support	WC Docket No. 05-337
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

**COMMENTS OF VONAGE HOLDINGS CORP.**

Brendan Kasper  
Senior Regulatory Counsel  
Vonage Holdings Corp.  
23 Main Street  
Holmdel, NJ 07733  
(732) 444-2216

April 18, 2011

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**COMMENTS OF VONAGE HOLDINGS CORP.**

**I. Introduction and Summary**

Vonage Holdings Corp. (“Vonage”) is pleased to submit these comments in response to the Commission’s NPRM on intercarrier compensation and universal service fund (“USF”) reform.<sup>1</sup> Vonage supports the Commission’s efforts, particularly its commitment to the deployment of broadband, and Vonage supports the creation of a broadband support mechanism as part of the Universal Service Fund.

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<sup>1</sup> *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) (“*ICC/USF Reform NPRM*”).

In proceeding with USF reform, however, the Commission cannot and should not classify interconnected voice-over-Internet-Protocol (“VoIP”) services as a telecommunications service. The statutory definition is clear, as is Commission precedent – VoIP is an information service. Even if the Commission could classify interconnected VoIP as a telecommunications service, doing so would subject interconnected VoIP to additional regulation that would decrease innovation and consumer choice. In any event, the Commission cannot lawfully take this step, as it would be arbitrary and capricious for the Commission to classify interconnected VoIP as telecommunications service merely to fortify its regulatory authority over an entirely distinct service – broadband transmission.

Vonage agrees with the Commission’s conclusion that it has the authority to distribute USF to broadband providers. In order to further the public interest, the Commission should use its authority to condition receipt of broadband USF funds on the provision of unbundled broadband service as well as compliance with the Commission’s open Internet rules.

## **II. The Commission Cannot and Should Not Classify Interconnected VoIP as a Telecommunications Service.**

### **A. Interconnected VoIP Meets the Statutory Definition of an Information Service.**

Congress defined “information service[s]” as those services that offer users “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.”<sup>2</sup> Interconnected VoIP meets that definition. Interconnected VoIP offers more than pure transmission; it also provides a net-protocol

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<sup>2</sup> 47 U.S.C. § 153(24).

conversion, which is a “transform[ation]” of information via telecommunications.<sup>3</sup>

Interconnected VoIP necessarily transforms information, by permitting communications sent from an IP-based device to reach the PTSN, and vice versa. Under the statutory definition, this “transform[ation]” makes interconnected VoIP an information service, not a telecommunications service. The Commission is not free to depart from these clear statutory definitions and classify interconnected VoIP as a telecommunications service.

**B. Interconnected VoIP is an Information Service under Long-Standing Commission Precedent.**

In numerous proceedings the Commission has held that services like interconnected VoIP that offer net-protocol conversion are information services. There can be no reasoned basis to depart from this long line of precedent where, as here, the Commission seeks to do so simply to fortify its jurisdiction over a different service – broadband transmission.

The defining characteristic of interconnected VoIP (VoIP that is capable of connecting to the PSTN) is net-protocol conversion. The Commission has described net-protocol conversion as occurring when “an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol.”<sup>4</sup> Thus when a VoIP user places a call over an IP-based network, and that call is completed on the PTSN, net-protocol conversion has occurred. And numerous Commission decisions hold that services that provide net-protocol conversion are information services.<sup>5</sup> The Commission cannot, without a reasoned basis, change its mind and

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<sup>3</sup> See *National Cable & Telecomms. Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 977 (2005) (describing protocol conversion that makes a service an enhanced service as the “ability to communicate between networks that employ different data-transmission formats”).

<sup>4</sup> *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 & 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).

<sup>5</sup> See *id.*; *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 422 ¶ 99 (1980).

classify interconnected VoIP – an information service under long-held Commission precedent – as a telecommunications service.

There is no reasoned basis for the Commission’s proposed departure from precedent here. The Commission has long declined to regulate information services, repeatedly concluding “that economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that lead to such regulation of common carrier services historically.”<sup>6</sup> In light of its long-held belief that such services should not be regulated, the Commission cannot now conclude the opposite.

Even if the Commission could reverse course, it has no reasoned basis for doing so here, because the Commission’s goal is *not* to exert authority over VoIP. Instead, the Commission proposes to classify interconnected VoIP – a service that the Commission is successfully regulating and that is subject to extensive competitive discipline – in order to fortify the Commission’s existing authority over broadband transmission.<sup>7</sup> But the Commission’s perceived need to establish authority to provide USF support to broadband providers – who necessarily control facilities and may control the only last-mile broadband connection in USF supported areas – cannot justify greater regulation of much more competitive interconnected VoIP service providers. Moreover, because the Commission already has the authority to provide universal service support to broadband providers without classifying VoIP as a telecommunications service,<sup>8</sup> classifying interconnected VoIP as a telecommunications service is

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<sup>6</sup> *Vonage Holdings Corporation’s Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, 22416-17 (2004).

<sup>7</sup> *ICC/USF Reform NPRM*, at ¶ 73.

<sup>8</sup> See Letter from Brita D. Strandberg, Counsel for Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Jan. 27, 2010); *infra* Part III.

simply unnecessary. For all of these reasons, it would be arbitrary and capricious for the Commission to classify interconnected VoIP as a telecommunications service.

**C. The Commission's Existing Approach to Interconnected VoIP Provides for Increased Innovation and Consumer Choice.**

Even if the statutory definition and the Commission's own precedent permitted the Commission to classify VoIP as a telecommunications service, it should not do so. The Commission should instead continue to refrain from wholesale regulation of information services, an approach that has permitted the continuing development of interconnected VoIP while allowing the Commission the flexibility to regulate on a case-by-case basis as needed. This policy has greatly benefited consumers.<sup>9</sup> Further, it has resulted in strong economic growth<sup>10</sup> and job creation.<sup>11</sup>

In contrast, classifying interconnected VoIP as a telecommunications service would immediately subject interconnected VoIP to a vast increase in both federal and state regulation, dramatically increasing the barriers to entry and costs of operation without any case-by-case consideration of the need for additional regulatory burdens. Broadly applying telecommunications regulations, which are designed for a capital-intensive industry with high

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<sup>9</sup> See, e.g., Michael D. Pelcovits & Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., *Consumer Benefits from Cable-Telco Competition*, at i (Nov. 2007), available at [http://www.micradc.com/news/publications/pdfs/Updated\\_MiCRA\\_Report\\_FINAL.pdf](http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf) (estimating the total consumer benefit from VoIP competition to be \$111B for the 2008 to 2012 timeframe).

<sup>10</sup> See, e.g., Press Release, IBISWorld, *IBISWorld Identifies Best and Worst Performing Sectors by Revenue Growth*, (Dec. 22, 2009), available at <http://www.ibisworld.com/pressrelease/pressrelease.aspx?prid=210> (determining that VoIP was the best performing industry segment from 2000 to 2009 and estimating that it will be again from 2010 to 2019, exceeding such diverse segments as retirement and pension plans and video games).

<sup>11</sup> See, e.g., *Report: VoIP the Place to Be for Jobs, Money*, Triangle Business Journal, April 2, 2008, available at <http://www.bizjournals.com/triangle/stories/2008/03/31/daily21.html> (predicting VoIP industry will be the top industry for job and wage growth with estimated annualized job growth of 19.4% and annualized wage growth of 21.8% through 2012).

barriers to entry, simply does not make sense for VoIP. The Commission has recognized that voice is becoming “one of many applications running over fixed and mobile broadband.”<sup>12</sup> Singling out one type of application running on broadband networks for specialized regulation designed to address inapplicable conditions is all but guaranteed to result in less innovation and more limited consumer choice and to hinder the transition to IP networks.

### **III. The Commission Has Authority to Distribute USF to Broadband Providers**

Congress gave the Commission broad authority to implement federal universal service policy, including the authority to provide USF support to broadband providers. To read the relevant provisions of the Telecommunications Act of 1996 so narrowly as to prevent those consumers from gaining access to modern communications technologies would ignore the very purpose of the Act.

The USF program was created to provide for access to advanced services, with good quality and reasonable and affordable rates in rural, insular, and high-cost areas of service.<sup>13</sup> In furtherance of those policy goals, Congress gave the Commission broad authority to implement universal service policies, including granting the Commission the power to identify additional principles that universal service policy should support.<sup>14</sup>

Likewise, rather than enumerating the services that would be eligible for USF support, Congress endowed the Commission with the discretion to determine what services would be eligible, in consultation with the Joint Board. Congress made the breadth of this delegation explicit by adopting an initial definition of universal services that is merely a definition “[i]n

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<sup>12</sup> *ICC/USF Reform NPRM*, at ¶ 10.

<sup>13</sup> 47 U.S.C. § 254(b)(1)-(3).

<sup>14</sup> *Id.* § 254(b)(7).

general.”<sup>15</sup> The very next provision provides for “[a]lterations and modifications” to the definition of services supported by USF.<sup>16</sup> The initial definition speaks of “telecommunications services” while simultaneously defining universal service as “evolving” and directing the Commission to “tak[e] into account advances in telecommunications and information technologies and services.”<sup>17</sup>

Under its mandate to periodically reevaluate the services that should be supported by USF mechanisms, the Commission can – and should – decide that broadband service should be a supported service. As the Commission has explained, “[h]ighspeed ubiquitous broadband can help to restore America’s economic well-being and open the doors of opportunity for more Americans, no matter who they are, where they live, or the particular circumstances of their lives. It is technology that intersects with just about every great challenge facing our nation.”<sup>18</sup>

The Commission and state regulators have been promoting universal service for decades, even before Congress passed the 1996 Act. And Congress gave no hint in the 1996 Act that it intended to displace those regulators from their roles. Nor did it intend to impose new statutory limits on the Commission’s authority to determine universal service policy or decide what services would be eligible for support. Indeed, the opposite is true. Congress was quite clear that the Commission would retain this authority, along with its authority to set universal service policy general, in consultation with the Joint Board. And Congress explicitly stated that the

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<sup>15</sup> *Id.* § 254(c)(1).

<sup>16</sup> *Id.* § 254(c)(2).

<sup>17</sup> *Id.* § 254(c)(1).

<sup>18</sup> *A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd. 4342, 4343 ¶ 1 (2009).

definition of universal service should evolve over time and should reflect the current state of technology.<sup>19</sup>

It would be contrary to the express will of Congress, then, to view section 254(c)(1)'s use of the term "telecommunications service" as somehow overriding the remainder of section 254, limiting the services eligible for support to old technologies and prohibiting support for advanced services commonly available to consumers in urban areas. Congress has consistently acted to ensure access to such advanced services, including as part of the recent Recovery Act the requirement that the Commission establish a plan for ensuring broadband access to "all people of the United States."<sup>20</sup>

Nor should section 254(e) be seen to limit the Commission's authority to distribute USF to broadband providers. Section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e)...shall be eligible to receive specific Federal universal service support."<sup>21</sup> But section 254(e) only limits funding to entities properly designated under section 214(e). That section, in turn, explains that an "eligible telecommunications carrier" is simply a "common carrier" meeting certain eligibility criteria.<sup>22</sup> Because common carriers offer information services, and nothing in section 214(e) limits the types of services that can be supported by USF under section 214(e), this does not bar the Commission from supporting information services under section 254.

The most that can be said is that the statute is ambiguous. And in this circumstance, "the breadth and complexity of the Commission's responsibilities demand that it be given every

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<sup>19</sup> 47 U.S.C. § 254(c)(1), (2).

<sup>20</sup> American Recovery and Reinvestment Act of 2009, § 6001(k)(2) (codified at 47 U.S.C. § 1305(k)(2)).

<sup>21</sup> 47 U.S.C. § 254(e).

<sup>22</sup> *See* 47 U.S.C. § 214(e)(1).

reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”<sup>23</sup> Under *Chevron*,<sup>24</sup> the Commission has the authority, as the agency charged with administering the Act, to resolve any ambiguities in the statute in favor of increased broadband deployment.<sup>25</sup>

#### **IV. The Commission Can and Should Place Conditions on Broadband Providers’ Receipt of USF.**

The Commission’s authority to distribute universal service support to broadband includes the authority to condition receipt of such support. As the Commission itself stated, “[n]othing in section 254 prohibits the Commission from conditioning the receipt of support, and the Commission has imposed conditions in the past. Similarly, both the states and the Commission may impose eligibility conditions as part of the ETC designation process under section 214(e).”<sup>26</sup>

Vonage agrees with that assessment and believes that the Commission should impose certain conditions on USF recipients. First, as Vonage has explained previously, the Commission should require entities receiving universal service support to provide standalone broadband service. Areas that require universal service support to ensure broadband deployment, by definition, will likely not be characterized by “vigorous competition.” The Commission should therefore require the provision of standalone broadband to ensure that

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<sup>23</sup> *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); see also *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 501-502 (2002) (citation omitted).

<sup>24</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>25</sup> *Cf. Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101-02 (D.C. Cir. 2009) (“Since the principles outlined [in § 254(b)] use ‘vague, general language,’ courts have analyzed language in § 254(b) under *Chevron* step two.”) (quoting *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999)); *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007) (discussing sections 254(e) and 214 and noting that “[t]he FCC’s interpretation of the Telecommunications Act’s provisions addressing state ETC designations is, of course, subject to [*Chevron*] deference”) (citation omitted).

<sup>26</sup> *ICC/USF Reform Order*, at ¶ 71.

critical policy goals—including encouraging broadband adoption and ensuring that all Americans have comparable access to advanced and IP services—are met. Imposing a standalone broadband requirement will promote broadband adoption, ensure that customers in high-cost areas have access to services that are comparable to those available in urban areas, and promote competition for advanced service.

For instance, standalone broadband can enable consumers to freely choose what communications services to purchase, allowing them to capture the savings available from competitive services like VoIP that depend on a broadband connection. Tying broadband to voice service, in contrast, raises the cost of broadband because consumers cannot purchase broadband separately from voice service at a lower charge, and thus may be disinclined to add broadband service unless they already want voice service from the same carrier.

Forcing customers to take a service they do not want in order to get a service they do want is not a viable competitive strategy when consumers can simply go elsewhere. But in rural, insular, and high-cost areas, there is typically less competitive pressure on service providers to offer standalone broadband Internet service. Requiring standalone broadband as a condition of receiving universal service support will therefore help ensure that consumers in high-cost areas will be offered reasonably comparable service to consumers in urban areas. It will also promote competition, as the availability of low-cost communications services over broadband may encourage consumers to “cut the cord” on landline telephone service.

Additionally, the Commission should require broadband providers receiving universal service support to comply with the Commission’s open Internet rules. Just as recipients of universal service should be prohibited from forcing customers to take certain services, they should also be prohibited from blocking or degrading customer access to applications of their

choice. The Commission should ensure that publicly funded broadband service is not hamstrung by universal service recipients, particularly when, in the case of interconnected VoIP providers, their funding is derived in part from the very entities whose services are blocked. Explicitly conditioning receipt of universal service on compliance with the Commission's open Internet rules will ensure that "broadband networks are widely deployed, open, affordable, and accessible to all consumers."<sup>27</sup> And both of these proposed conditions – requiring provision of standalone broadband and mandating compliance with the Commission's open Internet rules – will advance the goals of universal service as well as make the most effective use of USF monies.<sup>28</sup>

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<sup>27</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986 ¶ 4 (2005); *see also Preserving the Open Internet, Broadband Industry Practices*, Report and Order, FCC 10-201 (rel. Dec. 23, 2010).

<sup>28</sup> *See* Comments of Vonage Holdings Corp. at 2, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Dec. 7, 2009); *see also* Ex Parte Notice from Brita D. Strandberg, Counsel for Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC at 1-2, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Jan. 13, 2010). *See also* 47 C.F.R. § 54.201.

## **V. Conclusion**

Vonage supports the Commission in its efforts to promote broadband deployment by providing USF support to broadband providers. But the Commission cannot and should not classify interconnected VoIP as a telecommunications service as part of that goal – such classification would be arbitrary and capricious in light of the statutory language defining information services, long-standing Commission precedent, and the absence of any policy rationale other than fortifying existing Commission authority over broadband transmission. Finally, the Commission should exercise this existing authority by requiring recipients of broadband USF funds to provide standalone broadband and comply with the Commission’s open Internet rules.

Respectfully Submitted,

/s/ \_\_\_\_\_  
Brendan Kasper  
Senior Regulatory Counsel  
Vonage Holdings Corp.  
23 Main Street  
Holmdel, NJ 07733  
(732) 444-2216

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