

August 3, 2011

By Electronic Filing

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

Re: Filling the Regulatory Void: State VoIP Activity - WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 96-45; CC Docket No. 01-92; WC Docket No. 06-122; WC Docket No. 04-36

Dear Ms. Dortch:

In the absence of action by this Commission, states are filling the VoIP regulatory void with an increasingly complex patchwork of disparate regulations — even though VoIP is an inherently interstate service that cannot and should not be subject to state regulation at all. Many emerging state efforts to regulate VoIP, including attempts to impose high legacy intercarrier compensation rates on VoIP, threaten to harm VoIP providers and their customers by retarding innovation and deployment of next-generation VoIP products and by raising the costs of using such products. The longer the Commission delays in providing VoIP providers with legal certainty and consistency across their multi-state operations, the more difficult it will be to replace the growing body of disparate state regulation with a single coherent national regime. The attached exhibits identify state regulatory and legislative activity with respect to VoIP over the past several years.

In its 2004 *Vonage Order*,¹ the Commission preempted states from regulating VoIP services. As a result, most states declined to insert themselves into the VoIP space. But over time — despite the Commission’s effort to bring regulatory certainty to VoIP² and its express holding that the *Vonage Order* applied to “other types of IP-enabled services having basic characteristics similar to” *Vonage*’s³ — some states have asserted that legacy state regulations should apply to VoIP services. In the past few years, many state commissions have issued VoIP decisions that, while reaching specific results based on the particular facts before them, largely rest on the assumption that state regulators can and should impose the same rules on VoIP that historically applied to traditional POTS traffic. Still other commissions have addressed VoIP policy issues in *dicta*, or in the context of interpreting interconnection agreements. Attached as

¹ See *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 Order*”).

² *Id.*, ¶ 1.

³ *Id.* ¶ 32; see also *id.* ¶ 25 n.93.

Exhibit A is a chart that identifies state commission actions addressing VoIP in recent years. Carriers — especially cable VoIP providers — continue to file complaints regarding VoIP compensation with state commissions where they perceive the ability to gain regulatory advantages.⁴

Meanwhile, many state legislatures (although still a minority) have acknowledged the consumer harm caused by imposing legacy regulation on new technologies such as VoIP. Many have passed laws confirming that their commissions may not regulate VoIP services. Attached as Exhibit B is a chart identifying state legislative actions with respect to VoIP over the last several years. But the scope of those “VoIP Freedom” statutes varies, and each is subject to its own interpretation by the state’s commission and court system. Even where state legislatures have acknowledged the consumer benefits of not burdening VoIP providers with legacy regulation, state commissions have inserted themselves into VoIP compensation disputes. For example, parties in a complaint case before the Pennsylvania Public Utility Commission are currently litigating whether Pennsylvania’s “Voice-Over-Internet Protocol Freedom Act”⁵ prevents the Pennsylvania commission from adjudicating a complaint by a cable VoIP provider seeking to apply its intrastate switched access charges to traffic terminated to customers of its VoIP services.⁶ There is a similar dispute in Florida over whether the state’s VoIP exemption statute applies to compensation issues.⁷

⁴ See, e.g., Complaint of Cox California Telecom, LLC (U-5684-C) For Breach of Interconnection Agreements and Violation of Cox Tariffs, *Cox California Telecom, LLC (U-5684-C) v. Verizon California, Inc. et al*, Docket No. C.11-05-012 (Cal. Pub. Utils. Comm’n filed May 9, 2011); Complaint, *Complaint against Verizon Florida, LLC et al. for failure to pay intrastate access charges for the origination and termination of intrastate interexchange telecommunications service, by Bright House Networks Information Services (Florida), LLC*, Docket No. 110056-TP (Fla. Pub. Serv. Comm’n filed Feb. 22, 2011); Amended Complaint, *VAYA Telecom, Inc.(U7122C) v. Pacific Bell Tel. Co. d/b/a AT&T California (U1001C)*, Docket No. C. 10-12-001 (Cal. Pub. Utils. Comm’n filed Jan. 18, 2011); Formal Complaint of Armstrong Telecomms., Inc., *Armstrong Telecomms. Inc. v. Verizon Pennsylvania Inc. et al.*, Docket Nos. C-2010-2216205, 2216311, 2216325, & 2216293 (Penn. Pub. Util. Comm’n filed Dec. 16, 2010); Complaint, *Complaint of Midcontinent Commc’ns, Knology of the Plains, Inc., and Knology of the Black Hills, LLC, Against MCI Commc’ns Servs., Inc. d/b/a Verizon Bus. Servs. for Unpaid Access Charges*, Docket No. TC10-096 (S.D. Pub. Utils. Comm’n filed Oct. 27, 2010).

⁵ 73 Penn. Stat. § 2251.1 *et seq.* The Pennsylvania legislature found that VoIP provides consumers with “more choice...than at any other time” and that “[t]he economic benefits, including consumer choice, new jobs and significant capital investment, will be jeopardized and competition minimized by the imposition of traditional State entry and rate regulation on voice-over-Internet protocol and Internet protocol-enabled services.” See 73 Penn. Stat. § 2251.2.

⁶ A Pennsylvania administrative law judge recently denied a motion to dismiss or stay the VoIP provider’s complaint, finding that factual development is needed to assess whether the Pennsylvania commission has authority to adjudicate it. See Order Denying Motion to Dismiss or Stay and Motion for Partial Summary Judgment, *Armstrong Telecomms., Inc. v. Verizon*

And although most state legislatures that have addressed VoIP have sought to ensure that their state regulators do not regulate it, some purport to *empower* state regulators to make VoIP compensation determinations in certain contexts. For example, the Wisconsin legislature recently passed a law *requiring* the Public Service Commission of Wisconsin to impose the state's legacy compensation regime (which includes substantial intrastate switched access rates that are in many cases insulated from commission review under the same new law) on interconnected VoIP.⁸ Elsewhere there is ambiguity about what state law purports to permit or require the state commission to do with respect to VoIP compensation.⁹

The upshot is that states are filling the regulatory void surrounding VoIP in varying, often ambiguous, and largely unhelpful ways — ways in many cases at odds with the “policy of the United States” to promote “the continued development of the Internet and other interactive computer services” and 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.”¹⁰ They also conflict with several federal courts' determinations and with what this Commission may ultimately determine is an appropriate comprehensive national regime.

Imposing even *one* state's regulation — much less 50 or more different sets of regulations — on any-distance, multi-function VoIP services would conflict with the strong federal policies favoring the introduction of innovative services. The Commission has authority to establish a uniform regime for VoIP traffic because, *inter alia*, VoIP services are inherently interstate in nature and should be subject to a single set of rules.¹¹ Recent Supreme Court and court of appeals decisions confirm that the Commission can (and should) ensure that state

Pennsylvania Inc. et al., Docket No. C-2010-2216205 (Penn. Pub. Util. Comm'n issued July 18, 2011), at 10-11. The ALJ also declined to stay the state proceeding based on its finding that the FCC's resolution of VoIP compensation issues “has not happened, yet, and it may never happen.” *Id.* at 10.

⁷ See Opposition to Motion to Dismiss or Stay Complaint, *Bright House v. Verizon Florida* (filed Mar. 21, 2011).

⁸ See Wis. Stats. § 196.206(3) (2011 Wisconsin Act 22 became effective on June 9, 2011).

⁹ For example, the Missouri statute states that interconnected VoIP service is “subject to appropriate exchange access charges” without specifying what those “appropriate” charges are. See Mo. Rev. Stat. § 392.550(2). The validity of the statute is currently under challenge in federal court. *Global Crossing Local Servs., Inc. v. Missouri Pub. Serv. Comm'n, et al.*, Civ. Action No. 4:11-CV-00315 (E.D. Mo. filed Feb. 18, 2011).

¹⁰ 47 U.S.C. § 230(b)(1)-(2); see also 47 U.S.C. § 1302 (codifying § 706 of the Act).

¹¹ See, e.g., Comments of Verizon and Verizon Wireless, *Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, at 5-34 (Apr. 1, 2011). An additional independent basis supporting a federal VoIP regime is the fact that VoIP is properly classified as an information service. *Id.*

regulations do not obstruct the Commission’s longstanding policy goal of promoting investment in, and deployment of, innovative services including advanced broadband networks.¹² Against that backdrop, there is no reason for the Commission not to act promptly to establish a uniform VoIP framework that is pro-consumer and pro-innovation.

Very truly yours,



Information Technology Industry Council
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¹² See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (internal citation omitted) (the “liberal federal policy” in favor of arbitration could preempt even general provisions of state law where such law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of a federal policy); *Farina v. Nokia Inc.*, 625 F.3d 97, 123-26 (3d Cir. 2010) (“[w]hen Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives”; allowing state law “to impose a different standard permits a re-balancing of those considerations” in conflict with the federal policy); see also *Whistler Invs., Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159 (9th Cir. 2008) (state common-law claims conflicted with the federal policy in favor of uniform, national regulation of clearing and settling securities transactions).

Exhibit A

State Commission VoIP Decisions

Notes: This table does not include state commission decisions limited to E911 issues or assessments for state universal service, TRS or other funding purposes. Most, but not all, of the decisions below involve VoIP compensation. Many do not broadly constitute VoIP precedent because of the nature their specific factual holdings or procedural postures, negotiated contractual language affecting the treatment of VoIP, or other factors.

<u>State</u>	<u>Decision</u>
CA	Order Denying Request for Immediate Stay and the Rehearing of Decision (D.) 07-06-044, <i>Cox California, LLC (U-5684-C) vs. Global NAPs California Inc. (U-6449-C)</i> , Decision 07-09-050; Case 06-04-026, 2007 Cal. PUC LEXIS 503 (Cal. Pub. Utils. Comm'n Sept. 20, 2007)
GA	Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, <i>Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Tel. Co. et al. to the Traffic Delivered to Them by Global NAPs, Inc.</i> , Docket No. 21905 (Ga. Pub. Utils. Comm'n July 29, 2009)
IA	Order, <i>Sprint Commc'ns. Co. v. Iowa Telecomms. Servs.</i> , Docket No. FCU-2010-0001 (Iowa Util. Bd. Feb. 4, 2011), <i>appeal docketed, Sprint Commc'ns. Co. v. Berntsen et al.</i> , Case No. 11-cv-183 (S.D. Iowa Apr. 25, 2011) Order on Motions to Dismiss, Finding Violations and Providing Notice of Possible Civil Penalties, <i>MCC Telephony of Iowa, LLC, and MCC Iowa LLC v. Capitol Infrastructure LLC d/b/a Connexion Technologies and Broadstar, LLC d/b/a Primecast</i> , Docket No. FCU-2010-0015 (Iowa Util. Bd. Mar. 30, 2011)
KS	Order Adopting Arbitrator's Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing, <i>Petition of Southwestern Bell Tel. Co.</i> , Docket No. 10-SWBT-419-ARB (Kan. Corp. Comm'n Aug. 13, 2010)
ME	Order, <i>Pub. Utils. Comm'n Investigation into Whether Providers of Time Warner "Digital Phone" Serv. and Comcast "Digital Voice" Serv. Must Obtain Certificate of Pub. Convenience and Necessity to Offer Tel. Serv.</i> , Docket No. 2008-421 (Me. Pub. Utils. Comm'n Oct. 27, 2010) (voided through legislation, "An Act To Ensure Regulatory Parity among Telecommunications Providers," LD 1466, HP 1075, signed into law June 9, 2011)
MO	Decision, <i>Sw. Bell Tel. Co. d/b/a AT&T Mo. for Compulsory Arbitration of Unresolved Issues for an Interconnection Agreement with Global Crossing Local Servs., Inc. and Global Crossing Telemangement</i> , File No. IO-2011-0057 (Mo. Pub. Serv. Comm'n Dec. 15, 2010)

NH	Order Addressing Petition for Authority to Block the Termination of Traffic from Global NAPs Inc., <i>Hollis Tel., Inc., Kearsage Tel. Co., Merrimack County Tel. Co., and Wilton Tel. Co.</i> , DT 08-028, Order No. 25,043 (N.H. Pub. Utils. Comm'n Nov. 10, 2009)
NY	Order Directing Negotiation, <i>Complaint of TVC Albany, Inc. d/b/a Tech Valley Commc'ns Against Global NAPs Inc. for Failure to Pay Intrastate Access Charges</i> , Case No. 07-C-0059 (N.Y. Pub. Serv. Comm'n Mar. 20, 2008)
PA	Opinion and Order, <i>Palmerton Tel. Co. v. Global NAPs South</i> , Docket No. C-2009-2093336 (Pa. Pub. Util. Comm'n Mar. 16, 2010)
TX	Arbitration Award, <i>Petition of UTEX Commc'ns. Corp. for Arbitration Pursuant to Section 252(b) of the Fed. Telecomm. Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Sw. Bell Tel. Co.</i> , Docket No. 26831 (Pub.Util. Comm'n of Tex. Jan. 27, 2011)
VT	Order Re Phase I, <i>Investigation into regulation of Voice over Internet Protocol ("VoIP") servs.</i> , Docket No. 7316 (Vt. Pub. Serv. Bd. Oct. 28, 2010)
WI	Final Decision, <i>Application of Time Warner Cable Info. Servs., LLC to Expand Certification as an Alternative Telecomms. Util.</i> , Docket No. 5911-NC-101 (Pub. Serv. Comm'n of Wis. May 9, 2008) Final Decision, <i>Petition of AT&T Wis. for Declaratory Ruling that Its "U-verse Voice" Serv. is Subject to Exclusive Fed. Jurisdiction</i> , Docket No. 6720-DR-101 (Pub. Serv. Comm'n of Wis. Sept. 24, 2010)

Exhibit B

Statutes Regarding State Regulation of VoIP

Note: This table does not include state activity regarding E911 issues or assessments of VoIP providers for state universal service, TRS or other funding purposes.

<u>State</u>	<u>Effective Date(s)</u>	<u>Code and Legislative Citations</u>
AL	<p>May 8, 2009</p> <p>May 5, 2005</p>	<p>Ala. Code § 37- 2A-4(a) (2011)</p> <p>Ala. SB 373, 2009 Ala. Acts 461</p> <p>Ala. SB 114, 2005 Ala. Acts 110</p>
DE	<p>May 23, 2007</p>	<p>26 Del. C. 26 § 202(i)</p> <p>Del. SB 53</p> <p>76 Del. Laws 29</p>
DC	<p>June 5, 2008</p>	<p>D.C. Code §§ 34-403, 34-2001, 34-2003 & 34-2006</p> <p>55 DCR 6970 (June 27, 2008)</p> <p>D.C. Law 17-165</p>
FL	<p>June 2, 2005</p>	<p>27 Fla. Stat. 364.011</p> <p>S. 1322</p>
GA	<p>Apr. 28, 2006</p>	<p>Ga. Code Ann. § 46-5-222</p> <p>2006 Ga. Act 653 (enacted)</p> <p>SB 120 (2005)</p>
IL	<p>June 15, 2010</p>	<p>220 Ill. Comp. Stat. Ann. 5/13-401.1; <i>id.</i> 5/13-804</p> <p>PA 96-927 § 99</p> <p><i>Id.</i> § 10</p> <p>SB 107</p>
IN	<p>Mar. 30, 2007</p>	<p>Ind. Code § 8-1-2.6-1.1</p>

<u>State</u>	<u>Effective Date(s)</u>	<u>Code and Legislative Citations</u>
KY	July 12, 2006	Ky. Rev. Stat. § 278.010 (13) & (32) HB 337
ME	June 9, 2011	Resolve No. 2011-69 LD 1466
MA	July 1, 2010	Mass. Gen. Laws Ann. ch..25C, § 6A
MD	May 17, 2007	Md. Code Ann., Pub. Util. Cos., §§ 8-601, 8-602 SB 864
MI	June 14, 2011	Mich. Comp. Laws Serv. § 484.2401 2011 Mich. Adv. Legis. Serv. 58; HB 4314
MO	Aug. 28, 2008	Mo. Rev. Stat. § 386.020(54)(j); <i>see also</i> 386.020 - 392.550 HB 1779
NJ	Oct. 26, 2007	N.J. Stat. §§ 48:17-32 through 48:17-34 Assembly Bill 4339
OH	11/04/05 Sept. 13, 2010	Ohio Revised Code, Title 49, section 4905.042. SB 162
PA	July 4, 2008	Voice-Over-Internet Protocol Freedom Act (2008); 73 P.S. § 2251.1 <i>et seq</i> (2008) SB 1000
RI	July 9, 2009	R.I. Gen. Laws 39-28-1 <i>et seq.</i> S.0968

<u>State</u>	<u>Effective Date(s)</u>	<u>Code and Legislative Citations</u>
TN	July 1, 2008	Tenn. Code Ann. § 7-59-307(d) 2008 Tenn. Pub. Acts 932 § 8 HB 1421
TX	Sept. 1, 2011	Tex. Util. Code Ann. § 52.002(d) SB 980 (except amendments to §§ 56.032, 65.154, and 65.155 take effect Jan. 2, 2012)
VA	Mar. 20, 2007 Apr. 5, 2006	Va. Code Ann. 619 §§, 56-1 and 56-1.3 2007 Va. Acts 619 HB 1885; 2006 Va. Acts 691 HB 1198
WI	May 24, 2011	Wis. Stats. § 196.206 2011 Wis. Act 22 SB 13