

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

Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges	) ) ) )	WC Docket No. 01-92
Petition for Declaratory Ruling of TW Telecom Inc.	) ) )	WC Docket No. 11-119
Vonage Holdings Corp. Petition For a Limited Waiver	) )	WC Docket No. 99-200

**COMMENTS OF THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) submits these comments (Pa. PUC Comments) in opposition to petition of Vaya Telecom, Inc. in CC Docket No. 01-92 issued for public comment on September 20, 2011 (*Vaya Petition*).<sup>1</sup>

The Pa. PUC reiterates here and throughout these Comments as it has in other filings that any preemption of state certification and 911 mandates for Voice over Internet Protocol (VoIP) services in the *Vonage Preemption* decision was limited to *retail* VoIP preemption. The preemption does not extend to any preemption of state authority to address and ensure compensation for *wholesale* telecommunications embedded in the *Vaya Petition*.<sup>2</sup>

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<sup>1</sup> The Pa. PUC opposes the use of a general docket like this *Intercarrier Compensation* proceeding to solicit public input on an important matter like the *Vaya Petition*. A matter of such importance should be published as a separate proceeding with its own separate WC Docket number or similar docket assignment. This is particularly compelling when, as here, the matter is of considerable importance to state commissions given the distinct possibility of the preemption of state authority to address intrastate access rates in this *Vaya Petition*.

<sup>2</sup> Compare *In re: Petition of Vonage for a Declaratory Ruling Concerning an Order of the Minnesota Public Utility Commission*, WC Docket No. 03-211 (November 12, 2004) with *In re: Time Warner Petition for a Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, Docket No. WC 06-55 (March 7, 2007); *In re: DQE Communications, Inc. v. North Pittsburgh Telephone Company*, Docket No. EB-05-MD-027 (February 2, 2007); *In re: Fiber Technologies v. North Pittsburgh Telephone Company*, Docket No. EB-05-MD-014 (February 23, 2007); and *In re: Petition of UTEX, Inc. to Preempt the Public Utility Commission of Texas*, Docket No. WC 09-134 (October 9, 2009).

The Pa. PUC also files this as an Ex Parte filing in the related dockets examining the pending tw telecom Petition for Declaratory Ruling at Docket No. 11-119 (*tw Petition*) and the Vonage Holdings Corp. Petition for a Limited Waiver in Docket No. 99-200 (*Vonage Petition*). The Pa. PUC further files this Ex Parte in the dockets below.

The Pa.PUC filing addresses these proceedings together because they collectively address the issue of whether VoIP is “telecommunications” or “information service” under state and federal law. The Pa. PUC’s filing reflects opposition to any result in these dockets that preempts state law or overturns federal-state joint jurisdiction.

The Pa. PUC’s opposition relies upon and incorporates prior filings of the Pa. PUC in several ongoing FCC proceedings including, but not limited to, the *Connect America Fund* (Docket No. WC 10-90), the *Just and Reasonable Rates for Local Exchange Carriers* (WC Docket No. 07-135), *High-Cost Universal Service Support* (Docket No. 05-337), *Lifeline and Link-Up* (WC Docket No. 03-109), *Intercarrier Compensation* (CC Docket No. 01-92), *Universal Service* and the *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45), and *A National Broadband Plan For Our Future* (GN Docket No. 09-51). The Pa. PUC particularly incorporates the Pa. PUC prior Comments and Reply Comments in the pending *Connect America Fund* proceeding, particularly the proposed *ABC Plan*.<sup>3</sup>

As an initial matter, the PaPUC Comments should not be construed as binding on an individual Commissioner nor the PaPUC Commission in any proceeding before the Pa, PUC. Moreover, the views expressed in these Comments could change in response to subsequent events, including a later review of other filed Comments and legal or regulatory developments at the federal or state level.

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<sup>33</sup> *In re: Connect America Fund*, WC Docket No. 10-90, Comments of the Pa. PUC (August 24, 2011) and Reply Comments of the Pa. PUC (September 6, 2011).

### *Summary of the Three Petitions.*

The *Vaya Petition* would prohibit a Local Exchange Carrier (LEC) from collecting intrastate access charges from another LEC for LEC-to-LEC voice over the Internet Protocol (VoIP) traffic because all VoIP traffic would be jurisdictionally interstate. The *Vaya Petition* seeks compensation for interconnection at the lowest intrastate rate i.e., reciprocal compensation rates (not intrastate or interstate carrier access rates), under Section 251(b)(5) and 252(d)(2) based on the *ISP Remand Order*.

By contrast, the *tw Petition* asks the FCC to declare that carriers like *tw telecom* (TWTC) have a right to interconnection under Section 251(c)(2) to establish direct Internet Protocol to Internet Protocol (IP-to-IP) interconnection with incumbent LECs (ILECs). They seek interconnection to address the transmission and routing of IP and VoIP services, including traffic that originates in Time Division Multiplexing (TDM) but is converted in an IP format for transport, because they consider those services to be telecommunications. The *tw Petition* considers IP and VoIP to be telecommunications service under federal law and, apparently, state law as well.<sup>4</sup>

The *Vonage Petition* seeks a limited waiver of Section 52.15(g)(2)(i) of the FCC's rules, 47 CFR § 52.15(g)(2)(i). The rule requires applicants for numbers to demonstrate evidence that they are providing service in a given area.<sup>5</sup> Vonage is not a state-certificated carrier and, consequently, cannot get numbers directly from NANPA/PA under the rule. Nevertheless, Vonage and other VoIP providers want numbers directly from the North American Numbering Plan Administrator (NANPA) and/or the Pooling Administrator (PA) using a waiver granted to SBC Internet Services, Inc. (SBC) in 2005.

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<sup>4</sup> *In re: tw telecom inc. Petition for Declaratory Ruling*, WC Docket No. 11-119 (July 14, 2011). The Comments opposing that petition claim that a ruling will effectively require incumbents to build a superior network in violation of federal law which limits interconnection to any feasible location. The opponents generally claim that carrier mandates requiring IP providers to convert their protocol into TDM, the current technology used by most ILECs to transmit traffic from IP networks to their networks and *vice versa*, is burdensome and costly to implement.

<sup>5</sup> *In re: Petition of Vonage*, WC Docket No. 99-200 (March 8, 2011). Vonage claims that direct access to NANPA resources is appropriate based on the 2005 Order and to drive down costs. *Vonage Petition*, p. 2 citing *In re: SBICS*, Docket No. CC 99-200 (February 1, 2005).

The three petitions demonstrate the legal and regulatory chaos arising from short-term results on the regulatory treatment of VoIP by the FCC that gave rise to these petitions. The petitions illustrate the confusion arising from the failure of the FCC to properly classify VoIP service under state and federal law. Some proponents seek “information service” classification. That places regulatory and intercarrier compensation within the power of the FCC regardless of a VoIP call’s origination and termination. Others want intrastate carrier access rate compensation based on the NXX used for origination and termination points of the call

These proponents typically cite several confusing decisions on VoIP. One FCC decision preempted state certification of providers that offer retail VoIP services.<sup>6</sup> A later FCC decision imposed federal universal service fund (USF) contribution support assessments on VoIP providers with a “safe harbor” provision that insulated intrastate VoIP from the federal USF, a result that reflects joint jurisdiction.<sup>7</sup> Another decision declared VoIP a “successor” technology to traditional voice service,<sup>8</sup> again reflecting joint jurisdiction. The FCC’s *Time Warner* decision held that the wholesale transmission and termination of traffic is telecommunications irrespectively of whether or not the VoIP provided over that interconnection is telecommunications or information service.<sup>9</sup>

Recent FCC decisions have refused to preempt state authority over VoIP given the role that state commissions play in the arbitration and mediation of interconnection conflicts.<sup>10</sup> In 2011, the FCC again refused to preempt state commissions by declaring that carriers have interconnection rights under Sections 251(a) and (b) in rural areas

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<sup>6</sup> *In re: Petition of Vonage for a Declaratory Ruling Concerning an Order of the Minnesota Public Utility Commission*, WC Docket No. 03-211 (November 12, 2004).

<sup>7</sup> *In re: Universal Service Contribution Methodology*, WC Docket No. 06-122 (June 27, 2006), paragraph 2.

<sup>8</sup> *In re: CALEA*, ET Docket No. 04-295 (August 9, 2004), paragraph 2 and *In re: CALEA, 2<sup>nd</sup> Order and Notice*, ET Docket No. 04-296 (May 6, 2006).

<sup>9</sup> *In re: Time Warner Petition for a Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55 (March 7, 2007)

<sup>10</sup> *In re: Petition of UTEX, Inc. to Preempt the Public Utility Commission of Texas*, WC Docket No. 09-134 (October 9, 2009), paragraphs 9 and 10.

notwithstanding any Section 251(c) rural exemption in a “wholesale telecommunications-retail VoIP” decision similar to *Time Warner*.<sup>11</sup>

### ***The Pa. PUC Opposes Preemption.***

#### *a. The Vaya Petition.*

The *Vaya Petition* seeks an interstate classification for its service but payment of a far lower intrastate rate i.e., reciprocal compensation, a rate reserved for local calls. The *Vaya Petition* relies on the *ISP Remand Order* which applied a reciprocal compensation rate to an interstate service. Vaya knows that the FCC defended that *ISP Remand Order* on appeal as one of limited and rapidly diminishing practical significance.<sup>12</sup> Moreover, the *Vaya Petition* would classify VoIP as a “telecommunications” service when paying an intrastate reciprocal compensation rate based on a federal decision that set a rate for an “interstate” information service i.e., dial-up internet service.

The Pa. PUC opposes the *Vaya Petition*. The petitioner seeks freedom from the mandate to pay intrastate access charges for VoIP calls that originate and terminate intrastate and where intrastate access rates apply. They rely on an FCC decision involving an interstate service. Such a result and the ensuing jurisdictional and rate preemption undermines existing federal law as well as Pennsylvania law i.e., particularly the VoIP Freedom Act at 73 P.S. § 2251.1 et seq.

#### *b. The TWTC Petition.*

The *TWTC Petition* seeks interconnection rights for IP-to-IP network interconnection. They consider IP and VoIP as “telecommunications service” with interconnection rights under state and federal law. A decision granting that relief is attractive because, under federal law, there would be joint jurisdiction over

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<sup>11</sup> *In re: Petition of CRC Communications of Maine to Preempt the Maine Public Utilities Commission*, Docket 10-143 (May 26, 2011).

<sup>12</sup> *In re: Connect America Fund*, Docket No. 10-90, Comments of the Pa. PUC (August 24, 2011), p. 27 n. 21 citing *Pa. PUC v. FCC*, Docket No. 10-189 and *Core Communications, Inc. v. FCC*, Docket No. 10-185, Brief for the Federal Respondent in Opposition, p. 12.

telecommunications. Moreover, such a result is consistent with industry claims that IP technology and IP-based services are the way of the future for delivering voice service.

However, another dilemma has arisen because, under the *Time Warner* decision,<sup>13</sup> VoIP providers must partner with telecommunications carriers on a wholesale basis to secure interconnection to the public switched telecommunications network (PSTN). That decision, in turn, arose because *retail* VoIP providers lack a right to interconnection because interconnection to the PSTN is a right of telecommunications carriers that possess state or federal certificates to operate as a telecommunications carrier under state or federal law. *Retail* VoIP providers have no state certificate or FCC license.

But, the FCC's *Vonage Preemption* decision precluded states from certifying providers that offer *retail* VoIP services. As a result, IP-to-IP transmission providers may have no clear right to interconnect with the PSTN.

A decision classifying IP interconnection as an information service could also preempt state authority over interconnection arbitration and mediation as well as intercarrier compensation matters as mandated by TA-96 and the VoIP Freedom Act. Such a result will put all disputes within the authority of the FCC which is contrary to certain provisions of TA-96. Moreover, there is no federal-state joint jurisdiction if IP interconnection is not telecommunications.

Such a result will be totally impractical. The FCC will be called to adjudicate numerous interconnection and intercarrier compensation disputes that are normally and timely disposed of by the various state utility commissions including the Pa. PUC.

In addition, that result undermines Pennsylvania's VoIP Freedom Act to the extent that the result imposes a predetermined rate for IP interconnection in Pennsylvania, including local and intrastate long-distance compensation rates. The Pa. PUC opposes a result that undermines federal-state joint jurisdiction over telecommunications.

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<sup>13</sup> *In re: Time Warner Petition for a Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, Docket No. 06-55 (March 7, 2007), paragraph 1.

c. *The Vonage Petition.*

The *Vonage Petition* seeks relief from a self-created dilemma generated by the unintended consequences of its earlier FCC *Vonage Preemption* order. In that decision, Vonage convinced the FCC to preempt state certification and any 911 mandate on providers of *retail* VoIP services. Vonage has a problem because precluding states from providing a certificate or imposing 911 mandates on VoIP<sup>14</sup> means Vonage cannot get direct access to numbering resources.

Vonage is unable to submit the state certification needed for a telecommunications carrier to get numbers or otherwise directly avail itself of numbering resources. Section 52.15(g)(2) of the FCC's rules, 47 CFR § 52.15(g)(2), requires providers to submit the evidence indicating state certification or FCC license showing that the carrier is authorized to provide service in the area for which the carrier wants numbers.

Vonage's preemption also means that if *retail* VoIP providers get direct access to numbers, states with delegated numbering authority lack a regulatory vehicle like state certification to ensure that providers of *retail* VoIP services are complying with numbering conservation efforts like *wholesale* and *retail* telecommunications carriers. The states will lack basic information on where providers of *retail* VoIP services are located, who they are serving, and what they are doing with their numbers. This self-created dilemma has arisen because the absence of state accountability arising from the prohibition on state certification in the *Vonage Preemption* decision precludes access to numbers. Consequently, Vonage and others cannot be located, are not state certificated, cannot get numbers, and can provide no evidence of compliance with numbering efforts.

One of the problems with giving *retail* If the FCC provides VoIP providers like Vonage access to numbers is the state commissions will find it extremely hard to monitor and ensure numbering conservation efforts currently in place because some providers (in this case VoIP) will be getting numbers but have no known location or certificate to ensure compliance, Vonage's reliance on the *SBCIS* decision to circumvent the burden

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<sup>14</sup> *In re: Petition of Vonage for a Declaratory Ruling Concerning an Order of the Minnesota Public Utility Commission*, Docket No. 03-211 (November 12, 2004).

of numbering resource denial, a problem attributed to their earlier FCC preemption, is misplaced. *SBIC* granted a limited waiver of the current rules allowing an affiliate of an ILEC to obtain direct access to numbering resources but only until final rules addressing numbering for IP-enabled services were adopted.<sup>15</sup> This has not occurred.

The *SBICS* decision required the petitioner to comply with the Commission's numbering utilization and optimization requirements and industry guidelines and practices, including numbering authority delegated to state commissions. The petitioner was required to must submit any requests for numbering resources to the Commission and the relevant state commission at least 30 days prior to requesting resources from the NANPA or the PA.

There is no evidence that final rules have been promulgated. There is no evidence that this petitioner can effectively comply with numbering conservation efforts underway in states with delegated numbering authority. The petition fails to recognize or address compliance with state mandates, including number conservation. The relief focuses on addressing an unintended consequence arising from an earlier benefit but in a manner that causes more uncertainty than clarity when it comes to number conservation.

The fact that Vonage secured the benefit of preemption from the burden of state certification should not be abandoned simply because the beneficiary is unable to obtain a benefit of the very certification requirement they previously opposed i.e, numbers. The FCC should deny the petition and seriously re-examine the preemption of VoIP.

### *Conclusion.*

The Pa. PUC opposes any action by the FCC or carriers in these dockets that factually or constructively preempts Pa. PUC authority over intrastate communications under state or federal law. The Pa. PUC also opposes any FCC action which waives the requirement that carriers seeking access to numbers must submit evidence that they can provide service in the area for which they seek numbers.

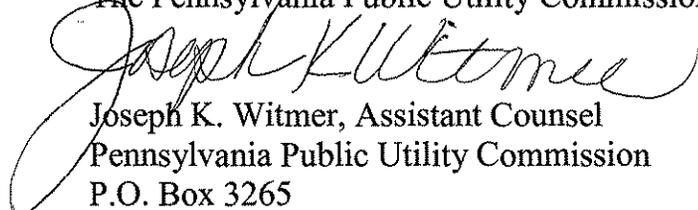
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<sup>15</sup> *In re: Petition of SBC Internet Services*, Docket No. 99-200 (February 1, 2005), paragraphs 1 and 5.

No federal action should preempt Pennsylvania law, including the VoIP Freedom Act at 73 Pa.C.S. § 2251.1 et. seq.. That law retains Pa. PUC authority over IP and VoIP traffic for Telecommunications Relay Service (TRS), Universal Service Funding (USF), 911 emergency services and, importantly, other intercarrier compensation rates. The Pennsylvania General Assembly's provisions retaining authority under state and federal law do not support any wholesale preemption of intercarrier compensation under Pennsylvania law.

The Pa. PUC urges the FCC to address issues of general importance like those set out in the three petitions using a rulemaking procedure. The FCC should not allow petitioners to pursue general relief in a specific pleading when it is more appropriate to consider the issue in a rulemaking. That includes the *Vonage Petition*.

Respectfully submitted,  
The Pennsylvania Public Utility Commission



Joseph K. Witmer, Assistant Counsel  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000  
Email: [joswitmer@state.pa.us](mailto:joswitmer@state.pa.us)

October 6, 2011.