

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

<i>In the Matter of</i>)	
)	
<i>Developing an Unified Intercarrier Compensation Regime</i>)	CC Docket No. 01-92
)	
<i>Petition of Vaya Telecom for a Declaratory Ruling Regarding LEC-To- LEC VoIP Traffic Exchanges</i>)	DA No. 11-1561
)	

**OPPOSITION OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this opposition to the August 26, 2011 filed Petition of Vaya Telecom, Inc. (Vaya) seeking a declaratory ruling regarding the application of intrastate access charges to voice over Internet protocol (VoIP)-originated calls that are sent to local exchange carriers' (LECs') customers for termination.¹ Specifically, Vaya seeks a declaration that, "a LEC's attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice."² Vaya asserts that "[c]onsistent with the Commission's treatment of ISP [Internet service provider]-bound traffic, this LEC-to-LEC, jurisdictionally interstate traffic exchange is subject to section 251(b) of the Telecommunications Act, and not the separate intrastate access charge regimes of the states."³

The timing of this petition is both ironic and superfluous.

Ironic because it comes on the heels of the FCC's creation of a task force to focus on call termination issues caused in part apparently by least cost routing providers like those discussed extensively in the Vaya petition.

¹ *Petition of Vaya Telecom, Inc. Regarding LEC-to-LEC VoIP Traffic Exchanges* (filed Aug. 26, 2011) (*Petition*), online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021710074>.

² *Id.* at 1.

³ *Id.*

Superfluous because it the declaration it seeks, and the legal justification it proposes has already been advanced by a coalition of carriers in the broader FCC Universal Service-Intercarrier Compensation Reform proceeding, that many anticipate will be addressed in the order and further rulemaking for this October 28th FCC agenda meeting. Indeed, the FCC notice of this docket limits both comments and the time for comments noting specifically that: “Since the issue raised in Vaya’s petition, the treatment of VoIP for purposes of intercarrier compensation, is an issue that the Commission is already considering in CC Docket No. 01-92, 30 days are not required for interested parties to give full consideration to the issues in the petition.[]For the same reason, we conclude that no reply comment period is necessary.”⁴

In support of its petition, Vaya makes two arguments:

First, it is well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate traffic based on the Commission's end-to-end analysis. A LEC's intrastate switched access tariff is therefore inapplicable to this traffic on this ground alone.

Indeed, it is SO well settled that (1) Vaya felt compelled to file this petition and (2) the FCC has a broad ongoing rulemaking focused in part on this precise issue. The fatal and obvious flaw in this argument, as discussed in more detail, *infra*, is that it requires one to ignore obvious facts concerning severability.

The second argument Vaya presents is of similar caliber:

Second, the exchange of telecommunications between LECs is subject to section 251(b)(5) and therefore reciprocal compensation arrangements are the exclusive means by which a LEC receives compensation, not the legacy access charge regime separately preserved by section 251(g) for LEC-to-IXC traffic exchanges.

⁴ *Pleading Cycle Established For Comments on Vaya Telecom Petition For Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges*, CC Docket No. 01-92, FCC Notice DA 11-1561, at 1 (rel. September 20, 2011), online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1561A1.doc, footnotes omitted, citing to *In the Matters of 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*, CC Docket Nos. 96-45, 01-92; GN Docket No. 09-51; WC Docket Nos. 03-109, 05-337, 07-135, 10-90, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4744-4751, ¶¶ 608-620 (2011).

This last argument, with its obvious legal deficits, could have been lifted *in toto* from the ABC plan proponents 69 page legal tome filed to justify the broad preemption they endorse.⁵ Neither argument has merit. Accordingly, NARUC respectfully requests the FCC reject the Vaya petition.

Discussion

The treatment of VoIP traffic vis-à-vis access charges is not a new issue. Indeed, one of NARUC's first resolutions on VoIP is from July of 2003. Even back then, NARUC recognized that:

- A decision by the FCC, in this docket or elsewhere, to declare all phone-to-phone calls over IP networks to be information services by virtue of the technology could have negative effects on various telecommunications policies, including universal service, and might be inconsistent with the 1996 Act, and
- Voice over the Internet Protocol and intercarrier compensation issues are inextricably linked, and
- A significant portion of the nation's total voice traffic could be transported on IP networks within a few years,

before resolving that the “FCC should confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services.”⁶

The best and perhaps the shortest answer to the Vaya petition has already been provided by the FCC in reply to a similar request to avoid the intercarrier compensation system filed by AT&T over five years ago. As AT&T did then, Vaya:

offers “telecommunications” because it provides “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”[] And its offering

⁵ See, Attachment 5 (“Legal” analysis), *Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC WC Docket No. 10-90 et al.* (filed July 29, 2011), available online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698696>.

⁶ See, *Resolution Relating To Voice Over The Internet Telecommunications* (February 2003) http://www.naruc.org/Resolutions/voice_over.pdf.

constitutes a “telecommunications service” because it offers “telecommunications for a fee directly to the public.”[] Users of [this] specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, [this carrier] does not offer these customers a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;” therefore, its service is not an information service under section 153(20) of the Act.[] End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through [a carriers] traditional circuit-switched long distance service . . . We clarify, therefore, that [this carriers’s] specific service constitutes a telecommunications service.” {emphasis added and notes omitted}⁷

While the underlying circumstances presented here are – purportedly – somewhat different, the required statutory analysis has not changed.

The Majority of VoIP Traffic is Severable (and is severed)

As noted, *supra*, after expressing outrage that Vaya should actually be required to pay the same charges for terminating its calls as other services it competes with, the petition argues that

“...is well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate traffic based on the Commission's end-to-end analysis. A LEC's intrastate switched access tariff is therefore inapplicable to this traffic on this ground alone.”

The proffered legal analysis is very simplistic. The “argument” references (correctly) that the traffic must be “inseverable” (a factual determination) but never really discusses the issue. The “analysis” is a truncated description of several FCC cases that are simply not relevant to the circumstances presented. All the cited cases are based on specific FCC findings of both the existence of mixed inter- & intrastate traffic and inseverability. The Vaya petition provides no insight or even statements about the severability or purported inseverability of the targeted traffic.

⁷ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361 (rel. April 21, 2004), ¶ 12, mimeo at 13, available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-97A1.pdf.

The FCC will necessarily have to make a factual determination that VoIP traffic is not severable to provide the relief Vaya has requested. That poses a real obstacle. Other than self-serving statements by carriers looking to avoid jurisdiction, there is ***no*** evidence provided in this proceeding (or the broader USF-ICC reform docket) that such traffic is not severable.

It is, at a minimum, counterintuitive that a network that has to deliver bi-directional voice traffic in real time is incapable of locating the end-points of that communication at least within existing State geographic boundaries.

It is also odd that companies like AT&T and others that are shifting to for-profit services to allow subscribers to track in real time the location of children and employees (and apparently even pets), can argue that they cannot locate – within a State boundary – where calls originate and terminate on their networks.

It is also completely at odds with federal CALEA mandates and the unswerving FCC goal of assuring ever better and more precise routing of E911 emergency calls – regardless of the technology used to provide the underlying voice service.

It is also completely at odds with the undeniable fact that the majority of fixed VoIP providers (and wireless providers) pay into the federal universal service program based on jurisdictional traffic distinctions.

Indeed, with respect to facilities-based or “fixed” interconnected VoIP services – severability is a non-issue.⁸ For them, it appears the traffic never touches the “internet” – but interfaces with the PSTN just like other communications systems with different dedicated protocols.⁹

⁸ Fixed VoIP services can be accessed from one and only one geographic point -- the physical location where the service connection is established. Fixed VoIP providers know where their subscribers are calling from. This fixed VoIP telephony is provided by companies which have their own fixed connections to customer premises and have bandwidth specifically dedicated to VoIP telephony. For the most part, instead of using the Internet, cable companies operate their own high-speed data networks on their cable facilities. These facilities typically only permit the end-user to access VoIP telephony from the hardwired connection at that user's premises.

⁹ Lawson, Stephen, *Comcast Calls on VoIP - Cable company announces plans to launch phone service this year*, IDG News Service (2006) According to *Comcast Chairman and Chief Executive Officer Brian Roberts*, Cable operator Comcast VoIP service "[w]ill not be an Internet telephony service, he says: Though they will use IP, the voice calls won't touch the Internet, running instead over Comcast's private data network, with priority over regular data packets to

Inseverability is a factual issue. Footnote 8, *infra*, cites sworn testimony and an on the record adjudication about the severability of facilities-based VoIP. The record statements in those hearings are consistent.

ensure good quality." Available at: <http://pcworld.about.com/news/Jan112005id119241.htm>. (Last accessed October 28, 2008) {emphasis added} See also, July 23, 2008 Sworn Initial Testimony of James R. Burt on behalf of Sprint Communications Company L.P. filed before the Arkansas Public Service Commission, *In the Matter of Petitions for Arbitration by Sprint Communications Company L.P. against Yelcot Telephone Company, DOCKET NO. 08-0764, and against Northern Arkansas Telephone Company, DOCKET NO. 08477-U*, Exhibit JRB-1 at page 65, and at pages 29-30, where Mr. Burt notes: available at http://www.apscservices.info/pdf/08/08-076-u_14_1.pdf. (Excerpt: "Is the proposed service an Internet Telephony, Internet-based VoIP or over-the-top VoIP service? No. I am not speaking to the regulatory treatment of these services, but rather, the functionality of the proposed service . . . The terms Internet Telephony, Internet-based VoIP and/or over-the-top VoIP services are used to describe voice services that utilize the public Internet. An example would be the service provided by Vonage. By contrast, the service provided by Sprint and Suddenlink does not use the public Internet in any manner. . . . The voice services provided by Sprint and Suddenlink are not nomadic; the customers only use the service in their homes. Internet Telephony, Internet-based VoIP service and over-the-top VoIP services have also struggled with providing 911 service consistent with customer or public safety official expectations. The voice services provided by Sprint and Suddenlink provide reliable 911 service. . . There is one factor that is sometimes used to attempt to create confusion between Internet Telephony, Internet-based VoIP service and over-the-top VoIP service and the voice service king provided by Sprint and Suddenlink. It is the fact that all of these services happen to use the Internet protocol. Since all of these services use the Internet protocol, there is a tendency to claim the services are the same. The mere fact that there is one technical similarity, use of the Internet protocol, should not lead one to the conclusion that the services are the same.) {emphasis added} Cf. June 6, 2008 Prefiled Testimony of Corey R. Chase on Behalf of the Vermont Department of Public Service, *State of Vermont Public Service Board Docket No. 7316 Investigation into regulation of Voice over Internet Protocol Services*, at pages 12-14, 13, (Excerpt: Q. Is it true that CDV packets "flow interwoven with other data packets such as email or video along Comcast's private IP data network" as Mr. Kowolenko stated on page 10 of his prefiled testimony? A. It appears to be true that at some points within the Comcast network, packets containing CDV data travel with packets containing other data types on the same IP network, with CDV packets marked to maintain quality. However, in the response to DPS Information Request 1-12, Mr. Kowolenko stated that, "It [CDV] does not contend with other IP based traffic destined for the public Internet that flows across the Comcast access network." Since packets carrying various data types do not contend for bandwidth and thus cannot affect each other, they should not be considered "interwoven" because CDV traffic can be identified separately from other data. Furthermore, as discussed above combining various traffic types on a single network is a function of all modern networks, not just IP networks. See also, July 25, 2008 Prefiled Rebuttal Testimony of David J. Kowolenko on behalf of Comcast of Vermont, *State of Vermont Public Service Board Docket No. 7316 Investigation into regulation of Voice over Internet Protocol Services*, at pages 8-9, where he points out, as does his CEO, *supra*, that Comcast's phone service "uses IP technology but provides a facilities-based service that does not traverse the public Internet unlike 'over the top' providers that do not directly connect via a private network to the PSTN as Comcast does. It also does not conflict with other IP-based traffic destined for the public Internet that flows across the Comcast access network." All 3 documents can be downloaded from: <http://www.naruc.org/Publications/Testimony%20filed%20in%20Vermont%20PSB%202008%20Examination%20of%20VOIP.pdf>. See also, May 9, 2008 FINAL DECISION, in *Public Service Commission of Wisconsin Docket 5911-NC-101, Application of Time Warner Cable Information Services (WI), LLC to Expand Certification as an Alternative Telecommunications Utility*, at 8, Findings of Fact # 8 "Under the business model established by Sprint and TWCIS, Digital Phone uses IP technology as a transmission protocol, but does not use the Internet as such." Available at: http://www.psc.wi.gov/apps/erf_search/content/docdetail.aspx?docid=94163. See also, Briefing Memorandum in *Public Service Commission of Wisconsin Docket 5911-NC-101, Application of Time Warner Cable Information Services (WI), LLC to Expand Certification as an Alternative Telecommunications Utility*, available at: http://www.psc.wi.gov/apps/erf_search/content/docdetail.aspx?docid=84954.

Even the FCC conceded in a June 2006 Order that fixed interconnected VoIP services do currently contribute to the federal program based on actual revenues (aka – severed traffic).¹⁰ Because there is no question it is possible to separate intrastate non-nomadic facilities-based VoIP calls from interstate calls, the FCC has no jurisdiction over such intrastate calls. Indeed, now that the FCC has *required* both constructive severance by means of a proxy interstate safe harbor for nomadic VoIP providers to contribute to the federal universal service programs, as well as actual severance, by requiring nomadic VoIP providers to have functioning 911 services,¹¹ it may be time to re-examine that FCC action.

The only facts currently in the record support rejection of the Vaya request. But if the FCC is seriously considering creating a factual record to allow it to consider granting the petition, NARUC respectfully suggests, given the painfully obvious inconsistency between the notion that VoIP (or wireless) traffic is not severable and the listed facts, federal mandates, and federal policy initiatives, that this is precisely the type of issue that requires the use of interrogatories, sworn testimony and the opportunity for cross-examination before any final legal determination is possible – either here or in the broader proceeding.

Protocol Conversions cannot justify Preemption.

The Vaya petition, at page 2, also implies, albeit obliquely, that “net protocol” conversions can somehow justify preemption. They cannot.

¹⁰ See Universal Service Contribution Methodology, WC Docket 06-122; CC Dockets 96-45, 98-171, 90-571, 92-237; CC Dockets 99-200, 95-116, 98-170; WC Docket 04-36, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518 (2006), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf (Contribution Order), *aff'd in part, vacated in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007), at note 189 (“Because we permit interconnected VoIP providers to report on actual interstate revenues, this Order does not require interconnected VoIP providers that are currently contributing based on actual revenues to revise their current practices.”).

¹¹ “In May 2005, the FCC adopted rules requiring providers of interconnected VoIP services to supply 911 emergency calling capabilities to their customers as a mandatory feature of the service by November 28, 2005. “Interconnected” VoIP services are VoIP services that allow a user generally to receive calls from and make calls to the traditional telephone network. Under the FCC rules, interconnected VoIP providers must: Deliver all 911 calls to the local emergency call center; Deliver the customer’s call back number and location information where the emergency call center is capable of receiving it.” See: <http://www.fcc.gov/pshs/services/911-services/voip/Welcome.html>.

The ubiquitous protocol conversions that characterize PSTN voice traffic do not change the form or content of the input to the service (e.g., real time voice communications) and have never been the basis for reclassifying a telecommunications service.¹² Protocol conversions “management, control or operations of a telecommunications system or the management of a telecommunications service”¹³ are part and parcel of any telecommunications network. To begin a telephone call, a sound wave is necessarily converted to an electronic wave. In almost all current PSTN telephone calls, these analog electronic waves are converted to digital signals (and packetized) as well as multiplexed with other traffic. In some cases, the digital electronic signals are converted to light signals and back again into electronic signals. These protocol conversions do not change telecommunications services into information services. The protocol conversions to so-called “Internet Protocol” – even in that small percentage of so-called “nomadic” VoIP traffic that actually does ride the public Internet – cannot create an information service. Indeed, it is telling that even the definition of “information services, 47 U.S.C. § 153(20) specifically excludes “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

¹² See *In re Independent Data Communications Manufacturers Ass’n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶16 (1995). The FCC also said (i) communications between the subscriber and the network for call setup or call routing, and (ii) protocol conversions necessitated by the introduction of new technology are not enhanced services. *Id.* at ¶¶14-15. The FCC classified frame relay service, a type of high-speed packet switching service, as a basic telecommunications service under Title II. *Id.* at ¶22. AT&T argued that because protocol conversion was an integral part of its frame relay service offering, the entire offering should be classified as an enhanced service. The FCC disagreed. *Focusing on the data transmitted by the customer, the FCC said that regardless of changes made to the frame header, the customer’s data contained within the frame are not modified in any way as they travel through the network and arrive intact.* *Id.* at ¶30 The FCC further noted that changes to the header information were in part responsible for the carriage of the customer’s data through the network to the proper termination point, and hence are part of a basic transmission service. *Id.* *And perhaps most critically, the FCC found that, to the extent protocol conversion was performed, such conversion did not change the essential character of the frame relay service as a basic common carrier transmission service.* *Id.* at ¶41 In particular, the FCC emphasized that the LECs treated functionally equivalent frame relay service as a basic transmission service. *Id.* at ¶40. The FCC thus rejected the notion that the mere bundling of a protocol conversion service that might be classified as enhanced altered the fundamental character of the basic frame relay service as a telecommunications transmission service. *Id.* at ¶40. The FCC’s reasoning appears applicable here. Assuming *arguendo*, a carrier’s protocol conversion service used in conjunction with a basic transmission service is “enhanced”, that is irrelevant. The enhanced protocol conversion service does not change the basic character of the voice service as a telecommunications service. Like AT&T’s protocol conversion service, such a service simply facilitates “the overall transparency and efficiency” of the basic voice service. See *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (Released April 21, 2004). Cf. *Computer II*, Final Decision, 77 F.C.C. 2d 384, 394 (1980). ([T]he confluence of communications and data processing renders unlimited the possible combinations and permutations of services which can be offered to the consumer. *Moreover, we noted that the nature of these services are determined not by the transmission facilities, but, rather, by the specific processing applications offered through electronic equipment attached to the channel of communication.*)

¹³ 47 U.S.C. 153(20).

In § 153(46), Congress made clear that distinctions in technology deployed to transmit voice communication are not relevant in classifying a service as a “telecommunications service.” 47 U.S.C. § 153(46). Congress’ definition of “advanced telecommunications capability” in § 706 likewise makes clear that such capability is “without regard to any transmission media or technology” and “enables users to originate and receive high-quality voice ... telecommunications using any technology.” 47 U.S.C. § 157 (reproduced in note thereto). The fact that any service uses IP technology rather than some other technology to deliver its voice telecommunications service is immaterial to a proper classification of the service. By mandating technology neutral determinations, Congress intended that functionally similar services, like basic telecommunications services, be classified similarly. Indeed, the FCC has affirmed elsewhere that telecommunications services are not limited to those employing circuit-switched technology.¹⁴

Moreover, a focus on the functional nature of particular VoIP services *from the end user’s standpoint* - which compels classification of such services as “telecommunications services” - is consistent with the *1998 Universal Service Report*. There, the FCC correctly observed, “Congress’ direct[ed] that the classification of a provider should not depend on the type of facilities used ... Its classification depends rather on the nature of the service being offered to customers.” They also noted: “. . . a telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable satellite, or some other infrastructure.” *Universal Service Report* at ¶ 59.¹⁵ The nature of the service in turn “depends on the functional nature of the end-user offering.” *Id.* at ¶86. “Congress intended the categories of ‘telecommunications service’ and ‘information service’ to parallel the [pre-1996] definitions of ‘basic service’ and ‘enhanced service’” in the 1996 Act. 290 F. Supp. 2d at 999, note 7.

¹⁴ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24032, ¶ 41 (1998). (“Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. . .The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology”).

¹⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 F.C.C.R. 11501 (Released April 10, 1998) (*1998 Universal Service Report*).

Like traditional voice communication service classified as a “basic service” under the pre-1996 Act precedent, most of “VoIP” voice services – including the nomadic offerings from companies like Vonage, as well as those offered or planned by facilities-based carriers do not provide subscribers with additional, different, or restructured information.¹⁶ Nor does the real-time voice service they provide involve subscriber interaction with stored information, which is a characteristic of an “enhanced” or information service. The information transmitted—i.e., the voice communication – is of the subscriber’s own design and choosing. The IP technology used to transmit the voice transmission is completely transparent to the calling and called parties and functionally equivalent to existing phone service.

The Relevant Case Law does not Support Preemption.

The FCC’s original Vonage order specifically eschewed classification of VoIP traffic as either an information service or telecommunications services. The basis for preemption – severability - that was ultimately upheld by the 8th Circuit necessarily had nothing to do with the traffic’s classification – and zero applicability to the bulk of fixed services that would be affected by the proposed new classification. Indeed, the FCC’s original *Vonage* order effectively concedes,¹⁷ the FCC can *only* preempt: (1) to the extent necessary to avoid a conflict between federal law and state law;¹⁸ AND (2) where the intrastate telecommunications service is inseverable from the interstate service component.¹⁹

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

¹⁷ See, Memorandum Opinion and Order, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, (rel. November. 12, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-267A1.doc, at ¶20-22 arguing that any State regulation will necessarily conflict with federal policy and at ¶23-32 pressing the – even then factually inaccurate – statement that intrastate nomadic VoIP services are impossible to separate from interstate services – based pretty much solely upon self-serving statements by the industry.

¹⁸ The FCC bears the burden of justifying its entire preemption order by showing “with some specificity” that it is narrowly tailored to preempt only such state regulations as would necessarily negate FCC regulations. *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990); *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994). To be valid, preemption must be limited to state regulation that would negate the FCC’s exercise of its own lawful authority over interstate communications. *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989). The FCC must explain why preemption is required in order to advance legitimate federal regulation. *Texas Office of Pub. Util. Counsel*, 183 F.3d at 422.

¹⁹ See, generally, Louisiana PSC, 476 U.S. at 374-376; *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. (1989).

A bare allegation that a State action “frustrates” a federal goal is insufficient. Indeed, in a subsequent order also addressing so-called “nomadic” VoIP,²⁰ the FCC specifies that “a fundamental premise of our decision to preempt Minnesota’s regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries.”

Without any reference to *an alleged potential* conflict between State and Federal oversight, (or possible future classification of nomadic VoIP as an information service) – the FCC, in that June 2006 order, goes on to concede that, “an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to State regulation. This is because the central rationale justifying preemption . . . would no longer be applicable.” Id.

However, as explained, *supra*, the factual predicate for this statement – the purported inseparability of traffic on the networks, is, to be charitable, a gross overstatement.

²⁰ See Universal Service Contribution Methodology, WC Docket 06-122; CC Dockets 96-45, 98-171, 90-571, 92-237; CC Dockets 99-200, 95-116, 98-170; WC Docket 04-36, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518 (2006), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf (Contribution Order), aff’d in part, vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007), at ¶ 56, mimeo at 29 (“While . . .interconnected VoIP providers may report their actual interstate telecommunications revenues . . . some interconnected VoIP providers do not currently have the ability to identify whether customer calls are interstate and Indeed, a fundamental premise of our decision to preempt Minnesota’s regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries [note 188 See *Vonage Order*, 19 FCC Rcd at paras. 23-31.] Therefore, an interconnected VoIP provider may rely on traffic studies or the safe harbor . . . in calculating its federal universal service contributions. Alternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls. [Footnote omitted] . . . an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.”

The Commission Lacks Authority to Unify Inter-carrier Compensation Regimes

At page 7 of the petition, the Vaya petition regurgitates with no significant elaboration – the “all traffic is properly classified as Section 251(b)(5) telecommunications” legal theory championed by the proponents of the so-called ABC plan. Theories that attempt to expand §251(b)(5) reciprocal compensation to include intrastate access charges flounder on any examination of either the legislative history or the unambiguous statutory text.

Section 251(b) specifies interconnection requirements applicable to LOCAL exchange carriers in competitive LOCAL markets.

Subsection (b)(5) specifies the LEC duty to transport *and terminate* the traffic of other LECs competing *in the same local exchange service area*. On its face, it has no applicability to interstate or intrastate exchange access services. LECs have never established “reciprocal compensation arrangements” with interexchange carriers. Indeed, Congress specifically distinguished *exchange access services* from the “reciprocal compensation” transport and termination arrangement required by §251(b)(5), when it specified that competitive LECs can utilize the facilities and equipment of incumbent’s “for the transmission and routing of telephone exchange service and exchange access.”

47 USC §251(c)(2)(A).²¹

²¹ Indeed, in the Conference report, the Senate’s specification that “[t]he obligations and procedures proscribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications under section 201..for the purposes of providing interexchange service, and nothing in this section is intended to affect the Commission’s access charge rules” morphed into new section 251(i). H.R. CONF. REP. 104-458, at pp 117, 123.

Section 252(d)(2)(A) adds further support to this view – when it talks about an “incumbent local exchange carrier’s” compliance with §251(b)(5) and specifies “mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” Although toll traffic is usually passed on to an intervening carrier by a LEC, it rarely terminates on such carrier’s carrier network. Courts will look to the common usage of a word.²² Congress’ selection of this term, in context, tracked the commonly used and widely understood meaning at the time the 1996 legislation²³ was being drafted.²⁴

²² Cornell University Law School, Legal Information Institute, http://topics.law.cornell.wex/statutory_construction.

²³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §151 et. seq.).

²⁴ See, Communications Daily (Warren Publ. 6/23/95) Vol. 15, No. 121; Pg. 7 (“[The PA PUC] ... adopt “bill-and-keep” model for reciprocal compensation *between competing local exchange carriers*,”); Communications Daily (Warren Publ. 12/21/95) Vol. 15, No. 245; Pg. 3 (“Fla. PSC approved 2-year interconnection agreement involving competitive access provider Intermedia Communications and BellSouth. . . sets terms for rates, reciprocal compensation.”); “Industry Lukewarm on FCC Plan To Collect Data on Competition”, Communications Daily (Warren Publ. 12/13/95) Vol. 15, No. 239; Pg. 4 (“[S]urvey has 2 “fundamental flaws”: (1) Bureau “omitted requests for data on the essential elements for [local] competition” -- such as reciprocal compensation, interconnection, number portability.”); Communications Daily (Warren Publ 19/21/95) Vol. 15, No. 224; Pg. 6 (“(PT) and MFS Communications announced interconnection agreement in Cal. . . grants co-carrier status to MFS, including provisions for number portability . . . reciprocal compensation.”); Brief Transmission MFS, Pac Bell Form Local Telecomms Pact, Telecomworldwire (M2 Communications Ltd. 10/21/95) MFS Communications has aligned in an agreement with Pacific Bell to provide the first Californian competitive local telephone company and its customers to receive the financial and operational benefits of co-carrier status. MFS says the pact will promote effective local telephone competition in California as well as providing number portability, reciprocal compensation, unbundled local loops.”) NARUC Convention; Work Group Urges Fewer Telecom Entry Barriers, Communications Daily (Warren Publishing Nov. 17, 1995) Vol. 15, No. 222; Pg. 2 State regulators should work to remove telecom entry barriers even though competition could develop in current environment, said NARUC Communications Subcommittee local competition work group in recommendations issued at convention here....Interconnection terms must be “reasonable and nondiscriminatory,” offered to all competitors, said group on interconnection and technical standards. It said those terms must include functions and switching software at any location, number portability and dialing parity, reciprocal compensation, “equal status in and control” over databases.’); Communications Daily, (Warren Publ. 12/01/95) Vol. 15, No. 211; Pg. 4 (Wis. PSC granted local exchange certificate to Teleport. . .will meet Dec. 4 to discuss interconnection, number portability, reciprocal compensation issues.”) Communications Daily (Warren Publ. 07/26/95) Vol. 15, No. 143; Pg. 8 (“Cal. PUC issued long-awaited decision Mon. opening local telephone service to competition. It permits competitors to enter local market by building own facilities or by reselling services of incumbent LECs. . . and sets interim rules for reciprocal compensation, interconnection and number portability.”) Prepared Testimony of Robert Annunziata, President, Chairman and CEO, Teleport Communications Group before the Subcommittee on Telecommunications and Finance, Commerce Committee, U.S. House of Representatives H.R. 1555, Communications Act of 1995 May 11, 1995 (“but the legislation that is finally passed must be the right legislation. The single most important “right” element of H.R. 1555 is the requirement for reciprocal compensation for the mutual exchange of local traffic.”)

Moreover, any reliance on §201 authority over “interstate or foreign communication” necessarily excludes by definition – and the action of §152(b)²⁵– intrastate access. Section 152 operates in tandem with other sections of the 1996 legislation to mandate reservation of continuing State authority to “establish access and interconnection obligations of local exchange carriers.”²⁶

Exceptions to this authority are,²⁷ and must be express²⁸ and explicit.²⁹

²⁵ See, 47 USC Sec. 152(b) (1996), which reserves States authority over intrastate rates and services – specifying: “nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”

²⁶ See, 47 USC Sec. 251(d)(3) (1996): “Preservation of State Access Regulation: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section ”

²⁷ 47 USC Sec. 223 – 227 (1996)

²⁸ See, Section 601(c)(1) [note to 47 USC Sec. 153 (1996)] entitled "Effect on Other Laws", states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment, or supersede Federal, State, or local law unless *expressly so provided* in such acts or amendment." {Emphasis added}

²⁹ See, *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, n.4 (1986) (*Louisiana*). Agency attempts to achieve a policy goal via an unsupported reading of other statutory provisions to expand preemptive authority has been a feature of several FCC orders. In *Louisiana*, the Supreme Court considered and fully rejected the argument that the Commission should be able to preempt state authority in order to foster federal policy:

“While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, Hines, 312 U.S., at 67, 61 S.Ct., at 404, it is also true that *a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority*. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. *Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy*. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do *Louisiana* at pp. 374-375. {emphasis added}.

The case law cited in the Vaya petition has zero relevance to managed VoIP services. The court never addressed and indeed no one raised the “severability” of the “end-to-end” nature of dial-up internet traffic.

Conclusion

NARUC’s resolutions confirm the widely held principle that functionally equivalent services should be treated the same, that regulators should not intervene in markets by favoring one technology over another, that the 1996 Act requires a functional approach, that an approach that treats services that are substitutable for/functionally equivalent to existing telephony services differently is inconsistent with Congressional intent, and that the express terms of the Act does not permit, and an appropriate policy approach would not countenance, preemption of all State oversight of information services, much less the intrusion into retail intrastate rate design proposed by the proposed preemption of State access charges.

Respectfully Submitted,

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October 6, 2011