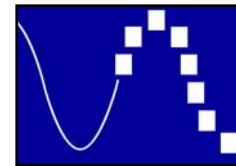


September 5, 2008

Chairman Tre Hargett
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505
Re: Case 05-00237



The VON Coalition

Dear Chairman Tre Hargett:

As the nation's leading companies developing and delivering voice innovations over the Internet, we are writing regarding Case 05-00237 and proposed new rules to extend Tennessee's Telecommunication Relay Service (TRS) to a broad classes of Internet voice communication technologies. While we applaud the laudable goal of expanding the base of support for Tennessee's TRS service, the extension of the proposed rules to a broad class of Internet communication technologies makes the rules definitionally impractical, technologically impossible, and legally impermissible.

Applying state rules to VoIP services as proposed is legally impermissible.

The FCC has specifically preempted states from imposing the kind of intrastate regulation that is proposed by TRA. Last year, the 8th Circuit Court of Appeals affirmed the FCC's Vonage Jurisdictional Order, which preempted state regulation of VoIP services. The Vonage Jurisdictional Order recognized that innovative and evolving services such as VoIP cannot be subject to a patchwork of regulations that would directly conflict with the goals of the federal Act and the FCC's pro-competitive deregulatory rules. The FCC also made clear that preempting state regulation of VoIP services was essential to "increase investment and innovation in [VoIP services] to the benefit of American consumers." Thus, state rules applying intrastate telecommunication regulation to VoIP is contrary to the FCC's and the court's decisions.

State telephone rules must not be applied to voice enabled blogs, web sites, computer games, multi-modal instant messenger software and other forms of Internet based communication as proposed.

In addition to the legality, the proposed definition for "Contributing Service Provider" in 1220-4-14.01(5) is overly broad. The definition captures a broad range of VoIP services that "include real-time voice communications that originate and terminate within the state" and specifically includes IP based communication. Indeed, VoIP represents an immense array of different types of products, services and technologies that enable text, voice, and video communications from web sites, software, hardware, and phones. Becoming the first state in the nation to regulate this broad class of technologies is both unnecessary and counterproductive.

The broad class of Internet enabled voice communications captured are often connecting users of the Public Switched Network (PSTN) to the Internet and enabling voice to be incorporated into a myriad of different web sites that allow people to communicate in entirely new ways – connecting

friends together on MySpace¹ and Facebook², giving voice to blogs³, transforming video games⁴, integrating voice and video into instant messaging⁵, enabling people with disabilities to access a host of new accessibility tools not previously possible⁶, allowing one telephone number to reach all your phones,⁷ enabling new privacy communication tools,⁸ ushering in a new era of voice recognition based information retrieval tools,⁹ and integrating click to dial functionality into mapping and other web sites.¹⁰ Subjecting these often free websites, services, software applications, social networking sites, and blogs to state telephone regulations runs the risk of stalling, stifling, and stopping the innovative new services that are now just emerging on the Internet.

We don't believe it is the TRA's goal to regulate these types of services, and therefore urge you to make this clear by deleting "IP based communication" from the definition of "Contributing Service Provider" in section 1220-4-14.01(5). By deleting this language, the TRA would be acting consistent with federal law as well as FCC regulation which prohibit regulation of Internet services that are not a replacement for a home phone service. However, even for Internet enabled replacement home phone services, which the FCC has defined as "Interconnected VoIP," the proposed rules are "impossible" to implement from a technological standpoint and impermissible from a legal standpoint.

VoIP providers deliver location independent services that make it "impossible" to identify communication that originate and terminate in Tennessee.

¹ See MySpace, Skype announce partnership to enable Single button links for calls between members, Associated Press, October 17, 2007, at <http://www.msnbc.msn.com/id/21341042/>

² Facebook now includes more than two dozen different VoIP applications enabling voice communication – each very different and all offered for free. Iotum's "Free conference calls" offers an innovative conference calling capability to connect all your friends at once, Grandcentral a one click way for a friend to call all your phones at once (home, cell and work) to reach you anywhere, Babytel offers a Java eggphone to connect your friends both online and offline from Facebook, PartyLine, offers a way to create groups for one click voice access, TringMe offers a way to leave voicemail and a way to use your computer's microphone to connect to the PSTN, and Rebtel's Let's Talk enables you to get "smart numbers" for your friends to communicate locally around the globe.

³ MyVox's VoiceBlog tool allows you to add a "VoiceBlog" to any web site or your iGoogle page. See: <http://www.google.com/ig/adde?moduleurl=api.myvox.com/demo/igoogle/voiceblog.xml> In addition by calling Jott at (866) JOTT-123/(866) 568-8123, you can convert your voice into emails, text messages, twitter message or blog posts on blogger. <http://jott.com/default.aspx>

⁴ Vivox has integrated voice into video games like SecondLife between avatars and also enables users to go to a virtual phone booth to make a call to the PSTN. See: <http://www.vivox.com/>

⁵ Voice enabled instant messenger services are transforming the idea of communications by integrating voice, video, text, and PSTN access to enable breakthrough advances in accessibility. For example voice enable IM software is offered by Skype, Yahoo!, MSN and Google.

⁶ The National Federation of the Blind uses a PSTN connected VoIP service that allows people who cant read print access to a newsline using a VoIP phone service to enable voice access to over 150 newspapers and magazines. Likewise, Bundled voices allows usres to create audible books. <http://bundledvoices.com/> Earthlink provides a voice activated e-mail by phone service.

⁷ GrandCentral provides one telephone number to connect to all of your other phones.

⁸ Match.com, Craigsnumber and others allow web users to connect by telephone without giving out their personal telephone numbers.

⁹ TellMe, Goog411, Jott, ReQall, and others provide ways to use voice recognition as a tool for accessing or delivering information to the Internet.

¹⁰ See several examples at: http://www.von.org/usr_files/Gee%20Whiz%20--%20one-way%20services.pdf

Unlike the telecommunication carriers that the TRA regulates, VoIP providers deliver a location-independent service, which, in short, means they are unable to accurately and consistently identify calls that “originate and terminate within the state” as described in the proposed rule. The FCC, in its Vonage Jurisdictional Order, found that several factors combine to make it “impossible” to isolate any intrastate-only component of such services. The FCC found that Interconnected VoIP services have “no means of directly or indirectly identifying the geographic location of a ... subscriber.”¹¹ In Minnesota Public Utilities Commission v. FCC, the Eight Circuit affirmed the FCC’s Vonage Order where the Commission found that Vonage’s service cannot be directly or indirectly tied to a specific geographic location. This is true both because “customers may use the service anywhere in the world where they can find a broadband connection,”¹² and separately, because Interconnected VoIP services like Vonage’s can assign telephone numbers to customers that are “not necessarily tied to” the user’s usual or “home” location.¹³

Thus, while it may be possible to attempt to identify intrastate conversations based upon the use of a North American Numbering Plan (NANP) assigned numbers representing a Tennessee area code, such data is an inaccurate proxy for calls that originate and terminate within Tennessee. As the FCC has found, Interconnected VoIP services can utilize “geographically independent telephone numbers”¹⁴ where the “number is not necessarily tied to the user’s physical location for either assignment or use, in contrast to most wireline, circuit-switched calls.”¹⁵ For example, several Interconnected VoIP providers enable U.S. consumers to subscribe to services utilizing area codes in cities throughout the country, international telephone numbers, and in some cases even multiple phone numbers in different cities or countries, thus facilitating competition and newer ways to communicate.¹⁶

While Interconnected VoIP services can bestow consumers “each with the ability to communicate with anyone in the world from anywhere in the world,”¹⁷ a call from a 615 prefixed telephone number does not suggest it originates in Tennessee. It instead might be a Kentucky family who has chosen a Tennessee phone number in order to allow their daughter studying at Vanderbilt University to more easily make a local phone call home.

Likewise, because interconnected VoIP services can be utilized from any broadband connection in the world, a call to a Nashville, Tennessee 615 area code phone number could in fact be an international call that is received by a member of the armed forces serving in Iraq. Indeed, VoIP is an especially popular service for people from the Volunteer State who volunteer to serve their country overseas.¹⁸ Yet, a VoIP provider has no way of accurately determining the origination or endpoint of data packets over the broadband network. This point was made especially clearly in

¹¹ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (released November 12, 2004) (“Vonage Order”) at 23.

¹² *Id.* at 5.

¹³ *Id.* at 9.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 9.

¹⁶ See for example <http://broadband-telephones.com/search/availability.aspx>

¹⁷ Vonage Order at 18

¹⁸ Everyone from the troops on the ground in Iraq, Afghanistan, to Central Command are enjoying widespread use of VoIP to affordably communicate with families, loves ones, and keep America safe. Troops are using VoIP to participate in weddings, visit with newborns and participate in family events. A soldier no longer has to choose between serving their families and serving their country. After using VoIP, one Army General recently observed that efforts to connect troops and families using VoIP represent the single greatest boost in morale for the troops in the past 25 years. (Source: Freedom Calls Foundation.)

the FCC's *Pulver Order*, which explained that Internet-based services are inherently "portable" and that VoIP providers cannot "determine the actual physical location of an underlying IP address."¹⁹

Furthermore, not only is an Interconnected VoIP service utilized independent of geography, it "enable[s] its users to establish a virtual presence in multiple locations simultaneously."²⁰ Consequently, the foundation on which state jurisdiction to regulate communication is based, that the two end points of a communication are both within the same state, becomes an almost meaningless concept in the context of Interconnected VoIP. In addition, the FCC found "the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers." Accordingly, the FCC "f[ou]nd that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme...."²¹

For these reasons, it is impossible for VoIP providers to show gross receipts for communication originating and terminating within Tennessee (as required by proposed Section 1220-4-14-.05(2)(a)) and impossible to ascertain "an affidavit from a company executive verifying the accuracy of the data" when the FCC has said it is "impossible" to do so.

Applying state regulation to Internet communication, in violation of FCC rules, would also stifle consumer benefits and slow broadband adoption in Tennessee.

Interconnected VoIP technologies can be a force for increased competition, a platform for innovation, a driver for broadband deployment, and a vehicle for continued economic growth. In fact, with the right policies Interconnected VoIP competition is projected to save Tennessee consumers an astounding \$2.2 billion over the next 5 years²² – putting real money back into consumers' pockets through the power of competition at a time when families really need it. And by harnessing VoIP as a broadband driver, just a 7% increase in broadband adoption could create nearly 50,000 more Tennessee jobs per year.²³ Indeed, as the nation faces economic challenges, VoIP is now projected to be the number one job creator of any industry in the country.²⁴ However the draft rules could not only stall and stifle these vast consumer benefits, they run counter to federal policy which seeks to promote competition, investment and innovation.

¹⁹ *Petition for a Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, ¶¶ 21-22 (2004) ("*Pulver Order*").

²⁰ Vonage order at 22419 ¶ 24

²¹ *Id.* at 22411 ¶ 14.

²² Micra report (available online at http://www.micradc.com/news/publications/pdfs/Updated_MicRA_Report_FINAL.pdf) found that VoIP competition can save consumers in Tennessee \$2,275,697,326 over the next 5 years.

²³ Just a 7% increase in broadband adoption could result in an additional 49,142 Tennessee jobs per year created. See http://www.connectednation.com/documents/2008_02_21_TheEconomicImpactofStimulatingBroadbandNationally_AConnectedNationReport_001.pdf.

²⁴ The industry leading the way in terms of employment growth over the next few years will be Voice Over Internet Protocol providers (VoIP), according to economic research firm IBISWorld, with average annualized jobs growth of around 19.4% through 2012. See <http://www.ibisworld.com/pressrelease/pressrelease.aspx?prid=116>.

Enabling VoIP benefits is not only important to consumers, its critical for Tennessee's small businesses as well. While small businesses in Tennessee are projected to save a whopping \$265 million over the next 5 years from VoIP enabled competition, these savings could be delayed if Tennessee imposed technologically impossible mandates on VoIP providers.²⁵ Furthermore, the proposed rules are likely to be especially difficult for the vast majority of VoIP providers which are small businesses themselves. As the Small Business Administration ("SBA") has pointed out, 97% of Interconnected VoIP providers are small businesses themselves – on average serving a little more than 1,000 customers each.²⁶ For the handful of their customers that may be located in Tennessee, these small businesses (although likely meeting the de minimus test in 1220-4-14-.05(2)(e)) would nonetheless have to deploy expensive technology in order to file the required data which the FCC has said is likely to "*potentially inhibit its deployment and continued availability to consumers.*"²⁷

Furthermore, Section 1220-4-14-.05(3) presumes that VoIP services are billed the same way as traditional services and can include a specific line item on a monthly phone bill. However, VoIP represents a broad diversity of business models for a broad diversity of services that are radically different from the traditional phone companies that TRA regulates – making such a rule impracticable. Many of these services simply don't have traditional monthly bills. For example:

- Ooma offers a service with a one-time price for life and "no more phone bills."²⁸
- MagicJack offers a service with a one-time hardware fee, and an annual fee going forward.²⁹
- Some services – like Adphone³⁰, LycosPhone³¹, the Russian based Evaphone³², or Plumble³³ – earn their revenue through a variety of different advertising based systems
- XO charges for their VoIP by the megabyte of broadband used, not by the voice line³⁴
- Some services, like Skype³⁵, use a pay as you go model allowing users to put money into an account in advance, with no monthly bills.
- Some click-to-call VoIP services are offered on a pay per call basis.³⁶

These are exciting business models that give consumers new choices and ways to communicate – without the monthly bills that characterize traditional phone services of the past. The TRA

²⁵ Micra report (available online at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf)

²⁶ Of 200 Interconnected VoIP providers, the SBA Office of Advocacy estimates that 193 companies are likely to be small businesses that collectively serve less than 200,000 customers – or a little over 1,000 customer a piece. See Universal Service Contribution Methodology, SBA comments, WC Docket No. 06-122, at 4-5 (filed Aug. 8, 2006).

²⁷ The FCC found "the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers."

²⁸ For a one time prices, and no monthly phone bills, Ooma provides a unique VoIP service but presumably doesn't have an ability to recover TRS fees on a monthly phone bill. See: <http://www.ooma.com/>

²⁹ Magicjack doesn't have a monthly bill in order to recover a Tennessee TRS fee. See <http://www.magicjack.com/>

³⁰ <http://www.adphone.com/>

³¹ http://www.download.com/Lycos-Phone/3000-2349_4-10519170.html

³² <http://evaphone.com/>

³³ <http://www.plumble.com/G/>

³⁴ See <http://telephonyonline.com/broadband/news/xo-pricing-models-0116/> and

<http://www.xo.com/forms/Campaign/ExternalSales/ppc/Voip/Voip.aspx>

³⁵ <http://www.skype.com/intl/en/allfeatures/skypecredit/>

³⁶ See for example: <http://www.patlive.com/click-to-call/>

should not adopt rules that force these innovative technologies and services to use the same business models and monthly bill structures in order to recover fees.

In view of the federal decisions preempting state regulation and the other harmful effects of regulating Internet services, we encourage the TRA to refrain from attempting to regulate VoIP and instead seek to harness the full power and potential that Internet based communication can deliver. More and more states are coming to recognize that VoIP can be harnessed for enormous public gain – including making phone service more affordable and as a tool for advancing universal access to broadband.

As a result, rather than adopting state specific rules for VoIP, government leaders in states like California, Florida, Virginia, Maryland, New Jersey, Georgia and elsewhere have all taken steps to prevent state regulation of VoIP in order to boost broadband deployment, make phone service more affordable, and harness VoIP's vast potential for important public policy goals. To enable Tennesseans to enjoy the vast benefits that VoIP can deliver, we simply encourage TRA to remove references to VoIP from the proposed rules.

Sincerely,

The VON Coalition

About the VON Coalition:

The Voice on the Net or VON Coalition consists of leading VoIP companies, on the cutting edge of developing and delivering voice innovations over Internet. The coalition, which includes BT Americas, CallSmart, Cisco, CommPartners, Covad, EarthLink, Google, iBasis, i3 Voice and Data, Intel, Microsoft, New Global Telecom, PointOne, Pulver.com, Skype, T-Mobile USA, USA Datanet, and Yahoo! works to advance regulatory policies that enable Americans to take advantage of the full promise and potential of VoIP. The Coalition believes that with the right public policies, Internet based voice advances can make talking more affordable, businesses more productive, jobs more plentiful, the Internet more valuable, and Americans more safe and secure. Since its inception, the VON Coalition has promoted pragmatic policy choices for unleashing VoIP's potential. <http://www.von.org>