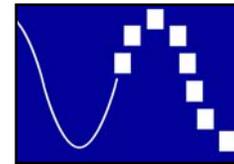


December 3, 2008

Missouri Public Service Commission,
Colleen M. Dale, Secretary of the Commission
PO Box 360,
Jefferson City, MO 65102



The VON Coalition

Re: Case No: TX-2008-0392

As the nation's leading companies developing and delivering voice innovations over the Internet, we are writing regarding Case No TX-2008-0392 and proposed new rules to extend Missouri's Telecommunication Relay Service (TRS) rules to interconnected VoIP service providers. While we applaud the laudable goal of expanding the base of support for Missouri's TRS service, the extension of the proposed rules to new classes of Internet communication technologies makes the rules technologically impractical, and legally impermissible.

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

Even though the Missouri legislature passed HB 1779, it doesn't change federal law that nonetheless prevents the Missouri PSC from regulating the intrastate components of VoIP. Specifically in its Vonage Jurisdictional Order, the FCC has specifically preempted states from imposing the kind of intrastate regulation that is proposed by the Missouri PSC. 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.

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

Unlike the traditional telecommunication carriers that the Missouri PSC regulates, many interconnected 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. 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."¹ 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

¹ *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.

may use the service anywhere in the world where they can find a broadband connection,"² 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.³

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 Missouri area code, such data is an inaccurate proxy for determining whether a service is being used within Missouri. As the FCC has found, Interconnected VoIP services can utilize "geographically independent telephone numbers"⁴ 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."⁵ 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.⁶

While Interconnected VoIP services can bestow consumers "each with the ability to communicate with anyone in the world from anywhere in the world,"⁷ a call from a 314 prefixed telephone number does not suggest it originates in Missouri. Because nomadic interconnected VoIP services can be utilized from any broadband connection in the world, a 314 area code call instead might be a U.S. soldier serving in Iraq who has chosen a Missouri phone number in order to allow his grandparents living in Missouri to more easily make a local phone call to reach him overseas. Indeed, VoIP is an especially popular service for people from Missouri who serve their country overseas.⁸ 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 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.*"⁹

Nor is a Missouri billing address or purchase receipt a proxy for knowing that the service is a Missouri based service. Many Interconnected VoIP providers sell a single device which may be purchased in Missouri but used entirely elsewhere. For example with some VoIP services, the user can purchase a device for a one-time \$40 price that plugs into a USB port on a computer and enables the purchaser to send these devices to relatives in other countries as Christmas presents to enable the relatives to make unlimited local and long distance calls to and from the

² *Id.* at 5.

³ *Id.* at 9.

⁴ *Id.* at 7.

⁵ *Id.* at 9.

⁶ See for example <http://broadband-telephones.com/search/availability.aspx>

⁷ Vonage Order at 18

⁸ 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.)

⁹ *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*").

U.S.¹⁰ Such a device could be originally purchased in Missouri and have a Missouri area code, but may never make or receive a call from Missouri. Nor does the VoIP provider have a means for determining if it is being used in Missouri.

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.”¹¹ 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....”¹² For these reasons, it is impossible for VoIP providers to always know which users are communicating to and from Missouri (as required by the proposed rules) 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 Missouri.

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 VoIP competition can save Missouri consumers an astounding \$2.3 billion over the next 5 years¹³ – putting real money back into consumers’ pockets through the power of competition at a time when families really need it. Further by harnessing VoIP as a broadband driver, just a 7% increase in broadband adoption in Missouri could create nearly 50,000 new jobs¹⁴. Indeed as the state enters an economic downturn, VoIP is now projected to be the number one job creator of any industry in the country.¹⁵ 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.

Enabling VoIP benefits is not only important to consumers, its critical for Missouri’s small businesses as well. While small businesses in Missouri are projected to save a whopping \$332 million over the next 5 years from VoIP enabled competition, these savings could be delayed if Missouri imposed technologically impossible mandates on VoIP providers.¹⁶ Furthermore, the

¹⁰ See for example: <http://www.magicjack.com/9/faq/>

¹¹ Vonage order at 22419 ¶ 24

¹² Id. at 22411 ¶ 14.

¹³ 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 Missouri \$2,319,229,231 over the next 5 years.

¹⁴ Missouri would see an additional 48,592 jobs from a 7% increase in broadband, according to Connected Nation’s State-by-State Summary of the Annual Economic Impact Associated with Accelerating Broadband for Each State http://www.connectednation.com/documents/2008_02_21_TheEconomicImpactofStimulatingBroadbandNationally_AConnectedNationReport_001.pdf

¹⁵ 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 percent through 2012. <http://www.ibisworld.com/pressrelease/pressrelease.aspx?prid=116>

¹⁶ Micra report (available online at http://www.micradc.com/news/publications/pdfs/Updated_MICRA_Report_FINAL.pdf)

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.¹⁷ For the handful of their customers that may be located in Missouri, these small businesses (although likely serving only a few customers) 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.*”¹⁸

Furthermore, Section 4 CSR 240-33.170 (1) which requires the application of “a monthly surcharge to each customer bill” presumes that VoIP services in fact have a monthly bill, are billed the same way as traditional services, and can include a specific line item on a monthly phone bill. However, Interconnected VoIP represents a broad diversity of business models for a broad diversity of services that are radically different from the traditional phone companies that the Missouri PSC regulates – making such a rule impracticable. Many of these services simply don’t have traditional monthly bills. For example:

- Ooma offers a VoIP service with a one-time price for life and “no more phone bills.”¹⁹
- MagicJack offers a service with a one-time hardware fee, and an annual fee going forward. They likewise advertise no more monthly phone bills.²⁰
- Some VoIP services – like Adphone²¹, LycosPhone²², the Russian based Evaphone²³, or Plumble²⁴ – earn their revenue through a variety of different advertising based systems
- XO charges for their VoIP service by the megabyte of broadband used, not by the voice line²⁵

These are exciting business models that can give Missouri consumers new choices and ways to communicate – without the monthly bills that characterize traditional phone services of the past. The Missouri PSC 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. Doing so would likely only deny Missouri consumers the option of using these innovative new services, or force the provider to create a monthly phone bill merely for regulatory purposes.

In view of the federal decisions preempting state regulation and the other harmful effects of regulating Internet services, we encourage the Missouri PSC 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

¹⁷ 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).

¹⁸ 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.”

¹⁹ 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/>

²⁰ Magicjack doesn’t have a monthly bill in order to recover a Missouri TRS fee. See <http://www.magicjack.com/>

²¹ <http://www.adphone.com/>

²² http://www.download.com/Lycos-Phone/3000-2349_4-10519170.html

²³ <http://evaphone.com/>

²⁴ <http://www.plumble.com/G/>

²⁵ See <http://telephonyonline.com/broadband/news/xo-pricing-models-0116/> and

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

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, Tennessee 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 Missouri consumers to enjoy the vast benefits that VoIP can deliver, we simply encourage Missouri PSC 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> For more information, contact the VON Coalition's executive director, Jim Kohlenberger at 703 237-2357 or ([Click here to call him](#))