

**BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the
Commission's Own Motion to Require
Interconnected Voice Over Internet Protocol
Service Providers to Contribute to the
Support of California's Public Purpose Programs

Rulemaking 11-01-008

**OPPOSITION OF THE VOICE ON THE NET COALITION
TO THE MOTION OF THE CONSUMER PROTECTION AND SAFETY DIVISION
FOR MODIFICATION OF THE SCOPE OF THE RULEMAKING**

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The Voice on the Net Coalition (“VON Coalition”)¹ hereby submits this opposition to the motion of the Consumer Protection and Safety Division (“CPSD”) for modification of the scope of the rulemaking to include consideration of whether providers of Voice over Internet Protocol (“VoIP”) should be regulated as telephone companies under California law and subject to the Commission’s consumer protection rules.² CPSD’s motion would impermissibly expand this proceeding beyond its stated, narrow purpose to examine state universal service fund (“USF”) assessments, without any notice to all potentially interested parties, and must be rejected on those grounds alone. Aside from the procedural problems with CPSD’s motion, there is no reason for the Commission to wade into the controversy CPSD seeks to raise with its attempt to impose utility-type regulation on VoIP. The Commission need not, and should not, address the broad issues about the regulatory treatment of VoIP that CPSD’s motion raises, but it should be aware, in any event, that the obligations sought to be imposed on VoIP providers by CPSD are

¹ The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP enabled communications. VON Coalition members are developing and delivering voice and other communications applications that may be used over the Internet. VON Coalition members include AT&T, Broadvox, BT, Google, iBasis, Microsoft, Skype, T-Mobile, Vonage, and Yahoo.

² The Von Coalition is concurrently filing today a motion to intervene requesting leave to file this opposition.

preempted by federal law.³ The VON Coalition urges the Commission to retain the limited scope of its rulemaking to the consideration of VoIP providers funding California universal service programs, and not to make any decisions on the broader issues CPSD improperly raises by its motion to expand this proceeding.

DISCUSSION

Any attempt to expand the scope of this proceeding is contrary to this rulemaking's stated "limited" and "modest" objective of supporting California's universal service programs.⁴ Expanding the scope is also inconsistent with the Federal Communications Commission's ("FCC") decision permitting states to impose universal service contribution requirements on nomadic interconnected VoIP providers, which specifically did not undermine prior FCC decisions otherwise preempting state regulation of interconnected VoIP.⁵ No other state yet has gone outside the bounds of this specific FCC state universal service decision to attempt to impose sweeping telephone service obligations on interconnected VoIP providers.

Interconnected VoIP is an information service exempt from state regulation. Both Congress and the FCC have made it clear that the FCC has the authority to determine the regulatory scheme for information services. The Telecommunications Act of 1996 ("1996 Act") creates a distinction between "telecommunications services" and "information services." The

³ In re *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Preemption Order*").

⁴ *Order Instituting Rulemaking on the Commission's Own Motion to Require Interconnected Voice Over Internet Protocol Service Providers to Contribute to the Support of California's Public Purpose Programs*, R. 11-01-008, Order Instituting Rulemaking, at 2, 23 (Filed Jan. 13, 2011).

⁵ In re *Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, Declaratory Ruling, 25 FCC Rcd 15651 (2010) ¶ 23 ("We note, however, that nothing in this Declaratory Ruling affects our conclusion in the *Vonage Preemption Order* concerning preemption of rate regulation, tariffing, or other requirements that operate as "conditions to entry. Nor should this order be construed as interpreting or determining the scope of the *Vonage Preemption Order*.").

first consists of pure transmission services offered to end users without change in form or content, and subject to common-carrier regulations.⁶ The second, in contrast, offers the ability, for example, to store, retrieve, utilize, and/or manipulate “information.”⁷ VoIP service takes full advantage of the flexibility and efficiency of IP-based transmission by enabling the user to manipulate, generate, store, transform, and make information services available to others.⁸

The FCC has further explained that the statutory definitions of telecommunications service and information service do not “rest[] on the particular types of facilities used.”⁹ Each rests instead “on the function that is made available.”¹⁰ IP-enabled services that originate or terminate in IP are intrinsically information services when traffic is exchanged between an IP network and the PSTN because the traffic must, of necessity, undergo a net protocol conversion from circuit-switched format to IP (or vice versa). The FCC has held that “both protocol conversion and protocol processing services are information services under the 1996 Act.”¹¹

In addition, the FCC has held that a service will be treated as a single, integrated information service, rather than as an information service with a separate telecommunications service component, when the telecommunications features are not “separated from the data-processing capabilities of the service” but are instead “part and parcel of the [the overall information] service and... integral to its other capabilities.”¹² Interconnected VoIP services are integrated, IP-enabled services providing multiple capabilities that combine information

⁶ 47 U.S.C. § 153(43) (2006).

⁷ *Id.* § 153(20).

⁸ The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...” *Id.*

⁹ In re *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities; Internet over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 35 (2002).

¹⁰ *Id.*

¹¹ In re *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 104 (1996).

¹² *Id.* ¶¶ 36, 38.

provision and processing, computer interactivity along with voice-calling capabilities, which renders such services as single “integrated offerings.” VoIP users can “utilize multiple service features that access different websites or IP addresses during the same communication session and perform different types of communications simultaneously.”¹³ These features and functions are inseparable from the voice application that may appear to be most similar to a telephone service. Thus, interconnected VoIP falls squarely within the definition of an “information service” and is subject to exclusive federal jurisdiction unless otherwise specifically provided by Congress or the FCC.

Under federal law, “information services” are exempt from telecommunications regulation, which includes state regulation. While the FCC has asserted limited jurisdiction over interconnected VoIP services, it has not treated interconnected VoIP as a traditional telecommunications service. The FCC has imposed a number of specific obligations, including, requirements to provide Enhanced 911 services, make the service accessible by law enforcement, contribute to the Federal Universal Service and Telecommunications Relay Service Funds, protect customer proprietary network information, and provide customers notice before discontinuing service.¹⁴ In none of these actions, however, has the FCC granted the states authority to impose any other specific obligations on interconnected VoIP providers, other than state USF contributions where not inconsistent with federal USF obligations and the payment of state and local fees to support the 911 network.¹⁵

¹³ *Vonage Preemption Order* ¶25.

¹⁴ First Report and Order and Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 05-116, (rel. Jun. 3, 2005) (“*VoIP 911 Order*”); Report and Order and Notice of Proposed Rulemaking, WC Docket No. 06-122, FCC 06-94 (rel. Jun. 27, 2006) (imposing USF requirements); Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 07-22 (rel. Apr. 2, 2007) (imposing CPNI requirements); Report and Order, WC Docket No. 04-36, FCC 09-40 (May 13, 2009) (imposing discontinuance requirements).

¹⁵ See Footnote 5, *infra.*, and *VoIP 911 Order* ¶52.

The FCC has also decided that certain VoIP services that do not touch the public switched telephone network are exempt from state public utility regulation.¹⁶ Further, multiple federal courts have enjoined state commissions from regulating interconnected VoIP services on the grounds that they were information services, exempt from state utility regulation.¹⁷ The Minnesota federal district court has even held that “[state] regulations that have the *effect* of regulating information services are in conflict with federal law and must be pre-empted.”¹⁸ Additionally, a federal district court in Missouri held that existing laws mandate that states classify VoIP services that perform IP to TDM conversions as an information service. The Missouri District Court recognized that IP-PSTN traffic is an information service because it offers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁹ The court further noted that IP-PSTN traffic “alters the form and content of the information sent and received because it involves a net protocol conversion from the digitized packets of the IP-protocol to the TDM technology used on the PSTN.”²⁰ While the court recognized that the Commission may be willing to revisit the classification and regulatory status of interconnected VoIP at some point, “existing rules and orders establish how VoIP and other IP services should be treated in the interim.”²¹

¹⁶ See *Petition for Declaratory Ruling that Pulver.Com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (“*Pulver Declaratory Ruling*”); See also *FCC Vonage Preemption Order*.

¹⁷ See e.g., *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (summarizing federal policy of preempting state attempts to regulate information services); *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-1083 (E.D. Mo. 2006) (classifying services as information services when it transforms or processes “information,” even if the content is the same).

¹⁸ See *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003).

¹⁹ See *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-83 (E.D. Mo. 2006) (citing § 153(20)).

²⁰ *Id.*

²¹ *Id.*

Interconnected VoIP is subject to the FCC’s exclusive jurisdiction under the *FCC Vonage Preemption Order*. In the *FCC Vonage Preemption Order*, the FCC held that Vonage’s “Digital Voice” service is subject to FCC exclusive jurisdiction and preempted the Minnesota PUC from imposing traditional telecommunications regulations on that service. The same principles that applied in the *FCC Vonage Preemption Order* apply here. The FCC concluded that Vonage’s service is “jurisdictionally mixed” meaning that it includes both interstate and intrastate services.²² The FCC stated that Vonage’s service could, in theory, be subject to state regulation, *provided that* the state regulation could coexist with the FCC’s pro-competitive deregulatory framework for information services. However, the FCC held that there were no “practical means” to separate the interstate and intrastate components of Vonage’s service to “enable[e] dual federal and state regulations to exist.”²³ In other words, the state regulations at issue were not compatible with the FCC’s generally deregulatory framework for information services.

The CPSD’s reliance on the Maine Public Utility Commission (MPUC) ruling concerning fixed interconnected VoIP services is misplaced.²⁴ As an initial matter, the Maine ruling is unlawful and under appeal. In addition, the MPUC decision addressed fixed VoIP services, such as those provided by cable companies, relying on the alleged ambiguity in the *Vonage Preemption Order*, which focused on nomadic VoIP services – i.e., those that could be used from any broadband connection. On the other hand, the CPSD motion attempts to include all VoIP services, including nomadic, which have clearly been broadly preempted from state regulation by the FCC.

²² See *FCC Vonage Preemption Order* at 22414, ¶ 18 & n. 63.

²³ *Id.* ¶ 23.

²⁴ *Public Utilities Commission, Investigation into Whether Providers of Time Warner “Digital Phone” Service and Comcast “Digital Voice” Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, Order (Oct. 27, 2010).

