



June 23, 2011

(Via fax – 304-340-0325)  
Ms. Sandra Squire  
Executive Secretary  
West Virginia Public Service Commission  
201 Brooks Street  
Charleston, WV 25301

Re: Case No. 11-0293-T-CN - SPRUCE KNOB SENECA ROCKS TELEPHONE, INC. - Application for a certificate of convenience and necessity to provide telecommunication services

Dear Ms. Squire:

The Voice on the Net Coalition ([www.von.org](http://www.von.org)),<sup>1</sup> an industry group that represents the nation's leading companies developing and delivering voice innovations over the Internet, including Voice-over-Internet-Protocol ("VoIP"), files this response to the to the Further Joint Staff Memorandum filed on June 13, 2011 and the Further Staff Internal Memorandum submitted by Technical Staff on June 10. These memoranda fail to explain why the Commission should address Voice over Internet Protocol ("VoIP") jurisdiction. As discussed below, the West Virginia Public Service Commission does not have authority over interconnected VoIP.

VoIP communications has prospered in a largely unregulated environment. The Federal Communications Commission (FCC) in 2004 preempted state regulation of interconnected VoIP – which are services that are used more like a replacement for regular telephone service. The FCC has, however, imposed certain public safety and consumer protection requirements on interconnected VoIP providers, such as a requirement to provide 911 services, protect customer data and assist law enforcement. There is no federal entry or price regulation of VoIP.

At least 20 other states have already provided certainty to the investment markets by codifying regulatory "safe harbors" for VoIP or IP-enabled communications. These states have recognized that there is no benefit to imposing legacy telephone regulations on VoIP and that investment will be lost and broadband adoption slowed if regulatory ambiguities are allowed to remain in place.

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 first consists of pure transmission services offered to end users without change in form or content, and subject to common-carrier regulations.<sup>2</sup> The second, in contrast, offers the ability, for example, to store, retrieve, utilize, and/or manipulate "information."<sup>3</sup> VoIP service takes full

<sup>1</sup> 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, Nextiva, Skype, T-Mobile, Vonage, and Yahoo.

<sup>2</sup> 47 U.S.C. § 153(43) (2006).

<sup>3</sup> *Id.* § 153(20).



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.<sup>4</sup>

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.”<sup>5</sup> Each rests instead “on the function that is made available.”<sup>6</sup> 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.”<sup>7</sup>

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.”<sup>8</sup> Interconnected VoIP services are integrated, IP-enabled services providing multiple capabilities that combine information 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.”<sup>9</sup> 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 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.<sup>10</sup> 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

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<sup>4</sup> 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.*

<sup>5</sup> 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).

<sup>6</sup> *Id.*

<sup>7</sup> 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).

<sup>8</sup> *Id.* ¶¶ 36, 38.

<sup>9</sup> *Vonage Preemption Order* ¶25.

<sup>10</sup> 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).



state USF contributions where not inconsistent with federal USF obligations and the payment of state and local fees to support the 911 network.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup> 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.”<sup>19</sup> In other words, the state regulations at issue were not compatible with the FCC’s generally deregulatory framework for information services.

<sup>11</sup> See Footnote 5, *infra.*, and *VoIP 911 Order* ¶52.

<sup>12</sup> 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*.

<sup>13</sup> 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).

<sup>14</sup> See *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003).

<sup>15</sup> 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)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *FCC Vonage Preemption Order* at 22414, ¶ 18 & n. 63.

<sup>19</sup> *Id.* ¶ 23.



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Finally, the Commission should not attempt to regulate VoIP because regulation is not needed to protect West Virginia consumers that purchase interconnected VoIP services. On the contrary, the competitive VoIP marketplace will ensure that consumers can move with their feet, taking their business to other providers if they are unsatisfied with their current service. VoIP providers are offering better, more innovative and cheaper (and sometimes free) services. The benefits of these services far outweigh the potential costs of new regulations.

Feel free to contact the undersigned if you have any questions.

Sincerely,

/s/

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Voice on the Net Coalition  
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