UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE MINNESOTA PUBLIC UTILITIES COMMISSION *et al*; Petitioners v. FEDERAL COMMUNICATIONS COMMISSION *et al*; Respondents	Case Nos. 05-1069, 05-1122, 05-3114, and 05-3118.

On Petitions for Review of a Decision of the Federal Communications Commission

BRIEF OF INTERVENORS THE HIGH TECH BROADBAND COALITION, THE VON COALITION, AND PULVER.COM

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SUMMARY OF THE CASE

In the decision at issue, the Federal Communications Commission (FCC) preempted the application of traditional state telephone company regulations to a Voice over Internet Protocol (VoIP) service offered by Vonage Holdings Corporation ("Vonage").[1] Vonage's interconnected VoIP service is fully portable, permitting subscribers to make voice calls anywhere in the world they can find a broadband connection to the Internet. The factual basis for the FCC's preemption decision was that Vonage does not know its subscribers' locations and, therefore, has no basis for distinguishing intrastate and interstate communications. For that reason, the FCC concluded that the application of state telephone company regulations would necessarily affect interstate communications and conflict with the FCC's deregulatory policies encouraging the development of innovative services.

The intervenors joining this brief provide equipment to companies offering VoIP service or provide VoIP service themselves. The intervenors support the FCC's decision because the application of traditional telephone company regulation to VoIP will impede its development.

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[1] *Vonage Holdings Corporation Petition*, 19 FCC Rcd 22,204 (Nov. 12, 2004) ("*Vonage Order*" or "*Order*") (reproduced at A 1-41 of the Joint Brief and Addendum of Petitioners Minnesota Public Utilities Commission *et al.*, hereinafter "PUC Br."). All further citations to the *Vonage Order* will be to the Addendum ("A") to the PUC petitioners' brief.

CORPORATE DISCLOSURE STATEMENT

The High Tech Broadband Coalition ("HTBC") is an unincorporated industry alliance formed by the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronic, software, and manufacturing sectors in the United States. HTBC does not own or maintain a controlling interest in any public company, nor is it owned or controlled by any public company. The six trade associations that comprise HTBC represent more than 15,000 corporations running the gamut of the high-technology industry:

a. The Business Software Alliance ("BSA") is an international organization representing leading software and e-commerce developers in 65 countries around the world.

b. The Consumer Electronics Association ("CEA") represents companies that lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services. More than 2,000 member companies generate more than $121 billion in annual factory sales.

c. The Information Technology Industry Council ("ITI") represents the world's leading providers of information technology products and services, including computer, networking, data storage, communications, and Internet equipment, software, and services. In 2000, ITI member companies employed more than one million people in the United States and exceeded $668 billion in worldwide revenues.

d. The National Association of Manufacturers ("NAM") is the largest United States industrial trade association, with more than 14,000 members and 350 member associations in every industrial sector and all 50 States.

e. The Semiconductor Industry Association ("SIA") is the premier trade association representing the $102 billion United States microchip industry. SIA member companies account for more than ninety percent of United States-based semiconductor production.

f. The Telecommunications Industry Association ("TIA") is the leading trade association for the information and communications technology (ICT) industry. Owner and producer of GLOBALCOMM™, TIA serves 600 ICT suppliers to global service provider and enterprise customers through its leadership in standards development, domestic and international policy advocacy, and facilitating member business opportunities.

While each association serves as a major force for advocating the public policy objectives of its own members, HTBC was established to highlight their common interest in, and to ensure sustained advocacy for, public policies that promote high-speed Internet access and VoIP deployment and competition.

Pulver.com is a New York State S corporation. Pulver.com does not own or maintain a controlling interest in any public company; nor is pulver.com owned or controlled by any public companies.

The Voice on the Net Coalition, Inc. ("VON Coalition") is a corporation organized in 1998 under the Nonprofit Corporation Act of the District of Columbia. The VON Coalition does not own or maintain a controlling interest in any public company, nor is it owned or controlled by any public company. The VON Coalition has 25 members that either provide VoIP services or provide equipment or other services to VoIP service providers. The VON Coalition is the

leading public policy organization for the VoIP industry, educating regulators and legislators worldwide about the benefits of VoIP.

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STATEMENT OF FACTS

The Internet is "an international network of interconnected computers," *Reno v. ACLU*, 521 U.S. 844, 849 (1997), that transfers data packets using a computing standard known as Internet Protocol (IP). Each computer attached to the Internet has a unique IP address and "the basic functionality of the Internet" is to deliver data packets to the IP address specified by the sender. *Register.com v. Verio, Inc.*, 356 F.3d 393, 410 (2d. Cir. 2004). In this sense, IP addresses are analogous to the "mailing addresses and telephone numbers [used by] the postal service and telecommunications system." *Id*. But unlike those systems, IP addresses are *not* tied to or associated with a particular geographic location. *See generally IP-Enabled Services*, 19 FCC Rcd 4863, 4869 (¶ 8 & n.25) (2004) ("*IP-NPRM*").

For instance, a laptop computer will receive packets sent to its IP address whenever it is connected to the Internet, whether in the user's home or workplace, or in a hotel room or an Internet café. *Id*. This fact led the Supreme Court to conclude that the Internet "constitute[s] a unique medium – known to its users as 'cyberspace' – located in no particular geographical location but available to anyone, anywhere in the world." *ACLU*, 521 U.S. at 851.

VoIP Service. Voice over Internet Protocol (VoIP) is a technology that allows Internet users to encode voice signals as IP data packets and route those

packets over the Internet. VoIP allows users to conduct real-time, two-way conversations of a quality comparable to or better than traditional telephone service over the Public Switched Telephone Network (PSTN).

Intervenor pulver.com offers a form of VoIP technology called "IP-to-IP," which allows Internet users to converse with other Internet users. In an order issued nine months before the *Vonage Order* under review in this case, the Federal Communications Commission (FCC) classified pulver.com's offering as an "information service" (rather than a "telecommunications service") and held that it is subject to exclusive federal regulation. *Petition for Declaratory Ruling*, 19 FCC Rcd 3307 (2004) ("*Pulver Order*"); *see also NCTA v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2695-99, 2702-2710 (2005) (explaining statutory distinction between "telecommunications" and "information" services). The FCC concluded that preemption of state regulation over such services is appropriate because "federal authority has already been recognized as preeminent . . . in the area of the Internet" and "it is impossible or impractical to attempt to separate [IP-to-IP VoIP services] into interstate and intrastate components." *Pulver Order* ¶¶ 15-22. Though more than a dozen parties filed comments in that proceeding, including the Minnesota Department of Commerce (MDOC), none sought judicial review of the *Pulver Order*.

The *Vonage Order* under review in this case addresses a more technically complex – but closely related – form of VoIP known as "interconnected VoIP." Interconnected VoIP allows Internet users to call and receive calls from any individual with an ordinary PSTN connection (*i.e.*, a familiar ten-digit telephone number) rather than just individuals with an Internet connection. 47 C.F.R. § 9.3 (defining "interconnected VoIP service"). Interconnected VoIP services (such as Vonage's "DigitalVoice" product) divide each IP-to-PSTN call into two distinct portions – a leg that travels over the Internet as IP data packets (like an IP-to-IP call) and a leg that travels over the PSTN (like a traditional telephone call).

Consider, for example, how a Vonage customer in St. Louis, Missouri calls a PSTN user in Washington, DC. The St. Louis caller must have (1) a high-speed Internet connection (typically DSL or cable) and (2) some variety of customer premises equipment that enables VoIP calls (typically a Multimedia Terminal Adapter, or MTA – a box about the size of a paperback novel that connects users' ordinary telephones to their Internet connections). A 3-4; *Brand X*, 125 S.Ct. at 2696. When the St. Louis caller dials the Washington DC telephone number, the MTA translates the St. Louis caller's voice signals into digital packets and routes them over the Internet to one of Vonage's Internet servers. A 4. During this Internet leg of the call, the IP data packets that encode the voice conversation are treated no differently than any other IP data packet – the Internet simply directs

them to their destination IP address (*viz.*, Vonage's Internet servers), often with different packets taking different physical paths.

Next, to initiate the PSTN leg of the call, Vonage transforms these IP data packets into a traditional telephone signal. *Id.* Vonage then transfers that signal to a separately-owned telephone company that routes the call in the ordinary fashion to the Washington DC party. *Id.*; *see also* Pet. Joint App. ("JA") 13-14.

Because of the Internet's remarkable architecture, Vonage's service is "fully portable." A 3. So long as the Vonage customer has a broadband connection and an MTA, the customer can place calls to *any* ten-digit telephone number in the country – regardless of whether he or she is calling from St. Louis or Hong Kong. The customer's IP packets will travel from anywhere in the world over the Internet to Vonage's servers (Internet leg) for termination to the PSTN by the separately-owned telephone company (PSTN leg).

Vonage also assigns its customers ordinary ten-digit telephone numbers to allow them to *receive* calls from the PSTN. A 4-5. If the Vonage customer has a 314 area code number (corresponding to St. Louis), then the Washington DC PSTN user can call by dialing that number on an ordinary telephone. The call will simply travel the same path in reverse – a PSTN leg from Washington DC to one of Vonage's facilities and an IP leg from that facility to the customer's IP address. Importantly, the Vonage customer *need not be located in the 314 area code to*

receive this call – the Internet will route the packets to his or her IP address regardless of his or her physical location. In this sense, the Vonage user's ten-digit telephone number is merely "the identification mechanism for the user's IP address" and, unlike the PSTN, does not equate to any particular physical location. A 5.

Vonage offers its customers a choice of telephone number regardless of their billing address. A 18. Thus, a customer with a St. Louis billing address may request a 202 area code (Washington DC) so that Washington DC residents with PSTN telephones can call him or her at local billing rates. *Id.* Indeed, the nominal "St. Louis customer" with a 202 area code may actually be a college student who lives in Washington DC nine months a year, but whose parents in St. Louis pay his or her Vonage bill; or the DC branch office of a small business headquartered in St. Louis.

In addition to IP-to-PSTN and PSTN-to-IP service, Vonage provides pure IP-to-IP service of the sort addressed directly by the *Pulver Order*. If a Vonage customer makes a call to (or receives a call from) another Vonage subscriber, the IP data packets that arrive at Vonage's server are not transformed into ordinary PSTN signals. A 4-5. They are instead re-routed by the server to the IP address of the called party. *Id.* Vonage also has "peering arrangements" with other VoIP providers, so that calls from those providers' customers will also remain in IP

format along the lines described above. A 5 n.24. As VoIP becomes more common, an increasing percentage of calls will be of this IP-to-IP variety, *see IP-NPRM* ¶ 1, and will accordingly be considered "information services" that are not subject to state regulation.

Implications for Competition Policy. The FCC has recognized in a series of reports and orders addressing the Internet that "the changes wrought by the rise of IP-based communications promise to be revolutionary." *IP-NPRM* ¶ 5. Indeed, "[t]he rise of IP . . . challenges the key assumptions on which communications networks, and regulation of those networks, are predicated." *Id.* ¶ 4.

The Supreme Court explained in 2002 that, since "the dawn of modern utility regulation," "[c]ompanies providing telephone service have . . . been regulated as monopolistic public utilities." *Verizon Comms., Inc. v. FCC*, 535 U.S. 467, 477 (2002). This historic assumption was justified because of the staggering cost of building traditional telephone infrastructure (*e.g.*, poles, copper wires, switches, and so forth). In the face of this economic fact, regulators granted legally enforceable monopolies to local telephone companies and focused on regulating retail rates and service quality. *Id.* at 477-489.

As the *Order* under review explains, VoIP changes this equation. Today, a company like Vonage can provide voice service to customers across *the entire world* "simply by attaching a server to the Internet." A 27. By the standards of the

traditional telecommunications industry, this is a tiny investment. *Id.* As long as they have a broadband connection, customers in any given local market can choose from dozens of service providers, not just one. And regulators can rely on the free market to set competitive prices and terms – if one company's rates are too high or the quality of its service is too low, consumers can vote with their wallets.

But the corollary is that each national VoIP provider may have only a relatively small number of customers in each jurisdiction. For example, Vonage has "approximately 500 customers with Minnesota billing addresses" and 88 other customers with non-Minnesota billing addresses but Minnesota area codes. JA 15.

If VoIP providers face even modest regulatory costs to provide service in each jurisdiction, they may be unable to justify providing service. Certainly, they will be far more easily deterred than incumbent telephone companies with many thousands of traditional telephone customers in each state. As the *Vonage Order* puts it, "[t]he Internet enables individuals and small providers to reach a global market … [but] requiring Vonage to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of Internet-based communications." A 27. Indeed, the *Order* repeatedly acknowledges the critical importance of minimizing barriers to entry for VoIP providers. A 2, 9, 12-13, 19-20, 24, 25-27.

If the MPUC were permitted to treat Vonage "as a company providing telephone service in Minnesota," JA 141, then Vonage would be required, among other things, to: (1) allow its customers to use other telecommunications providers (*e.g.*, AT&T) for intrastate long distance calls, Minn. Rules 7812.0600(1)(C); (2) offer a flat rate calling plan for local calls (*i.e.*, within a metropolitan area), *id.* 7812.0600(2); (3) guarantee "[d]ial tone within three seconds on at least 98 percent of telephone calls" for intrastate calls, *id.* 7810.5300(A); (4) "maintain service [so] that the average rate of all customer trouble reports in an exchange is no greater than 6.5 per 100 telephones per month," *id.* 7810.5900; (5) offer toll blocking and call blocking services for intrastate calls, *id.* 7812.0600(1)(E),(I); and so forth.

This far-from-exhaustive list of Minnesota's service requirements would apply to *each intrastate call* placed using Vonage's service. And without the ability to distinguish between interstate and intrastate calls, the practical effect of such a regulatory regime would be to force Vonage to meet these requirements for every call placed using its service. Indeed, as the *Order* points out, if other states were to follow Minnesota's example, Vonage probably would have to comply with the most onerous (and potentially conflicting) regulations applied by *any of the 50 states*. A 25.

In short, VoIP has the potential to revolutionize voice communications by permitting competition to flourish. Congress has made clear that it favors a pro-

competitive, deregulatory approach for all telecommunications markets, including local markets. S. Conf. Rep. No. 104-230, at 1 (1996). But the competition that justifies deregulation will fail to develop if new technologies are saddled with burdensome requirements designed decades ago with regulated monopolists in mind. And competition to provide interstate communications service will be impeded by the imposition of traditional state telephone company regulations on VoIP providers, even if such regulation purports to reach only intrastate communications. As explained below, that is because the "intrastate" rules necessarily will govern interstate communications as well.

SUMMARY OF ARGUMENT

In the *Order* under review, the FCC concluded that VoIP providers could not determine whether the sender and receiver of a VoIP call were located in the same state or in different states. The FCC reached this factual determination after considering a full and largely undisputed rulemaking record. In response, petitioners challenge the FCC's factual determination primarily based on a subsequent FCC decision that requires VoIP providers to assist public safety personnel in locating callers who dial 911. But agency decisions are reviewed based on the record before the agency when it issued the decision. In this case, that record supports the FCC's conclusion that Vonage did not have the capability to determine whether its calls were interstate or intrastate. Moreover, the record developed in the subsequent *VoIP E911* proceeding shows that VoIP providers continue to lack the ability to determine their customers' locations reliably and automatically.

The FCC's factual finding that VoIP providers cannot tell whether a particular call is interstate or intrastate fully justifies its decision to preempt state regulation of such providers. Although Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), grants states authority over intrastate calls, the Supreme Court and several circuits (including this one) have made clear that the FCC may preempt state regulation where a dual regulatory scheme would be a practical and economic

impossibility. Absent the capability to determine the jurisdictional nature of particular calls, it follows that the FCC may preempt in order to advance Congress's pro-competitive, deregulatory goals.

ARGUMENT

I. STANDARD OF REVIEW

Reviewing courts must accept agency factual findings unless they are "arbitrary, capricious, [or] an abuse of discretion," 5 U.S.C. § 706 – a standard of proof even more demanding (for petitioners) than the already demanding "clearly erroneous" standard applicable to district court factual findings. *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999). Reviewing courts apply that standard to the record compiled by the agency. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

To the extent that this Court must review the FCC's statutory interpretation of 47 U.S.C § 152, the applicable standard is established by *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984), which provides that an agency's interpretation of the statute it administers is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Contrary to petitioners' assertions, the *Chevron* framework plainly applies to FCC statutory interpretations that hold consequences for the FCC's jurisdiction. *See, e.g., Iowa Util. Bd. v. FCC*, 120 F.3d 753, 793 (8th Cir. 1997) (applying *Chevron* to review of FCC's authority to establish biding federal pricing standards), *rev'd on other grounds* 525

U.S. 366 (1999); *see generally Smiley v. Citibank*, 517 U.S. 735, 743-44 (1996) (agency substantive interpretations receive *Chevron* deference even if consequential for federal preemptive authority).

II. THE FCC REASONABLY CONCLUDED THAT VOIP PROVIDERS CANNOT TELL WHETHER A PARTICULAR CALL IS INTERSTATE OR INTRASTATE

In the *Order* under review, the FCC correctly concluded that VoIP providers have "no means of directly or indirectly identifying the geographic location" of the party using their service via an Internet connection. A 16. Thus, under the FCC's traditional "end-to-end" analysis – which defines calls as interstate or intrastate based on the location of the two parties to the call – there is simply no way for the service provider to tell whether a particular call is interstate or intrastate. A 15-21.

The FCC's factual conclusion that VoIP providers cannot determine the location of their customers is consistent with a long line of prior FCC reports and orders addressing IP-based communications, judicial decisions addressing the Internet, and the record in this rulemaking. In a Notice of Proposed Rulemaking issued eight months before the *Vonage Order*, the FCC carefully summarized its prior findings regarding VoIP services and explained why the Internet is fundamentally different than traditional telephone networks. *IP-NPRM* ¶¶ 8-22, 28-34; *see also* Letter from VON Coalition, WC Dkt. 03-211 (October 29, 2004), reproduced in Resp. Joint App. ("RA") at 98-104. As the FCC explained, the

Internet is actually a global "network of networks," and the "hundreds of thousands" of networks that make up the Internet are "owned and operated by hundreds and thousands of people" (*e.g.*, universities, corporations, and communications providers such as SBC and Comcast). *IP-NPRM* at ¶ 8 n.23 (internal quotation marks omitted). Though an individual end user is directly connected to only one or several of the Internet's constituent networks, the IP packets he or she sends will eventually reach their intended destination through a series of hops from network to network. *Id.* ¶ 8 n.25.

When an Internet user moves to a new geographic location, he or she reconnects to a different local network. The new network, which is "constantly communicating with the other" networks that make up the Internet, informs the other networks that it will now accept packets intended for that user. *Id.* (describing "routing configuration tables"). But this updated information does *not* reveal to the VoIP provider the user's new physical location – only that he or she is connected to a new network. *Id.* In many cases, the operator of the specific network will not even know the physical location of the end user, only which wire to send the packet down in order to reach that end user. As ably summarized by a district court in the Second Circuit, the net result is that:

> The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have "addresses," they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even where an Internet address provides such a clue, it may be misleading.

American Libraries Ass'n v. Pataki, 969 F.Supp 160, 170-171 (S.D.N.Y. 1997) (cited by *Order* at A 18 n.94).

Even if the operator of the local network has some indication of the physical location of the end user, the *VoIP provider itself* (*e.g.*, Vonage) does not have any way to acquire this information. *IP-NPRM* ¶ 15. 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." *Pulver Order* ¶¶ 21-22 (cited at A 18). The reason, the FCC explained, is that "[w]hat [a VoIP company] provides is information on its server located on the Internet." *Id.* ¶ 21. Customers can use that information to conduct voice conversations only because they have independent access to transmission capabilities provided by the separate networks that constitute the Internet. *Id.* But that does not change the fact that the VoIP provider "remains a server on the Internet." *Id.*

Vonage's innovative IP-based features further complicate geographic identification. For instance, it offers "call forwarding" that causes the customer's phone "plus any other number in the United States or Canada" to ring when the customer is called. A 4, 17. Even Vonage cannot tell which phone its customers use to answer such calls.

In short, Vonage's initial petition was entirely correct in stating that the company "has no service-driven reason to know users' locations, and . . . presently has no way to know." A 17-18; *see also* JA 11-12, 34-38. In light of the record before it and the wealth of agency and judicial precedent on which it relied, the FCC's decision to accept Vonage's conclusion can hardly be deemed "arbitrary and capricious."

Nor is there merit to petitioner's contention that the FCC's *E911 Order* – issued seven months after the *Vonage Order* – undermines the FCC's factual findings in the *Vonage Order*. PUC Br. 43-48 (citing *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10,245 (June 3, 2005) ("*E911 Order*")). To begin with, it is a bedrock principle of administrative law that the "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142. This rule is no mere technicality; it is critical to preserving an agency's "opportunity to address[,] . . . in the first instance," the factual and policy issues

that arise under the statute it administers. *Etchu-Njang v. Gonzales*, 403 F.3d 577, 583 (8th Cir. 2005); *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 763, 766 (8th Cir. 2004) ("By confining judicial review to the administrative record, the [Administrative Procedure Act] precludes the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency.").

This Circuit has applied the rule against post-record evidence strictly, affirming for instance a federal agency's deportation of a resident alien for a felony conviction even where the state court subsequently moved to downgrade the conviction to a misdemeanor. *Lukowski v. INS*, 279 F.3d 644, 646 (8th Cir. 2002) ("This recent state court ruling is a fact not presented to the agency, and our judicial review is limited to the administrative record.") Here, the dispute involving post-record evidence involves complex technical issues affecting an entire industry and millions of consumers. The need for the FCC to resolve the dispute through a multi-party rulemaking, rather than appellate briefs, is consequently even stronger than in *Lukowski*.

In any event, even if this Court were to attempt to "fill in the blanks" about what the *E911 Order* means for the *Vonage Order*'s conclusions, it is plain that the two orders are consistent. Most importantly, the *E911 Order* expressly reaffirms that VoIP providers "have no reliable way to discern from where their customers are accessing the VoIP service." *E911 Order* ¶ 25 & n.81 (citing *Vonage Order*),

46 (same). To be sure, in the absence of a mechanism for "reliably and automatically" determining geographic location today, the *E911 Order* also requires each VoIP provider to (1) collect self-reported location information from its customers and (2) transmit this information to emergency personnel if the customer dials 911. *Id.* ¶¶ 36-51. As the FCC explained, establishing a workable federal 911 requirement was, "[i]n many ways, . . . a necessary and logical follow-up" to preempting state regulation of 911 services. *Id.* ¶ 3.

But petitioners ignore the critical point that the *E911 Order* only requires VoIP operators to transmit the self-reported location of a caller *if that caller dials 911*. Because only a tiny portion of calls are to 911, the infrastructure necessary to identify, record, and transmit the origination of such calls is plainly dwarfed by the infrastructure required to do the same for *every* VoIP call. Indeed, constructing this infrastructure even for 911 calls has proved enormously complicated – since issuing the *E911 Order* on June 3, 2005, the FCC has issued *five public notices* (reproduced in the addendum to this brief) extending compliance deadlines or relaxing compliance standards because of technical obstacles documented by VoIP providers.

There is no end to the number of technical and policy questions raised by petitioners' suggestion that the self-reported location information gathered for 911 purposes be used to distinguish interstate and intrastate calls. For instance, the

E911 Order does not require providers to know the location of the *called* party. Would it be practically and economically feasible to do so, especially for the increasing number of VoIP calls that are IP-to-IP (*i.e.*, where the location of the terminating endpoint is unknown)? Also, the MPUC order at issue in this case requires Vonage to cease offering intrastate service in Minnesota. JA 142. If Vonage were to block calls between customers self-reporting Minnesota locations and parties with Minnesota area codes, would some customers simply (mis)report out-of-state locations in order to place intrastate calls? Would the cost to public safety be worth the jurisdictional benefits? All of these questions are important and uniquely within the competence and statutory mandate of the FCC. If petitioners want to argue that steps taken by VoIP providers to comply with the *VoIP E911 Order* are sufficient to undermine the FCC's conclusion in the *Vonage Order*, the only appropriate course is to first address that contention to the FCC. *Auer v. Robbins*, 519 U.S. 452 (1997) (the only permissible remedy for allegedly obsolete rule is petition for rulemaking, not judicial review).

III. THE FCC MAY PREEMPT STATE REGULATION OF VOIP UNDER THE "IMPOSSIBILITY EXCEPTION"

Based on its finding that VoIP providers cannot determine whether a particular call is jurisdictionally interstate or intrastate, the FCC was well within its legal authority to preempt state regulation of such services.

To be sure, Section 2 of the Communications Act provides for federal authority over interstate service and state authority over intrastate service. *See generally La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) ("*Louisiana PSC*"). And, as petitioners correctly observe, the Supreme Court applied this rule in *Louisiana PSC* to affirm a state's authority to set intrastate rates using different depreciation assumptions than those the FCC chose to set interstate rates for the very same pieces of equipment. *Id.; see also NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (affirming states' authority to set tariff for internal wiring despite federal decision to detariff internal wiring). But in these ratemaking cases, it was possible, through end-of-the-year accounting corrections, to apply the FCC's depreciation assumptions to the portion of calls that were interstate and the states' assumptions to the portion that were intrastate. *See Louisiana PSC*, 476 U.S. at 375-76; *NARUC*, 880 F.2d at 428-29.

In cases where it is not possible to apply different regulations in proportion to the amounts of interstate and intrastate traffic, however, the Supreme Court has made clear that the FCC may preempt state regulation that frustrates a federal purpose. *Louisiana PSC*, 476 U.S. at 375 n.4. In illustrating the meaning of this "impossibility exception," the Supreme Court approvingly cited two Fourth Circuit cases affirming the FCC's authority to preempt state regulations that prohibited residents from connecting their own telephones to the local network and instead

required them to lease telephones from their local service provider. *NCUC v. FCC*, 537 F.2d 787 (4th Cir. 1976); *NCUC v. FCC*, 552 F.2d 1036 (4th Cir. 1977). While it would have been possible for customers to attach their own telephones to make interstate calls and use leased phones to make intrastate calls, that would not have been "practical and economic." 552 F.2d at 1043. The Fourth Circuit therefore concluded that the FCC could preempt because one rule or the other would always govern interstate and intrastate matters as a practical matter.

Lower courts have applied this "impossibility exception" many times in the two decades since *Louisiana PSC.* Each time, they have consistently affirmed the FCC's authority to regulate equipment or services used for both interstate and intrastate calls where there is no practical and economic way to apply different regulatory regimes based on how the equipment is used. *See NARUC*, 880 F.2d 422 (requiring local telephone companies to offer inside wiring installation as a separate service); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (requiring local telephone companies to allow independent sales agents to resell Centrex services); *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (allowing businesses to purchase "trunk" lines); *Pub. Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (allowing local telephone companies to disconnect interstate and intrastate service for non-payment of interstate bill);

California v. FCC, 75 F.3d 1350 (9th Cir. 1996) (limiting restrictions on per-line Caller-ID blocking).

This Circuit recently affirmed that, under the "impossibility exception," the FCC "has the *power* to preempt states from establishing standards and requiring reports relating to" certain telephone lines used by businesses for interstate and intrastate calls. *Qwest Corp. v. Scott*, 380 F.3d 367, 372 (2004) (emphasis in original) (holding, however, that the FCC had not intended to exercise its power in that case). The common thread in all of these cases is that they involve situations where one rule will, as a practical matter, govern interstate and intrastate communications.

There is no practical and economic way to apply Minnesota's traditional telephone company regulations solely to intrastate calls without the ability to distinguish interstate from intrastate calls. As the FCC stated, state certification proceedings can take months. A 13. While an application is pending, VoIP providers cannot offer interstate service because, as the FCC also concluded, they cannot prevent their subscribers from making intrastate calls. A 20. Similarly, a VoIP provider would not be able to guarantee a dial tone within three seconds on at least 98 percent of its intrastate calls, as required by Minn. Rules 7810.5300(A), without applying a similar rule to interstate calls. Nor could it offer toll blocking and call blocking services for intrastate calls only, as required by Minn. Rules

7812.0600(1)(E) and (I), without offering it for interstate calls. Seeking a case-by-case waiver from such regulations, as petitioners suggest (PUC Br. 61-62), would hardly reduce the administrative burden on VoIP providers. Indeed, it would greatly extend the period of legal uncertainty and thus constitute another significant regulatory barrier to entry.

In short, unlike the depreciation rules at issue in *Louisiana PSC*, no accounting procedure could begin to accommodate Minnesota's policy of substantial regulation of intrastate calls and the federal policy of non-regulation of VoIP calls. A 12-15. The practical effect of such a regulatory regime would be to force Vonage to meet these requirements for every call placed using its service. Indeed, as the *Order* points out, if other states were to follow Minnesota's example, Vonage would probably have to comply with the most onerous (and potentially conflicting) regulations applied by *any of the 50 states.* A 25. In this situation, the FCC properly concluded that the "impossibility exception" applied and appropriately preempted state regulation of VoIP service.

CONCLUSION

The Court should affirm the FCC's *Order*.

Respectfully submitted,

_____

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Filed: December 1, 2005

PROOF OF SERVICE

I hereby certify that two true copies of the foregoing Brief, and one copy of a digital version of the foregoing Brief, were served by regular U.S. mail, postage prepaid, upon the following parties of record, this first day of December 2005.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C) AND 8th Cir. R. 28A(c)

1. This brief complies with the type-volume limitations of this Court's Order of September 27, 2005 because this brief contains 4958 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in a 14pt Times New Roman font.

_____
Bruce L. Gottlieb
Counsel for The High Tech Broadband Coalition
Dec. 1, 2005

CERTIFICATE OF COMPLIANCE WITH 8th Cir. R. 28A(d)

The undersigned, on behalf of the party filing and serving this brief, certifies that each computer diskette to be filed and served, containing the full text of the brief, has been scanned for viruses and that it is virus-free.

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Counsel for The High Tech Broadband Coalition
Dec 1. 2005

ADDENDUM
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PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 05-2085
Released: July 26, 2005

Enforcement Bureau Provides Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning the July 29, 2005 Subscriber Notification Deadlines

WC Docket No. 04-36
WC Docket No. 05-196

In this Public Notice, the Enforcement Bureau (Bureau) provides guidance to providers of interconnected voice over Internet protocol (VoIP) service concerning enforcement of the subscriber notification provisions of the Federal Communications Commission's (FCC or Commission) rules governing enhanced 911 (E911) capability. Specifically, the Bureau announces that it will not seek enforcement, for a 30-day period, of the requirement that providers obtain affirmative acknowledgements, by July 29, 2005, from 100% of their subscribers that they have read and understood an advisory concerning the limitations of their E911 service. To be eligible for this extension, providers must meet the reporting requirements outlined below. The Bureau will evaluate the sufficiency of the reports filed by interconnected VoIP providers and take subsequent action as necessary.

Background

On June 3, 2005, the FCC released an Order[1] requiring interconnected VoIP service providers[2] to provide E911 capabilities to their subscribers no later than 120 days from the effective date of the Order. The effective date of the Order is July 29, 2005, 30 days from the date of publication in the Federal Register.[3]

[1] *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 2005 WL 1323217, FCC, (rel. Jun 3, 2005) (*VoIP E911 Order*).

[2] "Interconnected VoIP service" means an interconnected Voice over Internet Protocol (VoIP) service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

[3] 70 Fed. Reg. 37,273 (June 29, 2005).

Additionally, as set forth in the *VoIP E911 Order*, by July 29, 2005, all providers of interconnected VoIP service must:

- Specifically advise every new and existing subscriber, prominently and in plain language, of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service;
- Obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood the advisory described in the paragraph above; and
- Distribute to its existing subscribers warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on or near the equipment used in conjunction with the interconnected VoIP service. Each interconnected VoIP provider should distribute such warning stickers or other appropriate labels to each new subscriber prior to the initiation of that subscriber's service.[4]

As referenced above, the Bureau has determined that it will not initiate enforcement action, until August 30, 2005, against any provider of interconnected VoIP service regarding the requirement that it obtain affirmative acknowledgement by every existing subscriber on the condition that the provider file a detailed report with the Commission by August 10, 2005, containing the information described below. During this brief extension, interconnected VoIP providers will have the ability to continue obtaining affirmative acknowledgements from the entirety of their customer base. Further, we expect that if an interconnected VoIP provider has not received subscriber acknowledgements from 100% of its existing subscribers by August 29, 2005, then the interconnected VoIP provider will disconnect, no later than August 30, 2005, all subscribers from whom it has not received such acknowledgements. As such, providers may wish to inform subscribers that their VoIP service will be disconnected if they do not provide their acknowledgements by August 29, 2005.

Subscriber Notification and Acknowledgement Status and Compliance Reports

The report to the Commission should include:

- A detailed description of all actions the provider has taken to specifically advise every subscriber, prominently and in plain language, of the circumstances under which E911 service may not be available through the interconnected VoIP service and/or may be in some way limited by comparison to traditional E911 service. This information should include, but is not limited to, relevant dates and methods of contact with subscribers (*i.e.*, e-mail, U. S. mail);
- A quantification of how many of the provider's subscribers, on a percentage basis, have submitted an affirmative acknowledgement, as of the date of the report, and an estimation of the percentage of subscribers from whom they do not expect to receive an acknowledgement by August 29, 2005;
- A detailed description of whether and how the provider has distributed to all subscribers warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on and/or near the customer premises equipment used in connection with the interconnected VoIP service.

[4] *VoIP E911 Order* at ¶¶ 48, 73; *see also* 47 C.F.R. §9.5(e).

This information should include, but is not limited to, relevant dates and methods of contact with subscribers (*i.e.*, e-mail, U. S. mail);

- A quantification of how many subscribers, on a percentage basis, to whom the provider did not send the advisory described in the first bullet above and/or to whom the provider did not send warning stickers or other appropriate label as identified in the bullet immediately above;
- A detailed description of any and all actions the provider plans on taking towards any of its subscribers that do not affirmatively acknowledge having received and understood the advisory, including, but not limited to, disconnecting the subscriber's VoIP service with the Company no later than August 30, 2005;
- A detailed description of how the provider is currently maintaining any acknowledgements received from its subscribers; and
- The name, title, address, phone number, and e-mail address of the person(s) responsible for the Company's compliance efforts with the *VoIP E911 Order*.

Filing Procedures

Interconnected VoIP providers may file the above-referenced reports in this proceeding on or before August 10, 2005. All reports must reference WC Docket No. 05-196 and should be labeled clearly on the first page as "Subscriber Notification Report." The report may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), or (2) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (May 1, 1998).

- Electronic Filers: Compliance letters may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number (WC Docket No. 05-196).

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

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DA 05-2358
Released: August 26, 2005

Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement

WC Docket No. 04-36
WC Docket No. 05-196

In this Public Notice, the Enforcement Bureau (Bureau) provides further guidance to providers of interconnected voice over Internet protocol (VoIP) service concerning enforcement of the subscriber affirmative acknowledgement requirement set forth in the Commission's *VoIP Enhanced 911 (E911)* rules.[1] Specifically, the Bureau announces that it will continue to refrain, for an additional 30 days -- until September 28, 2005 -- from enforcing the requirement that VoIP providers obtain affirmative acknowledgements from 100% of their subscribers that they have read and understood an advisory concerning the limitations of their E911 service against those providers that meet the reporting requirements established below.

In addition to satisfying these reporting requirements, to be eligible for this extension, providers also must have filed a report on or before August 10, 2005 in accordance with the Bureau's *July 26, 2005 Public Notice.* The Bureau will evaluate the sufficiency of the updated reports filed by interconnected VoIP providers and take subsequent action as necessary.

Background. The Federal Communications Commission (FCC) released an Order on June 3, 2005,[2] requiring interconnected VoIP service providers[3] to provide E911 capabilities to their subscribers

[1] *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 2005 WL 1323217, FCC, (rel. Jun 3, 2005) at ¶¶ 48, 73 (*VoIP E911 Order*); *see also* 47 C.F.R. §9.5(e).

[2] *VoIP E911 Order*.

[3] "Interconnected VoIP service" means an interconnected Voice over Internet Protocol (VoIP) service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

no later than 120 days from the effective date of the Order.[4] Additionally, as set forth in the *VoIP E911 Order,* all providers of interconnected VoIP service were required by July 29, 2005 to:

- Specifically advise every new and existing subscriber, prominently and in plain language, of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service ("advisory requirement"); and
- Obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood the advisory described in the paragraph above ("affirmative acknowledgement requirement"); and
- Distribute to its existing subscribers warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on or near the equipment used in conjunction with the interconnected VoIP service. Each interconnected VoIP provider should distribute such warning stickers or other appropriate labels to each new subscriber prior to the initiation of that subscriber's service ("sticker requirement").[5]

On July 26, 2005, the Bureau released a Public Notice stating that it would delay, until August 30, 2005, any enforcement action against any provider of interconnected VoIP service regarding the affirmative acknowledgement requirement if the provider filed a report by August 10, 2005, detailing its progress toward satisfying the customer advisory, affirmative acknowledgement, and sticker requirements. The Bureau further stated its expectation that interconnected VoIP providers would disconnect, by August 30, 2005, all subscribers from whom it had not received affirmative acknowledgements. The 30-day extension has allowed interconnected VoIP providers to continue to obtain affirmative acknowledgements from subscribers and minimize the number subject to potential disconnection.

The Bureau has reviewed numerous reports filed by VoIP providers on August 10. The reports demonstrate the significant efforts made by providers in complying with the 100% affirmative acknowledgement requirement. As a result of its review of these reports, the Bureau has determined that it will not initiate enforcement action, until September 28, 2005, regarding the affirmative acknowledgement requirement against those providers that: (1) previously filed reports on or before August 10, 2005 in accordance with the *July 26 Public Notice*; and (2) file two separate updated reports with the FCC by **September 1, 2005** and **September 22, 2005**, containing the information described below. During this additional period of time, the Bureau expects that all interconnected VoIP providers that qualify for this extension will continue to use all means available to them to obtain affirmative acknowledgements from all of their subscribers. Qualifying providers will also have additional time to consider "soft" or "warm" disconnect or suspension methods, as described below.

Subscriber Notification and Acknowledgement Status and Compliance Reports

In the September 1, 2005 and September 22, 2005 reports, each provider must submit the following information updating its August 10, 2005 report:

[4] The effective date of the Order is July 29, 2005 (30 days from the date of publication in the Federal Register). 70 Fed. Reg. 37,273 (June 29, 2005).

[5] *VoIP E911 Order* at ¶¶ 48, 73; *see also* 47 C.F.R. § 9.5.

- A detailed explanation regarding current compliance with the notice and warning sticker requirements *if* the provider did not notify and issue warning stickers or labels to 100% of its subscribers by the July 29, 2005 deadline. Providers expected to update this information include those that were in the process of providing notice and/or stickers to their subscribers, but had not completed the process by July 29, 2005.
- A quantification of the percentage of the provider's subscribers that have submitted affirmative acknowledgements as of the date of the September 1 and September 22 reports, and an estimation of the percentage of subscribers from whom the provider does not expect to receive an acknowledgement by September 28, 2005;
- A detailed description of any and all actions the provider plans to take towards any of its subscribers that do not affirmatively acknowledge having received and understood the advisory; and,
- A detailed description of any and all plans to use a "soft" or "warm" disconnect (or similar) procedure for subscribers that fail to provide an affirmative acknowledgement by September 28, 2005. The Bureau notes that in their August 10, 2005 reports some providers, such as Teliphone, Inc. and Broadview Networks, Inc., state that they will use a "soft" disconnect procedure to disconnect those subscribers that ultimately do not acknowledge having received and understood the customer advisory. As the Bureau understands it, the soft disconnect procedure will either disallow all non-911 calls or intercept and send those calls to the provider's customer service department. Under this "soft" disconnect procedure, however, calls to 911 will continue to go to the appropriate Public Safety Answering Point (PSAP). A provider's September 1 and September 22 reports must include either a statement that the provider will use a "soft" or "warm" disconnect (or similar) solution as of September 28, 2005, or a detailed explanation of why it is not feasible for the provider to use a "soft" or "warm" disconnect solution, as described above.

Filing Procedures

Interconnected VoIP providers may file the above-referenced reports in this proceeding on or before September 1, 2005 and September 22, 2005. All reports must reference WC Docket No. 05-196 and should be labeled clearly on the first page as "Subscriber Acknowledgement Report (date)." The report may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), or (2) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (May 1, 1998).

- Electronic Filers: Compliance letters may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number (WC Docket No. 05-196).

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DA 05-2530
Released: September 27, 2005

Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement

WC Docket No. 04-36
WC Docket No. 05-196

In this Public Notice, the Enforcement Bureau (Bureau) provides additional guidance concerning its intended enforcement of the subscriber affirmative acknowledgement requirement placed on interconnected Voice over Internet Protocol (VoIP) service providers in the Commission's *VoIP E911 Order*.[1] After considering the reports submitted to us by interconnected VoIP providers detailing their compliance with the Commission's notification requirements,[2] it is evident that many providers have devoted significant resources to notifying each of their subscribers of the limitations of their 911 service and obtaining acknowledgements from each of their subscribers. Specifically, by repeatedly prompting subscribers through a variety of means, the majority of providers submitting September reports have obtained acknowledgments from nearly all, if not all, of their subscribers. For example, the September reports indicate that at least 21 providers have received acknowledgments from 100 percent of their subscribers and at least 32 others have obtained acknowledgements from 90 percent or more of their subscribers. In recognition of these substantial efforts and the very high percentage of received acknowledgments, the Bureau announces that it will not pursue enforcement action against such providers. We do, however, expect these providers will continue seeking the remaining acknowledgements and will notify the Commission once they have achieved 100% compliance.

To the extent that a provider has not received acknowledgements from at least 90% of its subscribers, we intend to continue forbearing from enforcement of our acknowledgment requirement until October 31, 2005, provided that these providers submit a status report to us by October 25, 2005. This status report should detail the efforts that they have undertaken to obtain acknowledgments from the remainder of their subscriber base, explain why they have been unable to achieve an acknowledgment percentage closer to 100%, and provide the current percentage of acknowledgments that they have received as of the date of filing.

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[1] *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (rel. Jun 3, 2005) at ¶¶ 48, 73 (*VoIP E911 Order*); *see also* 47 C.F.R. § 9.5(e).

[2] The Bureau has reviewed numerous reports that interconnected VoIP providers filed on August 10, September 1 and September 22. *See* Public Notice, (DA 05-2085) released July 26, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-2085A1.doc; *see also* Public Notice, (DA 05-2358) released August 26, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-2358A1.doc.

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 05-2874
Released: October 31, 2005

Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement

WC Docket No. 04-36
WC Docket No. 05-196

In this Public Notice, the Enforcement Bureau (Bureau) provides further information regarding its intended enforcement of the subscriber affirmative acknowledgement requirement imposed on interconnected Voice over Internet Protocol (VoIP) service providers in the Commission's *VoIP E911 Order*.[1] In its September 27, 2005 public notice,[2] the Bureau announced that, after considering the reports submitted by interconnected VoIP providers detailing their compliance with the Commission's notification requirements,[3] it would not pursue enforcement action against providers who had obtained acknowledgements from 90% or more of their subscribers that they had read and understood an advisory from the provider addressing the limitations of the provider's 911 service. We also indicated that we would continue to forbear from enforcement action, until October 31, 2005, against providers who had obtained less than 90% of their acknowledgements, provided that such providers submitted a status report to us by October 25, 2005.

We have reviewed reports submitted by numerous providers on October 25, 2005, and continue to see evidence of providers' substantial efforts to comply with the Commission's rules, as well as significant progress in obtaining acknowledgements from all of their customers regarding the limitations of their 911 service. Based on these substantial efforts, we will continue to refrain from exercising our enforcement authority against those providers who have yet to obtain acknowledgements from 90% or more of their subscribers, provided that these providers file an additional status report with the Commission on November 28, 2005. This status report should detail the efforts that they have undertaken to obtain acknowledgments from the remainder of their subscriber base, explain why they have been unable to achieve an acknowledgment percentage closer to 100%, and provide the current percentage of acknowledgments that they have received as of the date of filing. Thereafter, we expect these providers

[1] *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (rel. Jun 3, 2005) at ¶¶ 48, 73 (*VoIP E911 Order*); *see also* 47 C.F.R. § 9.5(e).

[2] *See* Public Notice, (DA 05-2530) released September 27, 2005.

[3] The Bureau has reviewed numerous reports that interconnected VoIP providers filed on August 10, September 1 and September 22. *See* Public Notice, (DA 05-2085) released July 26, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-2085A1.doc; *see also* Public Notice, (DA 05-2358) released August 26, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-2358A1.doc.

to seek the remaining acknowledgements and notify the Commission once they have achieved 100% compliance.

Filing Procedures

Interconnected VoIP providers may file the above-referenced report in this proceeding on or before November 28, 2005. Reports must reference WC Docket No. 05-196 and should be labeled clearly on the first page as "Subscriber Acknowledgement Report (date of filing)." The report may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), or (2) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (May 1, 1998).

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- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

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- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

Parties should also send a copy of their filings to:

- Byron McCoy, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, Room 4-A234, 445 12th Street, S.W., Washington, D.C. 20554, or by email to byron.mccoy@fcc.gov;

- Kathy Berthot, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, Room 7-C802, 445 12th Street, S.W., Washington, D.C. 20554, or by email to kathy.berthot@fcc.gov; and

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PUBLIC NOTICE

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Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice Over Internet Protocol 911 Compliance Letters
WC Docket No. 04-36
WC Docket No. 05-196

In this Public Notice, the Enforcement Bureau (Bureau) sets forth the specific information that interconnected voice over Internet Protocol (VoIP) service providers[1] must include in the Compliance Letters required by the Federal Communications Commission (Commission) in its June 3, 2005 order establishing enhanced 911 requirements for IP-enabled service providers.[2] Compliance Letters must be filed with the Commission on or before November 28, 2005.[3] Although the Bureau has released prior public notices addressing the Commission's subscriber notification and acknowledgement requirements,[4] this Notice addresses only the Compliance Letter requirements.

In addition, the Bureau takes this opportunity to commend the steps undertaken by AT&T Corp. (AT&T), MCI, Inc. (MCI) and Verizon Communications, Inc. (Verizon) to comply with the

[1] "Interconnected VoIP service" means an interconnected voice over Internet Protocol service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. *See* 47 C.F.R. § 9.3.

[2] *IP-Enabled Services and 911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10273, ¶ 50 (2005) (*VoIP 911 Order*); 47 C.F.R. § 9.5(f).

[3] 47 C.F.R. § 9.5(f).

[4] *See* Public Notice, *Enforcement Bureau Provides Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning the July 29, 2005 Subscriber Notification Deadlines*, WC Docket Nos. 04-36, 05-196, DA 05-2085 (rel. July 26, 2005); Public Notice, *Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, WC Docket Nos. 04-36, 05-196, DA 05-2358 (rel. Aug. 26, 2005); Public Notice, *Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, WC Docket Nos. 04-36, 05-196, DA 05-2530 (rel. Sept. 27, 2005); Public Notice, *Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, WC Docket Nos. 04-36, 05-196, DA 05-2874 (rel. Oct. 31, 2005). The subscriber notification and acknowledgement requirements are codified in section 9.5(e) of the Commission's rules. 47 C.F.R. § 9.5(e); *see also VoIP 911 Order*, 20 FCC Rcd at 10271-73, ¶¶ 47-49.

Commission's VoIP 911 provisioning requirements, as outlined in recent letters they filed in the above-referenced dockets.[5] As detailed below, the Bureau strongly encourages other providers to adopt similar measures to comply with the VoIP 911 requirements and will carefully analyze an interconnected VoIP provider's implementation of such measures in determining whether and how to take enforcement action.

Background

On June 3, 2005 the Commission released the *VoIP 911 Order* adopting rules that require interconnected VoIP providers to provide their new and existing subscribers with 911 service no later than November 28, 2005.[6] Specifically, as a condition of providing interconnected VoIP service, each interconnected VoIP provider must, in addition to satisfying the subscriber notification, acknowledgment, and labeling requirements set forth in section 9.5(e) of the Commission's rules:[7]

- Transmit all 911 calls to the public safety answering point (PSAP), designated statewide default answering point, or appropriate local emergency authority that serves the caller's "Registered Location."[8] Such transmissions must include the caller's Automatic Numbering Information (ANI)[9] and Registered Location to the extent that the PSAP, designated statewide default answering point, or appropriate local emergency authority is capable of receiving and processing such information;[10]

- Route all 911 calls through the use of ANI and, if necessary, pseudo-ANI,[11] via the Wireline E911 Network,[12] and make a caller's Registered Location available to the appropriate PSAP,

[5] *See* Letter from Robert W. Quinn, Jr., Vice President, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36, 05-196 (filed October 7, 2005) (AT&T *Ex Parte*); Letter from Richard S. Whitt, Vice President, Federal Regulatory, MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36, 05-196 (filed October 21, 2005) (MCI *Ex Parte*); Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36, 05-196 (filed October 21, 2005) (Verizon *Ex Parte*).

[6] The effective date of these requirements is set at 120 days after the effective date of the *VoIP 911 Order*. The *VoIP 911 Order* became effective 30 days after publication in the Federal Register. Because the order was published in the Federal Register on June 29, 2005, and became effective on July 29, 2005, the effective date of these requirements is November 28, 2005. *See* 70 Fed. Reg. 37,273 (June 29, 2005); 70 Fed. Reg. 43,323 (July 27, 2005).

[7] *See* 47 C.F.R. § 9.5(e).

[8] *See* 47 C.F.R. § 9.5(b)(2). An end-user's "Registered Location" is the most recent information obtained by an interconnected VoIP service provider that identifies the physical location of the end-user. *See* 47 C.F.R. § 9.3.

[9] ANI is a system that identifies the billing account for a call and, for 911 systems, identifies the calling party and may be used as a call back number. *See* 47 C.F.R. §§ 9.3, 20.3.

[10] *See* 47 C.F.R. §§ 9.5(b)(2), (c).

[11] Pseudo-ANI is "a number, consisting of the same number of digits as ANI, that is not a North American Numbering Plan telephone directory number and may be used in place of an ANI to convey special meaning. The special meaning assigned to the pseudo-ANI is determined by agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system." *See* 47 C.F.R. §§ 9.3, 20.3.

[12] The "Wireline E911 Network" is a "dedicated wireline network that: (1) is interconnected with but largely separate from the public switched telephone network; (2) includes a selective router; and (3) is utilized to route

designated statewide default answering point or appropriate local emergency authority from or through the appropriate Automatic Location Identification (ALI) database;[13]

- Obtain from each of its existing and new customers, prior to the initiation of service, a Registered Location;[14] and

- Provide all of their end users one or more methods of updating their Registered Location at will and in a timely manner.[15] At least one method must allow end users to use only the same equipment (such as the Internet telephone) that they use to access their interconnected VoIP service.[16]

Compliance Letters

Additionally, given the vital public safety interests at stake, the *VoIP 911 Order* requires each interconnected VoIP provider to file with the Commission a Compliance Letter on or before November 28, 2005 detailing its compliance with the above 911 requirements.[17] To ensure that interconnected VoIP providers have satisfied the requirements set forth above, we require interconnected VoIP providers to include the following information in their Compliance Letters:

- 911 Solution: This description should include a quantification, on a percentage basis, of the number of subscribers to whom the provider is able to provide 911 service in compliance with the rules established in the *VoIP 911 Order*. Further, the detailed description of the technical solution should include the following components:

    - 911 Routing Information/Connectivity to Wireline E911 Network: A detailed statement as to whether the provider is transmitting, as specified in Paragraph 42 of the *VoIP 911 Order*, "all 911 calls to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority utilizing the Selective Router, the trunk line(s) between the Selective Router and the PSAP, and such other elements of the Wireline E911 Network as are necessary in those areas where Selective Routers are utilized."[18] If the provider is not transmitting all 911 calls to the correct answering point in areas where Selective Routers are utilized, this statement should include a detailed explanation why not. In addition, the provider should quantify the number of Selective Routers to which it has interconnected, directly or indirectly, as of November 28, 2005.

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emergency calls and related information to PSAPs, designated statewide default answering points, appropriate local emergency authorities or other emergency answering points." *See* 47 C.F.R. § 9.3.

[13] *See* 47 C.F.R. §§ 9.5(b)(3), (4).

[14] *See* 47 C.F.R. § 9.5(d)(1).

[15] *See* 47 C.F.R. § 9.5(d)(2).

[16] *Id.*

[17] *See VoIP 911 Order*, 20 FCC Rcd at 10273, ¶ 50; 47 C.F.R. § 9.5(f).

[18] *VoIP 911 Order*, 20 FCC Rcd at 10269-70, ¶ 42 (footnote omitted).

- Transmission of ANI and Registered Location Information: A detailed statement as to whether the provider is transmitting via the Wireline E911 Network the 911 caller's ANI and Registered Location to all answering points that are capable of receiving and processing this information. This information should include: (i) a quantification, on a percentage basis, of how many answering points within the provider's service area are capable of receiving and processing ANI and Registered Location information that the provider transmits; (ii) a quantification of the number of subscribers, on a percentage basis, whose ANI and Registered Location are being transmitted to answering points that are capable of receiving and processing this information; and (iii) if the provider is not transmitting the 911 caller's ANI and Registered Location to all answering points that are capable of receiving and processing this information, a detailed explanation why not.

- 911 Coverage: To the extent a provider has not achieved full 911 compliance with the requirements of the *VoIP 911 Order* in all areas of the country by November 28, 2005, the provider should: 1) describe in detail, either in narrative form or by map, the areas of the country, on a MSA basis, where it is in full compliance and those in which it is not; and 2) describe in detail its plans for coming into full compliance with the requirements of the order, including its anticipated timeframe for such compliance.

- Obtaining Initial Registered Location Information: A detailed description of all actions the provider has taken to obtain each existing subscriber's current Registered Location and each new subscriber's initial Registered Location. This information should include, but is not limited to, relevant dates and methods of contact with subscribers and a quantification, on a percentage basis, of the number of subscribers from whom the provider has obtained the Registered Location.

- Obtaining Updated Registered Location Information: A detailed description of the method(s) the provider has offered its subscribers to update their Registered Locations. This information should include a statement as to whether the provider is offering its subscribers at least one option for updating their Registered Location that permits them to use the same equipment that they use to access their interconnected VoIP service.

- Technical Solution for Nomadic Subscribers: A detailed description of any technical solutions the provider is implementing or has implemented to ensure that subscribers have access to 911 service whenever they use their service nomadically.

The Bureau notes that in an October 7, 2005 letter submitted in WC Docket Nos. 04-36 and 05-196,[19] AT&T outlined an innovative compliance plan that it is implementing to address the Commission's 911 provisioning requirements that take effect on November 28, 2005. In letters filed on October 21, 2005 in these dockets, MCI and Verizon each outlined similar compliance plans.[20] Each of these plans includes an automatic detection mechanism that enables the provider to identify when a customer may have moved his or her interconnected VoIP service to a new location and ensure that the customer continues to receive 911 service even when using the interconnected VoIP service nomadically. These plans also include a commitment to not accept new interconnected VoIP customers in areas where the provider cannot provide 911 service and to adopt a "grandfather" process for existing customers for whom the provider has not yet implemented either full 911 service or the automatic detection capability.

[19] *See* AT&T *Ex Parte*.

[20] *See* MCI *Ex Parte* and Verizon *Ex Parte*.

The Bureau applauds the steps undertaken by AT&T, MCI and Verizon and strongly encourages other providers to adopt similar measures. The Bureau will carefully review a provider's implementation of steps such as these in deciding whether and how to take enforcement action. Providers should include in their November 28, 2005, Compliance Letters a detailed statement as to whether and how they have implemented such measures. To the extent that providers have not implemented these or similar measures, they should describe what measures they have implemented in order to comply with the requirements of the *VoIP 911 Order*.

Although we do not require providers that have not achieved full 911 compliance by November 28, 2005, to discontinue the provision of interconnected VoIP service to any existing customers, we do expect that such providers will discontinue marketing VoIP service, and accepting new customers for their service, in all areas where they are not transmitting 911 calls to the appropriate PSAP in full compliance with the Commission's rules.

Filing Procedures

Interconnected VoIP providers must file the above-referenced Compliance Letters in this proceeding on or before November 28, 2005. All such filings must reference WC Docket No. 05-196 and should be labeled clearly on the first page as "Compliance Letter." Compliance Letters may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), or (2) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (May 1, 1998).

- Electronic Filers: Compliance Letters may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number (WC Docket No. 05-196).

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

Parties should also send a copy of their filings to: