Case No. 08-1764

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VONAGE HOLDINGS CORP. and VONAGE NETWORK INC.,

Plaintiffs-Appellees,

v.

NEBRASKA PUBLIC SERVICE COMMISSION; and ROD JOHNSON, FRANK E. LANDIS, JR., ANNE C. BOYLE, TIM SCHRAM, and GERALD L. VAP, in their official capacities as Commissioners of the Nebraska Public Service Commission, and JEFFREY L. PURSLEY, in his official capacity as Director of the Nebraska Telecommunications Infrastructure and Public Safety Department of the Nebraska Public Service Commission,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Nebraska
The Honorable Laurie Smith Camp

BRIEF FOR AMICI CURIAE VOICE ON THE NET COALITION, INC., COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, TELECOMMUNICATIONS INDUSTRY ASSOCIATION, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, AND FIBER-TO-THE-HOME COUNCIL IN SUPPORT OF APPELLEES AND IN FAVOR OF AFFIRMANCE

Paul Kenefick
VON COALITION, INC.
1718 M Street, NW PMB #336
Washington, DC 20036
(202) 223-9107
paul.kenefick@corp.earthlink.net

July 10, 2008

CORPORATE DISCLOSURE STATEMENTS

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 Computer & Communications Industry Association ("CCIA") is a non-profit trade association and as such has no parent corporation nor any issued stock or partnership shares.

The Telecommunications Industry Association ("TIA") has issued no stock and has no parent corporation.

The Information Technology Industry Council ("ITI") is a non-profit trade association and as such has no parent corporation nor any issued stock or partnership shares.

The Information Technology Association of America ("ITAA") has no parent corporation and no publicly traded company owns 10 percent or more of its stock.

The Fiber-to-the-Home Council ("FTTH Council") has no parent corporation and no publicly traded company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Agency Materials

Other Materials

STATEMENT OF AMICI

Statement of Identity. *Amici* are providers of Voice over Internet Protocol ("VoIP") products, services, and equipment as well as consumers of both VoIP and more traditional telephone services. *Amici* include the Voice on the Net Coalition, Inc. ("VON Coalition"), the Computer & Communications Industry Association ("CCIA"), the Telecommunications Industry Association ("TIA"), the Information Technology Industry Council ("ITI"), the Information Technology Association of America ("ITAA"), and the Fiber-to-the-Home Council.

The **VON Coalition** is the leading public policy organization for the VoIP industry, educating regulators and legislators worldwide about the benefits of VoIP.

CCIA is an international, nonprofit association of technology companies dedicated to open markets, open systems, and open networks. CCIA members participate in the Internet, information and communications technology industries, ranging from the largest in the business to small entrepreneurial firms. CCIA advocates for public policy that promotes broadband deployment, competition, and innovative applications such as VoIP. CCIA members employ nearly one million people and generate

annual revenues exceeding $200 billion. A complete list of CCIA's members is available online at http://www.ccianet.org/members.html.

Currently in its 84th year, **TIA** represents the global information and communications technology industry through standards development, advocacy, business opportunities, market intelligence, and world-wide environmental regulatory analysis. Thousands of companies and individuals work through TIA to enhance the business environment for telecommunications, broadband, mobile wireless, information technology, networks, cable, satellite, unified communications, emergency communications, and the greening of technology. TIA is accredited by the American National Standards Institute ("ANSI").

ITI represents over forty of the nation's leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies. ITI is the voice of the high tech community, advocating policies that advance U.S. leadership in technology and innovation, open access to new and emerging markets, support e-commerce expansion, protect consumer choice, and enhance global competition.

ITAA is the premier IT and electronics industry association working to maintain America's role as the world's innovation headquarters. ITAA

provides leadership in market research, standards development, business development, networking, and public policy advocacy to some 350 corporate members doing business in the public and commercial sector markets. These members range from the smallest start-ups to industry leaders offering Internet, software, services and hardware solutions. ITAA offers the industry's only grassroots-to-global network, carrying the voice of IT to companies, markets, and governments at the local, state, national, and international levels to facilitate growth and advocacy. For more information, visit www.itaa.org.

The **Fiber-to-the-Home Council** is a non-profit organization established to help its members with planning, marketing, implementing, and managing fiber-to-the-home solutions. Council membership numbers approximately 175 members and includes municipalities, utilities, developers, and traditional and non-traditional providers.

Statement of Interest. VoIP is a breakthrough technology that offers a host of new communications possibilities at a dramatic cost advantage over the traditional phone system. *Amici's* interest is in a coherent regulatory scheme that accounts for the differences between VoIP and traditional phone services. The Federal Communications Commission ("FCC" or "Commission"), with its unique ability to address regulation of

interconnected VoIP on a nationwide basis and ensure that state regulations not conflict, has taken on this challenge, and *amici* are interested in ensuring that the FCC's careful approach not be undermined.

Authority to File. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

1. The FCC definitively resolved the question presented by appellants in its *Vonage Preemption Order*. *Vonage Holdings Corporation Petition for Declaratory Ruling*, Mem. Op. & Order, 19 FCC Rcd 22404 (2004) ("*Vonage Preemption Order*"). In that *Order*, FCC preempted Minnesota's effort to regulate Vonage's services, including its effort to impose state universal service obligations on Vonage, and explained that its decision was the first step toward a comprehensive national regulatory policy for interconnected VoIP. There is no basis on which to conclude that Nebraska's effort to regulate Vonage is not likewise preempted.

In its *Vonage Preemption Order,* the FCC specifically recognized the risk that state regulation would "negat[e] valid federal policy and rules," *Vonage Preemption Order,* 19 FCC Rcd 22404 at ¶ 1, and replaced that risk with the "regulatory certainty" of a comprehensive and coordinated federal scheme. Nebraska's effort to regulate Vonage despite the clear direction of

the FCC generates the very uncertainty that the FCC sought to eliminate with its *Vonage Preemption Order*.

2. The FCC's decision that it had the responsibility and obligation to adopt a single national policy for regulation of interconnected VoIP is grounded in fundamental differences between traditional phone service and services like Vonage's, and in Congress's express policy commands. Among other differences, interconnected VoIP providers deliver a location-independent service, which, in short, means that the old regulatory framework—which depends on distinguishing intrastate calls (which are subject to state regulation) from interstate calls (which are subject to exclusive federal regulation)—simply cannot apply. The FCC likewise determined that a national policy for interconnected VoIP would further important federal policies, including the continued development of advanced services, the promotion of competition, and the spread of broadband access to more and more Americans. This Court should give full effect to the FCC's judgment.

Because of the technical characteristics of interconnected VoIP service, permitting state regulation over it would open the service up to the danger of inconsistent state regulation. The FCC was right to be wary of such a possibility and to preempt state regulation to avoid it. Defendants

argue that the same technical difficulties with determining the actual location a phone call is made from exist in the CMRS (mobile phone) context, where states are permitted to impose universal service surcharges. That argument does not help them, however, because a federal law eliminates the possibility of inconsistent state universal service obligations for CMRS providers. In addition to eliminating the risk of inconsistent state regulation, a single national policy is good for Nebraska and for America. Interconnected VoIP has saved consumers *billions* of dollars while revolutionizing communications.

3. In the *Vonage Preemption Order*, the FCC committed to pursuing a single national policy for the regulation of interconnected VoIP. Since then, it has moved carefully to create that national regulatory framework, enacting regulations covering topics from 911 service to access for persons with disabilities. While the FCC has pursued its single national policy for interconnected VoIP, it has carefully delineated the limited conditions under which state regulation of interconnected VoIP would not be preempted. Notably, those narrow conditions have not been satisfied here.

Finally, despite the suggestion by the National Association of Regulatory Utility Commissions to the contrary, nothing in the federal statute governing universal service supports the conclusion that federal

regulatory policy should yield to state universal service programs. Indeed, the federal universal service statute reemphasizes the supremacy of the FCC's rules. As federal policy is inconsistent with permitting Nebraska to impose universal service obligations on Vonage, Nebraska may not do so.

ARGUMENT

I. The FCC Preempted Nebraska's Authority to Impose State USF Obligations on Vonage.

This case is not about the benefits of Nebraska's universal service program. This case is about whether the Federal Communications Commission ("FCC" or "Commission"), recognizing that interconnected Voice over Internet Protocol ("VoIP") technology is fundamentally different from traditional telecommunications service, has decided to implement a "single national policy" for interconnected VoIP. *See Vonage Holdings Corporation Petition for Declaratory Ruling*, Mem. Op. & Order, 19 FCC Rcd 22404 ¶ 33 (2004) ("*Vonage Preemption Order*"), *aff'd sub nom. Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). The *Vonage Preemption Order* makes clear that it has and that this single national policy preempts Nebraska's effort to impose state universal service obligations.

In 2004, the FCC initiated a rulemaking proceeding to comprehensively consider the regulatory framework that would apply to VoIP and other internet-based services. *IP-Enabled Services*, Notice of

Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services NPRM*"). The Commission noted that the Internet had "transcended historical jurisdictional boundaries to become one of the greatest drivers of consumer choice and benefit, technical innovation, and economic development" in recent years, and it recognized that it had done so in an environment largely free of government regulation. *Id*. at 4864 ¶ 1. The FCC likewise recognized that the fundamental differences between the Internet and the traditional telephone network "challenge[] the key assumptions on which communications networks, and regulation of those networks, are predicated." *Id*. at 4866-67 ¶ 4. The Commission explained that it saw its role as facilitating the continued progress such services promised, while protecting the public interest. *See id*. at 4865-68 ¶¶ 2-5. The FCC was clear, though, that its regulatory decisions "would start from the premise that IP-enabled services are minimally regulated." *Id*. at 4868 ¶ 5.

Before the FCC could take further steps to address the appropriate regulation of IP-enabled services, however, it was confronted with a separate problem. The State of Minnesota had, the year before, declared that Vonage's DigitalVoice service was subject to state regulation, and Vonage had sought relief both in federal court, arguing that federal law preempted

the state from regulating its services, and from the FCC, asking for an explicit declaration of preemption. *See Vonage Preemption Order*, 19 FCC Rcd at 22408-10 ¶¶ 10-12. The district court acted first, taking little time to determine that Vonage's DigitalVoice could not be regulated by the state. *See Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *aff'd* 394 F.3d 568 (8th Cir. 2004).

After Vonage filed its petition with the FCC, and despite the court's determination that Minnesota's regulations were preempted, "a number of other states … opened proceedings to examine the jurisdictional nature of VoIP services." *Vonage Preemption Order*, 19 FCC Rcd at 22410 ¶ 13. The FCC was thus faced with the question whether to rule on Vonage's petition and address the emerging state efforts to regulate VoIP services or, instead, to address the issues it had identified in the *IP-Enabled Services* docket while permitting the states to assert jurisdiction to regulate. It was in this context that the FCC issued the *Vonage Preemption Order*, holding that its authority was exclusive and declaring that "*this Commission, not the state commissions*, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice." *Id*. at 22405 ¶ 1 (emphasis added).

The role of the states following the *Vonage Preemption Order* was twofold. First, the FCC did not preempt "general laws governing entities

conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices." *Id*. Second, the FCC invited state commissions to assist *it* as it considered how best to regulate VoIP on a nationwide basis. The FCC explained that the *Vonage Preemption Order* "will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping *us* answer the questions that remain … questions regarding the regulatory obligations of providers of IP-enabled services." *Id*. at 22405 ¶ 2 (emphasis added); *see also id*. at 22412 n.46 (preempting state regulation would "enable this Commission and the states to focus resources in working together"). The FCC's statement echoed a letter signed by commissioners from various state regulatory bodies encouraging the FCC to preempt state regulation:

> A declaratory ruling by the FCC that IP-enabled services, including VoIP, is [sic] subject to exclusive federal jurisdiction does not in any way preclude Federal-State collaboration on the many issues of concern to states, such as … universal service …. In fact, clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined *will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation*.

Vonage Holdings Corporation Petition for Declaratory Ruling, WC Docket No. 03-211, Letter of Gregory Sopkin, et al., at 6 (Nov. 2, 2004) (attached as

an Appendix to this brief) (emphasis added); *see also Vonage Preemption Order*, 19 FCC Rcd at 22411 n.46 ("it is essential that we take action to bring some greater measure of certainty to the industry to permit services like DigitalVoice to evolve"); *id.*, *Statement of Commissioner Abernathy* (quoting the state commissioners' letter and explaining that the decision of some states to regulate VoIP made it "imperative for the Commission to establish [its] exclusive jurisdiction as the first order of business").

The Defendants ("Nebraska PSC") and their amicus, the National Association of Regulatory Utility Commissions ("NARUC"), argue that, notwithstanding the FCC's desire to put a stop to the quickly multiplying state proceedings asserting jurisdiction over interconnected VoIP and to consolidate all such questions before the Commission, the FCC had no intention to preempt *Nebraska's* regulations imposing state universal service contribution obligations. They are mistaken.

First, as Vonage pointed out in its brief, the FCC identified Minn. Stat. § 237.16(g), the statute that requires contributions to the state's universal service fund, as one of the provisions it was preempting. Vonage Br. 20; *see also Vonage Preemption Order*, 19 FCC Rcd at 22409 n.28 (listing the statutory provisions that the Minnesota PUC had identified as applying to Vonage); *id*. at 22411 ¶ 14 (preempting the Minnesota PUC

order). There is no basis on which to argue that Nebraska's state universal fund requirements are not likewise preempted.

Even if the FCC had not been so explicit, however, it would be unreasonable to conclude that the Nebraska regulations at issue here are not preempted. The Commission was well aware that unless it took action, providers like Vonage would continue to face state efforts to regulate their services. *See id*. at 22410 ¶ 13. Indeed, the FCC declared state regulatory action in Minnesota preempted even though the state was at that moment enjoined from enforcing its statute against Vonage (although the state's appeal was pending), confirming that FCC issued its order not just to resolve the Minnesota dispute, but to resolve *all* such disputes and put an end to the litigation that threatened to repeat itself all over the country. *See id.*, *Statement of Commissioner Abernathy*; *see also Vonage Preemption Order*, 19 FCC Rcd at 22414 ¶ 18 & n.64. Under these circumstances, it is implausible that the FCC did not intend to preempt regulations like Nebraska's, which have led to precisely the kind of litigation the FCC was trying to prevent.

II. The FCC's "Single National Policy" Should Not Be Disturbed.

The FCC's decision to adopt a "single national policy" for interconnected VoIP services like Vonage's makes good sense for industry,

consumers, and regulators. Interconnected VoIP is a revolutionary technology, quite different from traditional telephone service offered using circuit-switched technology. As the FCC understood when it initiated the IP-Enabled Services proceeding and preempted state regulation in the *Vonage Preemption Order*, these fundamental differences require a new regulatory paradigm—a coherent national policy coordinated by the national regulator.

A. Vonage's service is fundamentally different from conventional telephone service.

In the *Vonage Preemption Order*, the FCC found that "there are fundamental differences between" Vonage's DigitalVoice service and conventional telephone service. *Vonage Preemption Order*, 19 FCC Rcd at 22406 ¶ 4. As the FCC explained, Vonage's DigitalVoice service is an application that requires its users to have access to a broadband connection to the Internet; it does not matter *where* the users obtain that connection, or, indeed, whether a user uses the same or a different connection every time he or she accesses the service. *Id*. at 22406 ¶ 5. Additionally, although Vonage's service provides its customers with conventional phone numbers, those phone numbers have nothing to do with the geographic location of the Vonage subscriber. *Id*. at 22408 ¶ 9. Thus, a Vonage subscriber who joins the armed forces might choose a phone number with a hometown area code,

so friends and family can call the same local number to reach him or her, no matter where he or she is serving or how often the servicemember moves.

Not only is Vonage's service independent of geography, it "enable[s] its users to establish a virtual presence in multiple locations simultaneously." *Id*. at 22419 ¶ 24. Moreover, a Vonage user can access "multiple service features" and perform "different types of communications simultaneously." *Id*. at 22419 ¶ 25. Consequently, the foundation on which state jurisdiction to regulate communication is based, that the two end points of a communication are both within the same state, becomes an almost meaningless concept in the context of interconnected VoIP. *See id*. at 22419 ¶ 24 ("making jurisdictional determinations about particular DigitalVoice communications" is "difficult, if not impossible"); *see also IP-Enabled Services NPRM*, 19 FCC Rcd 4863 at 4866-67 ¶ 4 (recognizing that networks employing VoIP "are, both technically and administratively, different from" the public switched telephone network, and that "[t]he rise of IP thus challenges the key assumptions on which communications networks, and regulation of those networks, are predicated"). Accordingly, the FCC "f[ou]nd that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory

scheme.…" *Vonage Preemption Order*, 19 FCC Rcd at 22411 ¶ 14. The district court found no reason to question this technical finding.[1]

B. The FCC's "single national policy" carries out Congress's express policy goals.

The FCC concluded that adopting a "single national policy" would promote important policy goals, as articulated by Congress. The FCC explained that federal law "counsel[s] a single national policy for services like DigitalVoice." *Id.* at 22425 ¶ 33. Congress, the FCC noted, had declared that "it is the policy of the United States—to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* at 22425 ¶ 34 (quoting 47 U.S.C. § 230(b)(2)). The FCC has consistently held that this provision "expresses Congress's clear preference for a *national* policy to accomplish this objective." *Vonage Preemption Order*, 19 FCC Rcd at 22425 ¶ 34 (emphasis added). In addition, the FCC recognized that a

[1] Indeed, the FCC's determination is not open to challenge in this case. FCC orders such as the *Vonage Preemption Order* can be challenged only by petition for review. *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) ("The Administrative Orders Review Act ('Hobbs Act') prescribes the sole conditions under which the courts of appeals have jurisdiction to review the merits of FCC orders.… No collateral attacks on the FCC Order are permitted."). Moreover, this Court already upheld the *Vonage Preemption Order* against a Hobbs Act challenge. *See Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

single national regulatory policy for Vonage's DigitalVoice service would foster demand for the service, which in turn would further Congress's goal of "encourag[ing] the deployment of advanced telecommunications capability" because DigitalVoice requires subscribers to obtain a broadband connection to function. *Id*. at 22426-27 ¶ 36 & n.125 (citing 47 U.S.C. § 157 nt.). The FCC considered and rejected the possibility of forcing Vonage to make changes to its service "for the sole purpose of making it easier to apply traditional voice regulations," explaining that requiring such changes "would greatly diminish the advantages of the Internet's ubiquitous and open nature that inspire the offering of services such as DigitalVoice in the first instance." *Vonage Preemption Order*, 19 FCC Rcd at 22422 ¶ 29. While Nebraska and NARUC might have preferred for the FCC to favor other goals, that was not the choice the FCC made. *Cf*. *id*. at 22427 n.129 (quoting *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) ("Haphazard and uncoordinated state regulation [of the Internet] can only frustrate the growth of cyberspace.") (alteration in *Vonage Preemption Order*)).

C. State regulation of interconnected VoIP poses a risk of inconsistent regulation.

As Vonage explained in its brief, any attempt by the states to impose their own regulations—even if limited, as Nebraska's current effort is, to its

universal service fund—threatens to subject VoIP services to overlapping and inconsistent regulation. Nebraska has chosen to assess universal service fees against all Vonage subscribers that have a billing address in Nebraska. *See* Nebraska PSC Br. 17. If Nebraska is not preempted from assessing such fees, there is no reason other states could not do so as well. As Vonage points out, other states might base their assessments on other proxies, such as the area code of the subscriber's phone number. Vonage Br. 28. The FCC concluded that not only was this unacceptable, it would violate the Commerce Clause. *See Vonage Preemption Order*, 19 FCC Rcd at 22429-30 ¶ 41.

Nebraska and NARUC argue that the difficulty of determining location should not matter for the purposes of VoIP calls, because the same difficulty exists in the CMRS (that is, mobile phone) context, and no one disputes that mobile phone services are subject to state universal service fund assessments. *See* Nebraska PSC Br. 38-42; NARUC Br. 17-18. Their argument, however, misses the mark. In the CMRS context, a uniform federal approach precludes the possibility of inconsistent state regulation. The Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126, permits only the state encompassing the customer's "place of primary use"—which is the customer's residential or primary business street

address—to impose state universal service fees. *See* 4 U.S.C. §§ 117(b), 122(a). Neither the FCC nor Congress has established a similar national rule for VoIP services. In any event, regardless of whether the Nebraska PSC or NARUC believes the FCC was correct in its determination that inconsistent regulation justified preemption or would violate the Commerce Clause, the FCC's judgment is not open to question in this case. *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004).

D. Interconnected VoIP is good for Nebraska and the Nation.

The FCC recognized that innovative services like interconnected VoIP emerged in an environment almost entirely free from regulation, and it expressly intended for the *Vonage Preemption Order* to "clear[] the way for increased investment and innovation in services like Vonage's to the benefit of American consumers." *Vonage Preemption Order*, 19 FCC Rcd at 22405 ¶ 2; s*ee also IP-Enabled Services NPRM*, 19 FCC Rcd at 4864 ¶ 1. As the FCC realized, "innovative services like DigitalVoice are having a profound and beneficial impact on American consumers." *Vonage Preemption Order*, 19 FCC Rcd at 22431 ¶ 43. The FCC was right.

Interconnected VoIP makes much more efficient use of transmission capacity than traditional circuit-switched networks do, which means that the cost of delivering voice communications using VoIP technology is

significantly lower than the cost of delivering circuit-switched calls. Accordingly, interconnected VoIP service generally costs much less than traditional phone service. Vonage's unlimited-use residential service, for example, costs $24.99 per month, which includes local, long-distance, and international calls to several countries, as well as a variety of advanced features (including voicemail). *See* http://www.vonage.com (click on the link for "calling plans") (visited July 9, 2008). Qwest, which provides local phone service in many parts of Omaha, Nebraska, charges $40.99 for a "bundle" of local and long distance (though no European calls) that includes three calling features. A recent report estimates that consumers who use VoIP providers like Vonage that provide service to customers who provide their own broadband connection will exceed $1 *billion* in 2008. *See* Michael D. Pelcovits & Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., *Consumer Benefits from Cable-Telco Competition* at ii (updated Nov. 2007), available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf ("MiCRA Report") (visited July 9, 2008).

In addition to offering lower prices to consumers, interconnected VoIP services from providers like Vonage compete with incumbent telephone companies, forcing them to lower prices. The total consumer

benefits are staggering. The MiCRA Report explains that "[b]ased on the competitive response observed to date, and *even assuming no additional price cuts by the ILECs*, we estimate benefits from competition in the voice market … to be approximately $71.7 billion over the next five years." *Id*. at ii-iii. The authors estimate total consumer benefits from all sources to exceed $111 billion over the same period. *Id*. at iii. In 2007, the authors estimated that VoIP competition saved consumers over $80 million just in Nebraska. *Id*. at 34.

The dramatic savings VoIP offers to consumers belies the suggestion that imposing state USF obligations on providers of interconnected VoIP is necessary to ensure competitive neutrality between providers of VoIP services and those who provide conventional telephone services. *Cf.*, *e.g.*, Nebraska PSC Br. 37-38, 55-56; NARUC Br. 17. As the Nebraska PSC pointed out in its brief, the Nebraska USF surcharge is set at 6.95 percent of end-user revenue from intrastate calls, and VoIP providers would be permitted to use a safe-harbor estimate and allocate 35.1 percent of revenue as intrastate. Nebraska PSC Br. 8, 16. Simplifying somewhat, that means that to a consumer considering switching to Vonage in Nebraska, the state USF charge would be about 60 cents per month ($24.99 (monthly service) x .351 (safe harbor allocation) x .0695 (Nebraska USF surcharge rate) =

$0.609). As shown above, however, a consumer gets more services for $15 less a month with Vonage than with Qwest in Omaha, and according to the MiCRA Report, the average price difference between traditional voice service and service from a cable provider is $11.70. *See* MiCRA Report at ii. *Amici* submit that 60 cents per month in preempted state USF charges is not what makes consumers switch to Vonage or other VoIP providers.[2]

Not only is interconnected VoIP bringing enormous financial benefits to consumers, it is also delivering innovative services. Vonage, as already described, permits subscribers to use their phone (and phone number) anywhere in the world they can obtain a broadband Internet connection. Vonage also offers subscribers the ability to access a wide range of features, as the FCC recognized. *See also Vonage Preemption Order*, 19 FCC Rcd at 22407 ¶ 7 (describing Vonage's "suite of integrated capabilities and features," including innovative voicemail management features). These

[2] The effect on competition of the preemption of state USF is actually smaller. As the Nebraska PSC points out, Vonage has argued that the FCC's safe harbor for interstate calls is set too high. Nebraska PSC Br. 38. As a result, Vonage pays more than its competitors do into the federal program. And because the federal contribution factor is almost twice as high as Nebraska's (11.3 percent for the second quarter of 2008), Vonage actually pays in *federal* USF contributions about what it would pay in *total* USF contributions for customers in Nebraska if the FCC used a realistic figure for its interstate safe harbor and permitted states to impose USF charges on interconnected VoIP. Moreover, since federal USF funds are distributed to the states, Vonage and other interconnected VoIP providers are already supporting universal service in Nebraska.

innovative features were, as the Commission recognized, developed in an environment free from burdensome regulation—and interconnected VoIP providers will continue to deliver exciting new features to consumers if they remain "unfettered by Federal or State regulation" as contemplated by the FCC. *See id*. at 22426 ¶ 35; 47 U.S.C. § 230.

Finally, not only is interconnected VoIP driving innovation and lowering costs for both subscribers and nonsubscribers alike, services like interconnected VoIP drive the deployment of broadband access. *See IP-Enabled Services NPRM*, 19 FCC Rcd at 4867 ¶ 5. The Organisation for Economic Co-Operation and Development recently ranked the United States 15th among surveyed countries in broadband penetration. *See Broadband Growth and Policies in OECD Countries* 25, available at http://www.oecd.org/dataoecd/32/57/40629067.pdf (visited July 9, 2008). Given the "paramount importance of encouraging deployment of broadband," *IP-Enabled Services NPRM*, 19 FCC Rcd at 4865 ¶ 3, the FCC's intent to establish a "single national policy" of light regulation for interconnected VoIP services appears all the more sensible.

III. The FCC Is Implementing its Single National Regulatory Policy for Interconnected VoIP.

A. The FCC has proceeded carefully to create a coherent set of national regulations for interconnected VoIP services.

In the *Vonage Preemption Order*, the FCC noted that it had not yet decided on "the appropriate federal regulations, if any, that will govern this service in the future." *Vonage Preemption Order*, 19 FCC Rcd at 22412 n.46. Several participants in the Vonage proceeding urged the FCC to establish a complete federal regulatory scheme rather than to first preempt state regulation and later decide what regulations would apply to interconnected VoIP. *Id*. The FCC was convinced, however, that "it [was] essential that we take action to bring some greater measure of certainty to the industry to permit services like DigitalVoice to evolve." *Id*. By preempting state regulation, the FCC "permit[ted] the industry participants and our colleagues at the state commissions to direct their resources toward helping us [the FCC] answer the questions that remain" regarding that federal regulatory system. *Id*. at 22405 ¶ 2; *see also id*. at 22411 n.46 (noting that preempting state regulation would allow the states to focus on assisting the FCC in addressing the regulation of interconnected VoIP).

Since issuing the *Vonage Preemption Order*, the FCC has been diligently at work establishing a national regulatory framework for

interconnected VoIP. The Commission has imposed a variety of regulations on VoIP providers, including, in addition to the federal USF regulations discussed at length by the parties, 911 service requirements, *E911 Requirements for IP-Enabled Services Providers*, First Report & Order, 20 FCC Rcd 10245 (2005), regulations requiring cooperation with law enforcement, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report & Order, 20 FCC Rcd 14989 (2005), and regulations governing access to VoIP services for persons with disabilities, *Implementation of Sections 255 and 251(a)(2)*, Report & Order, 22 FCC Rcd 11275 (2007), just to name a few. The FCC did not simply preempt state regulators and then ignore VoIP and the needs of the states. Rather, the FCC has carefully established regulations in furtherance of its "single national policy," and this Court should not permit Nebraska to opt out of that national policy simply because its regulators are dissatisfied with it.

B. The FCC has made clear the boundaries of its national regulatory framework and the limits of federal preemption.

As part of its "single national policy," the FCC has required interconnected VoIP providers to contribute to the federal Universal Service Fund. *See Universal Service Contribution Methodology*, Report & Order, 21 FCC Rcd 7518 (2006) ("*VoIP USF Order*"). In the *VoIP USF Order*, the

FCC explained the limited circumstances under which states would have jurisdiction over interconnected VoIP services. Because it is infeasible for many VoIP providers to determine whether a call is interstate or intrastate, the FCC declared that interconnected VoIP providers could assume that 64.9 percent of all revenues were from interstate traffic for purposes of calculating federal USF contributions. *See id*. at 7544-45 ¶¶ 53-54. The FCC allowed those VoIP providers that could determine which calls were interstate and which were intrastate to use the actual figures. *Id*. at 7546 ¶ 56. But, the FCC explained, "an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage* [*Preemption*] *Order* and would be subject to state regulation." *Id*.

The FCC's statement in the *VoIP USF Order* about which kinds of interconnected VoIP services were subject to state regulation and which were not confirms that the Nebraska regulations at issue in this case are preempted. The FCC, while issuing an order specifically addressing universal service obligations, made clear that those providers that could not determine the end-points of their customers' communications were exempt from state regulation, while those that could do so were not. If the FCC had intended for states to have the power to impose universal service obligations

without regard to providers' ability to determine the end-points of user communications, it would have said so then, when it was addressing both universal service obligations and the scope of its preemption decision.

C. The federal universal service fund statute does not require federal policy to yield to state efforts to impose universal service obligations.

NARUC claims to find support for the Nebraska regulations at issue in this case in the federal universal service fund statute, which refers to state universal service programs. *See* NARUC Br. 10-11; 47 U.S.C. § 254. NARUC reads far too much into the provisions it cites.

As an initial matter, it is not even clear that Section 254(f) has any application to universal service surcharges for interconnected VoIP services. The FCC has refrained from determining that interconnected VoIP services qualify as "telecommunications services," but instead asserted authority to impose universal service obligations on interconnected VoIP pursuant to its ancillary authority. *See VoIP USF Order*, 21 FCC Rcd at 7537 ¶ 35. States, however, only have authority to impose universal service obligations on those who provide "intrastate telecommunications services." 47 U.S.C. § 254(f). *Amici* submit that Nebraska has not carried its burden to show why Vonage's services qualify as telecommunications services, when the FCC has so carefully refrained from making that determination. *Cf. Vonage*

Holdings Corp., 290 F. Supp. 2d at 999 (concluding that Vonage's service qualifies as an information service, *not* a telecommunications service).

Even if Section 254(f) does apply to Vonage's service, that section does not support Nebraska's attempt to regulate interconnected VoIP. While there is no doubt that Congress did contemplate the existence of state universal service programs, there is also no question that federal policy takes precedence over state programs. Indeed, Congress reemphasized, in the very section relied upon by NARUC, that state programs could exist "only to the extent that [they] … do not rely on or burden Federal universal service mechanisms." 47 U.S.C. § 254(f); *cf.* NARUC Br. 11. The portion of the statute NARUC neglects to quote is even more emphatic: "A state may adopt regulations *not inconsistent with the Commission's rules*." 47 U.S.C. § 254(f) (emphasis added). The Nebraska PSC cannot now be heard to argue that the imposition of state universal service obligations on Vonage is consistent with the Commission's rules; that question was settled in the *Vonage Preemption Order* and is not open to review here. *Vonage Holdings Corp.*, 394 F.3d 568 (FCC orders may only be reviewed by petition for review). In any event, as set out in both this brief and in Vonage's brief, Nebraska's regulations are contrary to FCC policy as expressed in the *Vonage Preemption Order*, and they are preempted.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

Paul Kenefick
VON COALITION, INC.
1718 M Street, NW PMB #336
Washington, DC 20036
(202) 223-9107
paul.kenefick@corp.earthlink.net

Dated: July 10, 2008

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 5,486 words, excluding the parts of the brief exempted by Fed. R. App. 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 2003 in 14-point Times New Roman.

_____

Paul Kenefick

Attorney for *amici curiae*

Dated: July 10, 2008

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28A

Pursuant to Eighth Circuit Rule 28A, I certify that the file containing this brief, which was copied to a CD-ROM and filed and served, has been scanned for viruses and that it is virus-free.

_____

Paul Kenefick

Attorney for *amici curiae*

Dated: July 10, 2008

CERTIFICATE OF SERVICE

I certify that on July 10, 2008, I caused to be served two copies of the Brief for Amici Curiae Voice on the Net Coalition, Inc., Computer & Communications Industry Association, Telecommunications Industry Association, Information Technology Industry Council, Information Technology Association of America, and Fiber-to-the-Home Council in Support of Appellees and in Favor of Affirmance and a CD-ROM containing an electronic copy of the same by first-class mail on the parties listed below:

L. Jay Bartel
Assistant Attorney General
2115 State Capitol
Lincoln, NE 38509-8920

James Bradford Ramsay
National Association of
Regulatory Utility Commissioners
1101 Vermont Ave, NW Suite 200
Washington, DC 20005

Thomas G. Connolly
Mark A. Grannis
Justin Dillon
Harris, Wiltshire & Grannis LLP
1200 18th St, NW
12th Floor
Washington, DC 20036

_____
Paul Kenefick

Attorney for *amici curiae*

Dated: July 10, 2008

APPENDIX

ORIGINAL

EX PARTE OR LATE FILED

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA
505 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

SUSAN P. KENNEDY
COMMISSIONER

TEL: (415) 703-3700
FAX: (415) 703-3352

November 2, 2004

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: IP-Enabled Services, WC Docket No. 04-36; Vonage Petition for Declaratory Ruling, WC Docket No. 03-211

Dear Ms. Dortch:

The attached comments on the issue of State and Federal jurisdiction over IP-enabled services, in particular VoIP, represent those of the individual signatories to these comments and do not necessarily represent the positions of the public utility commissions on which the signatories serve.

If you have any questions regarding these comments, please do not hesitate to contact me.

Sincerely,

SUSAN P. KENNEDY
Commissioner

SPK/tjs

Attachment

THE COMMISSION SHOULD DECLARE THAT IP-ENABLED SERVICES ARE JURISDICTIONALLY INTERSTATE AND PREEMPT STATE REGULATION OF THESE SERVICES

The Commission should declare that IP-enabled services are interstate or "mixed" for jurisdictional purposes and preempt state regulation of these services.[1] The Commission should strive to issue this declaratory ruling as quickly as possible in order to promote a uniform regulatory environment in which IP-enabled and other advanced services may continue to thrive, and before any comprehensive reform of universal service programs or intercarrier compensation is considered.

The Commission maintains clear authority to preempt state regulation of IP-enabled service when "the matter to be regulated has both interstate and intrastate aspects," and when "preemption is necessary to protect a valid federal regulatory objective."[2] Both of these important elements are present with respect to IP-enabled services. IP-enabled services are inherently interstate or at a minimum jurisdictionally "mixed," a feature that should be encouraged, not hampered for the sake of maintaining some version of existing jurisdictional boundaries between State and Federal regulators. Federal preemption of IP-enabled services is also consistent with and necessary to promote a national policy repeatedly expressed by Congress to protect the Internet and emerging technologies from unnecessary regulation, and to encourage the deployment of advanced telecommunications services.

The FCC should move quickly to establish IP-enabled services, including VoIP, as an emerging technology that should remain free from unnecessary regulation *before* addressing intercarrier compensation and universal service reform for the following reasons:

- Protecting IP-enabled services including VoIP from being shoe-horned into current regulatory regimes will prevent the migration of outdated, unnecessary and burdensome rules to advanced services and emerging technologies.

- IP-enabled services and VoIP are the primary *cause* of destabilization in the intercarrier compensation (IC) regime and the revenue base for universal service (USF). Intercarrier compensation and universal service must adapt to an IP world, *not the other way around.*

[1] This in no way suggests that the legitimate interests of states in issues such as e911, universal service, intercarrier compensation reform, access to consumers with disabilities, network reliability, service quality and consumer protection could not or should not be addressed. To the contrary, clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation.

[2] Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1515 (DC Cir. 1990).

Federal preemption of IP-enabled services is consistent with and necessary to protect a well-established national policy of protecting emerging technologies from unnecessary regulation.

Since opening the first *Computer Inquiry*[3] into the interrelationship between data services and the telecommunications network in 1966, the FCC and Congress have repeatedly affirmed that innovation and new telecommunications technologies should be allowed to flourish in a largely unregulated environment. The FCC's early deregulatory efforts to facilitate the growth of data services using the public telecommunications network contributed directly to the explosive growth and development of the Internet.

As the integration of computer-based services and the telecommunications network developed and matured over three decades, Congress and the FCC continued to take numerous steps to "wall off" advanced services and new technologies from regulations applied to common carriers offering traditional voice services. In *Computer Inquiry II*, the FCC expanded the scope of telecommunications services that should remain protected from traditional regulation by creating a new category of services called "enhanced services." In that decision the FCC defined "enhanced services" as:

> Services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.[4]

In the Telecommunications Act of 1996, Congress furthered this national policy by directing the FCC to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." "Advanced telecommunications capability" is defined in Section 706 of the Act as:

> Without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.[5]

IP-enabled telecommunications service is the natural evolution of this long-standing federal policy designed to promote exactly this type of innovation in the telecommunications industry to benefit consumers.

---

[3] FCC *Computer I Final Decision,* 28 F.C.C. 2d. 267.

[4] FCC, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*), *aff'd sub nom. Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198, 209-210 (D.C. Cir. 1982) (*CCIA*), *cert. denied*, 461 U.S. 938 (1983).

[5] 47 U.S.C. § 706(c)(1).

IP-enabled services, such as those offered by Vonage, provide a wealth of innovative services that fully integrate voice, data, video, interstate or international mobility, Web-based account management, "follow me" calling, fax capabilities, multimedia conferencing, "virtual" phone numbers, and "SoftPhone" features that allow a customer to turn any PC, laptop or PDA into a fully-functioning telephone, and other features being invented every day.

It is neither commercially feasible nor in the public interest to attempt to separate the "basic" intrastate voice function of IP-enabled services in order to permit State regulation of that portion of a bundled service package. In fact, it would be a *reversal* of long-standing national policy protecting new technologies from unnecessary regulation for the FCC *not* to preempt regulation of IP-enabled services by State Commissions.

The foundation of national telecommunications policies over the last four decades has been a conspicuous effort to promote innovation and progressively replace government regulation of the telecommunications industry with competitive market forces. The 1996 Act was explicit in its directive to the FCC and State Commissions in this regard:

> ... the Commission shall forebear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications services... if the Commission determines that – (1) enforcement of such regulation or provision is not necessary to ensure that the charges practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[6]

Aside from clearly identifiable areas where regulation is required to protect consumers or ensure public safety, such as sustaining the emergency 911 networks, anti-fraud provisions, anti-trust provisions and access for law enforcement, the emphasis should be on *eliminating* anachronistic and unnecessary regulations, not *expanding* them to new technologies and services.

IP-enabled services are inherently interstate and the interstate nature of IP-enabled services should be encouraged, not hampered for the sole purpose of preserving a state role in regulation.

Many IP-enabled services, including VoIP, rely on the same dispersed networks that constitute the Internet. As the Commission itself has recognized, the Internet is "an international network of interconnected computers enabling millions of people to

[6] 47 U.S.C. 160.

communicate with one another and to access vast amounts of information from around the world."[7] Applications provided over the Internet are clearly jurisdictionally mixed, involving computers in multiple locations, often across state and national boundaries. There is no commercially feasible or practical way for providers of IP-enabled services, including VoIP, to separate the interstate aspects from the intrastate aspects of the services. Thus, IP-enabled services are inherently interstate or, at a minimum, "mixed" for jurisdictional purposes and subject to the exclusive jurisdiction of the FCC.

Even if it were technically feasible to reliably distinguish between the interstate and intrastate aspects of IP-enabled services, *it would not be in the public interest to do so*. Because VoIP virtually eliminates the relevance of time and distance in the cost and transmission of voice telephony, most VoIP providers are able to offer "unlimited local and long distance" calling for as low as $19.95 per month, and tout add-on international calling for as low as two or three cents a minute.[8] *These low rates are directly related to the bundled nature of the services offered.* Consistent with the long-standing national policy to "promote competition" and "secure lower prices,"[9] encouraging the continued growth of bundled IP-enabled services such as VoIP provides consumers with the widest range of options for voice telephony based on cost, quality and services to meet the customer's needs, and promotes competition among providers of telecommunications services using other platforms. Thus, in order to remain faithful to the mandates of federal law, IP-enabled services must be recognized as inherently interstate, or at the very least jurisdictionally mixed, and the FCC should continue to encourage the development of bundled VoIP services.

The regulatory treatment of IP-Enabled Services must be established immediately, *before* any plans to resolve intercarrier compensation and universal service are formed.

IP-enabled services are the future of telecommunications. The definition and regulatory treatment of VoIP and other IP-enabled services must be determined uniformly at the federal level and be recognized as an integral layer in the foundation of any plan to reform intercarrier compensation (ICC) and universal service funding (USF).

The argument by some regulators and policymakers that it would be premature for the FCC to make a determination on jurisdiction outside of comprehensive reform is backwards and self-defeating. VoIP is widely recognized as a disruptive technology that will dramatically hasten the demise of the ICC and USF funding base, and *the regulatory structure of intercarrier compensation and universal service must be changed to conform to an IP-based world, not the other way around.*

---

[7] FCC, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling*, GN Docket No. 00-15; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, March 15, 2002.

[8] See Packet 8 "Freedom Unlimited" at www.packet8.net or International Rates at www.Vonage.com

[9] The Telecommunications Act of 1996, Preamble.

State regulators and policymakers are rightly concerned that allowing IP-enabled services to remain unincorporated in the regulatory regime of traditional telecommunications carriers with regard to access charges, universal service, 911 and other social obligations will create significant incentives for arbitrage. But the nature of IP technology makes it impossible on a practical level to eliminate arbitrage under the current ICC regime. Even if it were practical, it would not be so without applying significant regulatory limitations to VoIP and IP-enabled services in contravention of a clear federal policy of forbearance on new technologies and advanced services.

For example, one of the features of VoIP that customers find most attractive is mobility. VoIP customers can usually select an area code that bears no relationship to the customer's geographic location.[10] VoIP providers advertise this feature as an explicit means of avoiding "long distance" charges.[11] Most providers of VoIP services also market the fact that the service is portable – i.e., consumers can use it anywhere in the world, wherever they have access to a broadband connection. Even if a VoIP provider can know where its customer originated the call, it may not know the geographic location of the called party – since a phone number could be assigned to the customer of a local exchange carrier (LEC) or to another VoIP provider, in which case the area code dialed may not reflect the geographic location of the called party.

Companies cannot reliably determine the location of end users served by Internet Service Providers (ISPs) that backhaul their traffic to a single location, or end users served by corporate networks deploying proxy servers that function as gateways or hubs, or use security procedures and filters that obscure the location of the IP address. Some service providers use "dynamic IP addressing" for residential customers, in which case the IP address changes each time the user connects to the Internet.

Forcing companies to develop intricate systems and infrastructure for the purpose of trying to capture IP-enabled services under the current location-based ICC regime would be pointless, since it would simply prompt companies and users to develop new ways to circumvent the costs of any regulations. Clearly, as the Commission has itself recognized, requiring VoIP providers to develop these systems "for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on th[ese] service[s] for the sake of regulation itself, rather than for any particular policy purpose.[12]

We agree that reform of ICC, USF and 911 issues must be completed quickly. Among the few areas of consensus in the telecommunications industry is that the current intercarrier compensation system is broken, that universal service funding is declining, and that IP-enabled services will rapidly accelerate the demise of both. Generally

[10] See www.Vonage.com "Choose any area code we offer, worldwide."
[11] Id. "So Mom doesn't have to pay long distance charges when she calls you."
[12] *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service,* WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, February 19, 2004, ¶ 21.

accepted industry estimates indicate that it costs roughly 15 times less to move a bit of information from one point to another over an IP network than it does to move the same bit of information across the PSTN.[13] That fact is the primary reason for the dramatic expansion of IP networks and services in North America, Europe and other parts of the world in the last few years. It is also the primary reason for destabilization in the intercarrier compensation regime and the decline in funding for universal service programs, since those programs are largely based on a percentage of rapidly declining costs. The California Public Utilities Commission has indicated that, by 2008, funding for universal service programs in California could decline by as much as 40% due to the migration of voice telephony to IP networks.[14]

The alarm expressed by regulators and policymakers by the rapid destabilization of revenues for universal service programs is valid, and the FCC must move quickly to examine the purpose and goals of both ICC and universal service, in close coordination with State Commissions, in order to redefine the need and adapt these programs and their funding mechanisms to an IP-based world. The definition and regulatory treatment of IP-enabled services must be determined uniformly at the federal level as a precursor to development of a comprehensive and sustainable plan for reforming ICC and universal service.

Federal preemption on VoIP does not preclude collaboration with States on key issues including public safety, consumer protection and reform of intercarrier compensation and universal service.

A declaratory ruling by the FCC that IP-enabled services, including VoIP, is subject to exclusive federal jurisdiction does not in any way preclude Federal-State collaboration on the many issues of concern to states, such as reform of intercarrier compensation and universal service, maintenance of 911/E-911 standards, network reliability, consumer protection and service quality issues. In fact, clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation.

Several State Commissions have already attempted to make determinations as to types of IP-enabled services that constitute a "telecommunications service" or which companies offering IP-enabled services are "telecommunications carriers" subject to State regulation.[15] These determinations vary from state to state based on inconsistent interpretations of federal law or individual State statutes. In New York, for example, the PSC Order states that:

---

[13] Telecom Regulation and Voice Over IP, Position Paper, Level (3) Communications, 2/15/04.

[14] CPUC Report to the California State Senate Committee on Energy, Telecommunications and Public Utilities, January 27, 2004.

[15] See New York State Public Service Commission, *Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation*, Case No. 03-C-1285; Minnesota Public Utilities Commission P-6212/C-03-108; California Public Utilities Commission, *Order Instituting Investigation* 04-02-007.

> Vonage owns and manages equipment (a media gateway server) that is used to connect Voyage's customer to the customers of other telephone corporations via their public networks, as necessary. This equipment constitutes a "telephone line" under the PSL and is used to facilitate the provisioning by Vonage of telephonic communication to customers. Accordingly, Vonage is a "telephone corporation" under our jurisdiction.[16]

In an Order opening an investigation to determine the regulatory treatment of VoIP providers, the California Public Utilities Commission broadly defined VoIP as a "public utility telecommunications service that delivers voice and other related services using Internet Protocol (IP) technology" and tentatively concluded:

> Viewing VoIP functionally from the end-user's perspective, and consistent with definitions in the Public Utilities Code, we tentatively conclude that those who provide VoIP services interconnected with the PSTN are public utilities offering a telephone service subject to our regulatory authority.[17]

The opportunity for variation among states in making determinations as to the definition of VoIP services, the regulatory status of service providers, and the application of federal and state statutes is limitless. Permitting states to make these individual determinations is an invitation to endless litigation and uncertainty. Attempts to regulate VoIP providers by State Commissions in Minnesota and New York have already been litigated and struck down by Federal Courts.[18]

In conclusion, absent a declaratory ruling by the FCC establishing exclusive jurisdiction, companies providing IP-enabled services will be subject to an effort by States to impose a patchwork of regulations, intrastate access charges, social obligations and taxes. In a regulatory environment of uncertainty regarding the jurisdiction of IP-enabled services, comprehensive reform of ICC and USF will be made much more difficult and costly. Disparate regulatory treatment on a state by state basis will lead to:

- A patchwork of different definitions and rules for similar types of telecommunications services on a state by state basis.
- Increased litigation over state determinations which will delay comprehensive regulatory reform at the federal level.
- A chilling effect on investment in new IP-based services.
- Exponentially increased opportunities for regulatory arbitrage based on which state regulatory treatment is more favorable to a carrier's interests.

---

[16] New York PSC Order m, Case No. 03-C-1285.

[17] CPUC OII 04-02-007, 4.

[18] *Vonage Holdings Corporation, Plaintiff, v. The Minnesota Public Utilities Commission, and Leroy Koppendrayer, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as the commissioners of the Minnesota Public Utilities Commission and not as individuals, Defendant,* Civil No. 03-5287, U.S. District Court for Minnesota, 290 F Supp. 2d 993; *Vonage Holdings Corp. v. New York Public Service Commission, et.al.*(S.D. New York 2004) Civil No. 04-4306-DFE.

- Entrenchment by carriers and legislators who come to rely on a particular revenue stream or regulatory scheme established by a State Commission, making subsequent changes at the federal level more difficult.

The Commission should declare that IP-enabled services are interstate or "mixed" for jurisdictional purposes and preempt state regulation of these services. The Commission should strive to issue this declaratory ruling as quickly as possible in order to promote a uniform regulatory environment in which IP-enabled and other advanced services may continue to thrive.

* * * * *

These comments herein represent, collectively, those of the individual signatories to the comments and do not necessarily represent the positions of either the public utility commissions on which the signatories serve or the states in which the signatories serve.

Dated: November 2, 2004

Respectfully submitted,

GREGORY E. SOPKIN, CHAIRMAN
Colorado Public Utilities Commission

THOMAS L. WELCH, CHAIRMAN
Maine Public Utilities Commission

JACK R. GOLDBERG, VICE-CHAIRMAN
Connecticut Department of Public Utility Control

ELLEN WILLIAMS, VICE-CHAIRMAN
Kentucky Public Service Commission

JAMES CONNELLY, COMMISSIONER
Massachusetts Department of Telecommunications & Energy

CHARLES M. DAVIDSON, COMMISSIONER
Florida Public Service Commission

SUSAN P. KENNEDY, COMMISSIONER
California Public Utilities Commission

CONNIE MURRAY, COMMISSIONER
Missouri Public Service Commission