STATE OF MUNNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

David C. Boyd	Chair
Phyllis A. Reha	Commissioner
J. Dennis O'Brien	Commissioner
Thomas Pugh	Commissioner
Betsy Wergin	Commissioner

In the Matter of a Commission Investigation of the Applicability of 911, TAP, and TAM Surcharges to VoIP Services	MPUC Docket No. P999/CI-09-157

REPLY COMMENTS OF VON

The Voice on the Net or VON Coalition[1] (VON) hereby submits reply comments responding to the Minnesota Public Utilities Commission ("Commission") Notice Soliciting Comments ("Notice") and other parties' opening comments concerning the applicability of telecommunications utility fees (911, Minnesota Telecommunications Assistance Program ("TAP"), and Telecommunications Access Minutes "TAM")) to Voice over Internet Protocol ("VoIP") services. Specifically, the Commission has asked for interested parties to respond to multiple questions contained in the Notice concerning the state's authority to impose such regulatory fees over nomadic and fixed interconnected VoIP services.

[1] The Voice on the Net or VON Coalition consists of leading VoIP companies, on the cutting edge of developing and delivering voice innovations over Internet. The coalition works to advance regulatory policies that enable Americans to take advantage of the full promise and potential of VoIP. The Coalition believes that with the right public policies, Internet based voice advances can make talking more affordable, businesses more productive, jobs more plentiful, the Internet more valuable, and Americans more safe and secure.

As demonstrated below, the 8th Circuit Court has confirmed what the Federal Communications Commission ("FCC") has previously concluded--that the FCC has the authority to determine what, if any, regulations apply to such services.[2] Furthermore, the FCC has emphasized that federal preemption also applies to state efforts to regulate VoIP service, including "facilities-based" VoIP services that share the same characteristics as nomadic VoIP services.[3]

As noted by Vonage in its Comments, the federal government has authorized states to impose 911 fees on interconnected VoIP providers, but such authority does not extend to telecommunications regulatory fees such as state universal service fees, TAP and TAM funds.[4] The FCC has consistently recognized the benefits of a uniform, national regulatory structure for VoIP services to promote innovation and competition in the information services market. Any action by the Commission departing from these federal policies, including application of state regulatory fees such as the TAP and TAM surcharges, would be in contravention of the law.

I. INTERCONNECTED VOIP IS EXEMPT FROM STATE PUBLIC UTIILTY REGULATION INCLUDING THE APPLICATION OF TELECOMMUNICATIONS REGULATORY FEES SUCH AS TAP AND TAM.

The Commission has asked whether Congress or the FCC has preempted states from applying telecommunications regulatory fees to VoIP providers. Both Congress and

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[2] *See Vonage Holdings Corp. v. Nebraska Public Service Commission,* 564 F.3d 900, (8th Cir. May 1, 2009) (*"Vonage Nebraska Decision").*

[3] Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Board,* 19 FCC Rcd 22404 (2004) (*"FCC Vonage Preemption Order"), petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007).

[4] Vonage Comments, *In the Matter of a Commission Investigation of the Applicability of 911, TAP and TAM Surcharges to VoIP Services,* June 15, 2009, page 1. VON agrees with Vonage that Congress has made clear that "[n]othing in . . . the Communications Act of 1931 or any [FCC] regulation or order shall prevent the imposition and collection of a fee or charge applicable to . . . IP-enabled voice services specifically designated . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services . . . ." 47 U.S.C. §615a-1(f)(1).

the FCC have made it clear that the FCC has the authority to determine the regulatory scheme for information services. The Telecommunications Act of 1996 ("1996 Act") creates a distinction between "telecommunications services" and "information services." The first consist of pure transmission services offered to end users without change in form or content, and subject to common-carrier regulation.[5] The second, in contrast, offers the ability, for example, to store, retrieve, utilize and/or manipulate "information."[6] Under federal law, these "information services" are exempt from common-carrier regulation, which includes state common-carrier regulations (e.g., annual reporting requirements, telecommunications regulatory fees). The FCC's long standing policy of exempting information services from state public utility regulation has proven to be one of the great successes in implementing the 1996's pro-competitive objectives.

While the FCC has asserted jurisdiction over interconnected VoIP services, it has not treated interconnected VoIP as a traditional telecommunications service. VoIP service takes full advantage of the flexibility and efficiency of IP-based transmissions by enabling the user to manipulate, generate, store, transform and make information services available to others.[7] Further, the FCC has held that a service will be treated as a single, integrated information service, rather than as an information service with a separate telecommunications service component, when the telecommunications features are not "separated from the data-processing capabilities of the service" but are instead "part and parcel of [the overall information] service and . . . integral to its other capabilities."[8]

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[5] 47 U.S.C. § 153(43).
[6] 47 U.S.C. § 153(20).
[7] The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." *See* 47 U.S.C. § 153(20).
[8] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable*

Thus, interconnected VoIP falls squarely within the definition of an "information service" and is subject to exclusive federal jurisdiction unless otherwise provided by Congress or the FCC.

Interconnected VoIP providers, however, are subject to "general laws governing entities conducting business within the state."[9] The FCC has imposed a number of public safety and consumer protection obligations, including, 911 services, CALEA, universal service obligations, privacy related regulations, and various reporting requirements. In all of these actions, however, the FCC has not granted the states authority to impose state telecommunications utility fees on VoIP services such as the TAM or TAP. As noted in the Vonage Comments, the TAP and TAM are "not general obligations applicable to 'entities conducting business within [Minnesota],'" which means that, rather than being laws of general applicability, they instead are targeted at a specific class of entities, and as a result fall within the scope of regulations preempted under the *FCC Vonage Preemption Order.*[10]

The Commission notes that the FCC filed an amicus brief at the 8th Circuit Court stating that it did not preempt states from imposing universal service contributions for nomadic interconnected VoIP service providers. However, this amicus brief not only is in direct conflict with the *FCC Vonage Preemption Order,* which was voted by the full FCC, but was issued by the FCC General Counsel's.[11] Just as the amicus brief was not

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Facilities, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶¶ 36, 38.

[9] *FCC Vonage Preemption Order* at 22405, ¶ 1.

[10] *Id.*

[11] Furthermore, the makeup of the FCC has changed substantially from when the FCC General Counsel's Office filed the amicus brief.

determinative to the 8th Circuit Court in the *Vonage Nebraska Decision,* it should not be determinative or persuasive to the Commission.

The FCC has decided that certain retail VoIP services are exempt from state public utility regulation.[12] Further, multiple federal courts have enjoined state commissions from regulating interconnected VoIP services on the grounds that they were information services, exempt from state utility regulation.[13]

The Minnesota federal district court has even held that "[state] regulations that have the *effect* of regulating information services are in conflict with federal law and must be pre-empted.[14] Additionally, a federal district court in Missouri held that existing laws mandate that states classify VoIP services that perform IP to TDM conversions as an information service. The Missouri District Court recognized that IP-PSTN traffic is an information service because it offers the "capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information via telecommunications."[15] Additionally, IP-PSTN traffic "alters the form and content of the information sent and received because it involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN."[16] While the court recognized that the FCC may be willing to revisit the classification and

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[12] *See Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service,* Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) ("*Pulver Declaratory Ruling).*

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

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

[15] *See Southwestern Bell Telephone L.P. v. Missouri Public Service Board,* 461 F. Supp. 2d 1055, 1082-1083, *citing* 47 U.S.C. ¶ 153(20).

[16] *Id.*

regulatory status of interconnected VoIP at some point, "existing rules and orders establish how VoIP and other IP services should be treated in the interim."[17]

II. INTERCONNECTED VOIP SERVICE IS SUBJECT TO THE FCC's EXCLUSIVE JURISDCITION BASED ON THE REASONING OF THE *FCC VONAGE PREEMPTION ORDER AND VONAGE NEBRASKA ORDER*

In the *FCC Vonage Preemption Order*, the FCC held that Vonage's "Digital Voice" service is subject to FCC exclusive jurisdiction and preempted the Minnesota PUC from imposing traditional telecommunications regulations on that service. The same principles that applied in the *FCC Vonage Preemption Order* apply here. The FCC concluded that Vonage's service is "jurisdictionally mixed" meaning that it includes both interstate and intrastate services.[18] The FCC stated that Vonage's service could, in theory, be subject to state regulation, *provided that* the state regulation could coexist with the FCC's pro-competitive deregulatory framework for information services. However, the FCC held that there were no "practical means" to separate the interstate and intrastate components of Vonage's service to "enable[e] dual federal and state regulations to exist."[19] In other words, the state regulations at issue would not be compatible with the FCC's generally deregulatory framework for information services.

Both facilities-based and nomadic VoIP service are integrated, IP-enabled services providing multiple capabilities that combine information provision, computer interactivity along with voice-calling capabilities, which renders such services as single "integrated offerings." VoIP users can "utilize multiple service features that access

[17] *Id.*.
[18] *See FCC Vonage Preemption Order* at 22414, ¶ 18 & n. 63.
[19] *Id.* at 22418, ¶ 23.

different websites or IP addresses during the same communication session and perform different types of communications simultaneously."[20]

The *Vonage Nebraska Decision* affirmed the FCC's analysis of preempting state regulatory utility regulations on the finding that nomadic interconnected VoIP services are not telephone services. Additionally, the 8th Circuit recently concluded the same as this Court previously held in 2007: "that VoIP services cannot be separated into interstate and intrastate usage" and are therefore classified as information services.[21] The 8th Circuit Court recognized the FCC's explicit language when it states that "[the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [Vonage's service] and other IP-enabled services having the same capabilities."[22] Thus, while a universal service fund surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied."[23] The same would apply in Minnesota for other telecommunications regulatory fees such as the TAM and TAP. There is no difference between Nebraska's attempt to impose a state universal service fee on Vonage and Minnesota's similarly flawed proposal to apply the TAM and TAP to interconnected VoIP providers. As a result, Minnesota does not have authority to apply its telecommunications fees such as TAM and TAP to all interconnected VoIP providers.

[20] *Id.* at 22419, ¶ 25.
[21] *See Vonage Nebraska Decision*, at page 8, *citing Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578-79 (8th. Cir. 2007).
[22] *Vonage Nebraska Decision* at pages 8-9.
[23] *Id.* at 19.

III. CONCLUSION

For the foregoing reasons, The VON Coalition respectfully requests that the Commission find that it is preempted by federal law from imposing state telecommunications regulatory fees such as the TAM and TAP on interconnected VoIP providers.

Sincerely,

/s/
The VON Coalition