



Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

Glenn S. Richards  
tel 202.663.8215  
glenn.richards@pillsburylaw.com

December 1, 2009

Central Records  
Public Utility Commission of Texas  
1701 N. Congress  
Austin, TX 78711

Re: PUC Project No. 37614 – Rulemaking Related to the Regulatory  
Treatment of Voice Over Internet Protocol Services (Control Number 37614)

To Whom It May Concern:

Please find enclosed for filing in the above-referenced proceeding an original and 16 copies of the Comments of the Voice on the Net Coalition. As required by Commission rules, one of the copies is unbound. Also enclosed is a receipt copy that we ask that you date stamp and return in the enclosed stamped, self addressed envelope.

Please contact the undersigned should you have any questions. Thank you for your assistance

Sincerely yours,

Glenn S. Richards  
Counsel for the VON Coalition

Enclosure

PUC PROJECT NO. 37614

**RULEMAKING RELATED TO THE ) PUBLIC UTILITY COMMISSION  
REGULATORY TREATMENT OF )  
VOICE OVER INTERNET PROTOCOL ) OF TEXAS  
SERVICES )**

**COMMENTS OF THE VOICE ON THE NET COALITION**

The Voice on the Net or VON Coalition<sup>1</sup> (“VON”) hereby submits these comments responding to the Texas Public Utility Commission (“Commission”) Request for Comment (“Request”) concerning the regulatory treatment of Voice over Internet Protocol (“VoIP”) services. Specifically, the Commission has asked for interested parties to respond to multiple questions contained in the Request concerning the state’s authority to regulate fixed interconnected VoIP service.<sup>2</sup>

As discussed below, 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. In 2004, the (“FCC”) broadly preempted state regulation of interconnected VoIP.<sup>3</sup> This decision has been upheld by the 8<sup>th</sup> Circuit, which has found that the FCC has the ultimate authority to determine what, if

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<sup>1</sup> 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 IP-enabled communications. VON believes that with the right public policies, IP-enabled communications can increase broadband adoption, make talking more affordable, businesses more productive, jobs more plentiful, the Internet more valuable, and Americans more safe and secure. VON Coalition members include AT&T, Cisco, Covad, Google, iBasis, Intel, Microsoft, New Global Telecom, PointOne, Skype, T-Mobile and Yahoo.

<sup>2</sup> In the Request, the Commission mirrors the definition of interconnected VoIP used by the Federal Communications Commission (“FCC”) and defines fixed VoIP, as a VoIP service where the location of the subscriber is known and fixed. Request at page 3.

<sup>3</sup> 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 (8<sup>th</sup> Cir. 2007).

any, regulations apply to such services.<sup>4</sup> Any action by the Commission departing from these well-established federal policies would be in contravention of the law.

## **I. INTERCONNECTED VOIP IS EXEMPT FROM STATE PUBLIC UTILITY REGULATION**

The Commission has asked a series of questions concerning how interconnected VoIP should be defined for purposes of federal and state communications law. Most of these questions are based on definitions that have traditionally been reserved for traditional telecommunications. However, the threshold question that first needs to be addressed is whether the Commission has any jurisdiction whatsoever to regulate interconnected VoIP. We believe that answer is no.

Both Congress and the FCC have made it clear that the FCC has the authority to determine the regulatory scheme for information services. The Telecommunications Act of 1996 (“1996 Act”) creates a distinction between “telecommunications services” and “information services.” The first consist of pure transmission services offered to end users without change in form or content, and subject to common-carrier regulation.<sup>5</sup> The second, in contrast, offers the ability, for example, to store, retrieve, utilize and/or manipulate “information.”<sup>6</sup> Under federal law, “information services” are exempt from telecommunications regulation, which includes state regulation (including certification and tariff requirements). 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 Act’s pro-competitive objectives.

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<sup>4</sup> See *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900, (8<sup>th</sup> Cir. May 1, 2009) (“*Vonage Nebraska Decision*”).

<sup>5</sup> 47 U.S.C. § 153(43).

<sup>6</sup> 47 U.S.C. § 153(20).

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.<sup>7</sup> 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.”<sup>8</sup> Thus, interconnected VoIP falls squarely within the definition of an “information service” and is subject to exclusive federal jurisdiction unless otherwise specifically provided by Congress or the FCC.

Interconnected VoIP providers are subject to “general laws governing entities conducting business within the state.”<sup>9</sup> In addition, the FCC has imposed a number of public safety and consumer protection obligations, including, requirements to provide Enhanced 911 services, make the service accessible by law enforcement, contribute to the Federal Universal Service and Telecommunications Relay Service Funds, protect customer proprietary network information and provide customers notice before discontinuing service. In all of these actions, however, the FCC has not granted the states authority to require certification or impose any other specific telecommunications fees or

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<sup>7</sup> The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .” See 47 U.S.C. § 153(20).

<sup>8</sup> 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 Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶¶ 36, 38.

<sup>9</sup> *FCC Vonage Preemption Order* at 22405, ¶ 1.

other obligations on interconnected VoIP providers. Certification, for example, is not a general obligation applicable to entities conducting business within a state, but instead is targeted at a specific class of entities, and as a result falls within the scope of regulations preempted under the *FCC Vonage Preemption Order*.<sup>10</sup>

The FCC has also decided that certain retail VoIP services are exempt from state public utility regulation.<sup>11</sup> Further, multiple federal courts have enjoined state commissions from regulating interconnected VoIP services on the grounds that they were information services, exempt from state utility regulation.<sup>12</sup>

A Minnesota federal district court has even held that “[state] regulations that have the *effect* of regulating information services are in conflict with federal law and must be pre-empted.<sup>13</sup> Additionally, a federal district court in Missouri held that existing laws mandate that states classify VoIP services that perform IP to TDM conversions as an information service. The Missouri District Court recognized that IP-PSTN traffic is an information service because it offers the “capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>14</sup> Additionally, IP-PSTN traffic “alters the form and content of the information sent and received because it involves a net protocol conversion from the

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<sup>10</sup> *Id.*

<sup>11</sup> See *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (“*Pulver Declaratory Ruling*”).

<sup>12</sup> See e.g., *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (summarizing federal policy of preempting state attempts to regulate information services); *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-1083 (E.D. Mo. 2006) (classifying services as information services when it transforms or processes “information,” even if the content is the same).

<sup>13</sup> See *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003).

<sup>14</sup> 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).

digitized packets of the IP protocol to the TDM technology used on the PSTN.”<sup>15</sup> While the court recognized that the FCC may be willing to revisit the classification and regulatory status of interconnected VoIP at some point, “existing rules and orders establish how VoIP and other IP services should be treated in the interim.”<sup>16</sup>

## **II. INTERCONNECTED VOIP SERVICE IS SUBJECT TO THE FCC’S EXCLUSIVE JURISDICTION BASED ON THE REASONING OF THE FCC VONAGE PREEMPTION ORDER**

In the *FCC Vonage Preemption Order*, the FCC held that Vonage’s “Digital Voice” service is subject to FCC exclusive jurisdiction and preempted the Minnesota PUC from imposing traditional telecommunications regulations on that service. The same principles that applied in the *FCC Vonage Preemption Order* apply here. The FCC concluded that Vonage’s service is “jurisdictionally mixed” meaning that it includes both interstate and intrastate services.<sup>17</sup> The FCC stated that Vonage’s service could, in theory, be subject to state regulation, *provided that* the state regulation could coexist with the FCC’s pro-competitive deregulatory framework for information services. However, the FCC held that there were no “practical means” to separate the interstate and intrastate components of Vonage’s service to “enable[e] dual federal and state regulations to exist.”<sup>18</sup> In other words, the state regulations at issue would not be compatible with the FCC’s generally deregulatory framework for information services.

Fixed VoIP services 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

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<sup>15</sup> *Id.*

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

<sup>17</sup> See *FCC Vonage Preemption Order* at 22414, ¶ 18 & n. 63.

<sup>18</sup> *Id.* at 22418, ¶ 23.

users can “utilize multiple service features that access different websites or IP addresses during the same communication session and perform different types of communications simultaneously.”<sup>19</sup> These features and functions are inseparable from the voice application that may appear to be most similar to a telephone service.<sup>20</sup>

Accordingly, until the FCC rules otherwise, fixed, interconnected VoIP services are subject to the exclusive jurisdiction of the FCC.

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<sup>19</sup> *Id.* at 22419, ¶ 25.

<sup>20</sup> As an additional matter, VON notes that the Commission need not make any determinations regarding the classification of interconnected VoIP. Rather, under the FCC's decision in *In re Time Warner Cable*, 22 FCC Rcd 3513, 3520 (2007), the classification of the interconnected VoIP service provided to the end user is irrelevant. The FCC there approved a framework in which VoIP providers obtain interconnection to the PSTN through third-party wholesale providers who themselves offer telecommunications services and whose interconnection rights are governed by Sections 251 and 252 of the Communications Act. It is the rights of those wholesale providers that the Commission will address in the AT&T-UTEX arbitration and any similar proceedings to the extent the parties cannot reach agreement. But, as the FCC said in *Time Warner Cable*, the classification of the end user interconnected VoIP service has no bearing on the resolution of such disputes.

**CONCLUSION**

For the foregoing reasons, VON respectfully requests that the Commission find that it is preempted by federal law from regulating fixed, interconnected VoIP providers.

Respectfully submitted,

VOICE ON THE NET COALITION



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Glenn S. Richards  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street NW  
Washington D.C. 20037  
(202) 663-8215

Its Attorney

December 1, 2009