

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
VONAGE HOLDINGS)	
CORPORATION)	
)	
Petition for Declaratory Ruling)	WC Docket No. 03-211
Concerning an Order of the Minnesota)	
Public Utilities Commission)	
)	

COMMENTS OF CISCO SYSTEMS, INC.

Cisco Systems, Inc. (“Cisco”), the world’s leading manufacturer of IP networking equipment, believes that Voice over Internet Protocol (“VoIP”) applications are helping drive the resurgence of the telecom sector. This is because in a broadband environment VoIP offers consumers and industry both cost and service advantages over traditional circuit-switched telephony; advantages sufficiently important to encourage the growth of broadband networks. The advantages of VoIP derive not from regulatory differences, but from the enormous differences between advanced IP networks and traditional networks.

Unfortunately, some state commissions have decided that the regulatory regime fashioned for traditional telephone networks ought to be applied to VoIP applications running on advanced networks. Such decisions are both unwise and unlawful. Accordingly, Cisco supports the Petition for Declaratory Ruling filed by Vonage, a new VoIP provider, asking the Commission to “preempt an order of the Minnesota Public Utilities Commission ... requiring Vonage to comply with state laws governing providers of telephone service....”¹ Vonage does

¹ *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, Public Notice, WC Docket No. 03-211, DA 03-2952 (rel. Sept. 26, 2003).

not offer “telecommunications” or “telecommunications services,” as defined by the Telecommunications Act of 1996 (the “1996 Act”). Instead, as the U.S. District Court for the District of Minnesota (the “Minnesota District Court”) concluded when it enjoined the Minnesota Public Utilities Commission (“MPUC”) order, “Vonage is an information service provider,” and “information services such as those provided by Vonage must not be regulated by state law enforced by the MPUC.”² The Commission should, therefore, declare that Vonage offers an interstate “information service” not subject to common carrier-type regulation under the 1996 Act or the law of *any* state. Such action is necessary – despite the rapid demise of the MPUC order – to preempt other state commissions that have expressed an interest in regulating Vonage and other VoIP services in the same manner as the MPUC.³

DISCUSSION

Vonage’s VoIP service resembles traditional telephone service in one respect: it allows individuals to converse with one another over a distance. However, as the Minnesota District Court explained, a “simplistic ‘quacks like a duck’ argument, essentially holding that because Vonage’s customers make phone calls, Vonage’s services must be telecommunications services ... simplifies the issue to the detriment of an accurate understanding of this complex question.”⁴

² *Vonage Holdings Corp. v. Minnesota Public Util. Comm’n*, Memorandum and Order, 2003 U.S. Dist. LEXIS 18451 at *2 (“Vonage Injunction Order”).

³ *See Petition for a Declaratory Order regarding classification of IP Telephony Service*, Alabama Public Service Commission, Docket No. 29016; *In the Matter of the Investigation into Voice Over Internet Protocol (VOIP) Services*, Colorado Public Utilities Commission, Docket No. C03-0559, Docket No. 03M-220T; *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, New York Public Service Commission, Case No. 03-C-1285; *In the Matter of the Commission's Investigation Into Voice Services Using Internet Protocol*, Public Utilities Commission of Ohio, Case No. 03-950-TP-COI; *Complaint of the Oregon Exchange Carrier Association et. al. against LocalDial Corporation*, Oregon Public Utility Commission, Docket No. UCB 19; *Washington Exchange Carriers Ass'n v. Local Dial Corp.*, Washington Utilities and Transportation Commission, Docket No. UT-031472.

⁴ Vonage Injunction Order, 2003 U.S. Dist. Lexis 18451 at *24.

In fact, several technical and functional differences make clear that Vonage does not provide a “telecommunications service” under the 1996 Act or the Commission’s rules.

As a threshold matter, Vonage offers an “enhanced service,” not a “telecommunications service,” under the Commission’s rules.⁵ In essence, Vonage “provides an interface between the otherwise incompatible network protocols of the Internet and the PSTN” by “convert[ing] the asynchronous IP packets generated by the customer’s computer equipment into the synchronous TDM format used by the telephone network (and vice versa).”⁶ Vonage’s VoIP service thus executes a net change in the format of the information sent and received by the end user. Accordingly, Vonage’s VoIP service complies with the Commission’s definition of “enhanced services,” because it “employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.”⁷ And, as an enhanced services provider, Vonage is free from common carrier regulation under Title II.⁸

Vonage’s VoIP service also does not comply with two of the four functional criteria that the Commission has used to define “phone-to-phone” VoIP, or those VoIP services that may be regulated as “telecommunications services.”⁹ First, Vonage customers do not use a standard analog telephone to access Vonage’s VoIP service.¹⁰ Rather, customers must purchase special CPE that can perform IP protocol conversions.¹¹ Second, Vonage performs a “net change in

⁵ 47 C.F.R. § 64.702(a).

⁶ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Petition for Declaratory Ruling, WC Docket No. 03-211 at 12-13 (filed Sept. 22, 2003) (“Vonage Petition”).

⁷ 47 C.F.R. 64.702(a).

⁸ *See id.*

⁹ *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11543-44 (¶ 88) (1998) (“Universal Service Report”).

¹⁰ *See id.*

¹¹ *See Vonage Petition* at 5.

form or content” of a communication.¹² This is because Vonage transforms a call from IP to TDM, or vice versa, enabling Vonage customers and stations on the PSTN to communicate.

Vonage’s VoIP service is best described as an Internet application – like email or instant messaging – that allows customers to communicate using the connectivity provided by their own Internet Service Provider (“ISP”) and broadband connection. The Commission has declined to regulate Internet applications based on functionality, so the mere fact that Vonage’s VoIP service sends voice rather than text packets across the Internet does not transform it into a “telecommunications service.”¹³ Instead, the Commission has recognized that the provider of the underlying broadband transmission facilities – not the Internet application provider or the ISP – provides the “telecommunications” used, so common carrier regulation under Title II (if any) must be limited to the transport provider.¹⁴ Vonage – which does not provide the customer’s broadband connection – therefore “*uses* telecommunications to deliver information to its users, but Vonage does not *provide* telecommunications.”¹⁵

The MPUC and other state commissions also lack jurisdiction over Vonage’s VoIP offering because it is best characterized as an interstate service. Unlike traditional wireline telephony, Vonage does not establish a physical connection with its customer, so it cannot determine where the customer is located at any given time.¹⁶ As a result, it is impossible for Vonage to identify where a call originates, and by extension, the jurisdiction (*i.e.*, intrastate or interstate) of the call. This is a particular challenge given the nature of Vonage’s VoIP service, which like commercial mobile radio service, is inherently portable – a customer “can easily plug

¹² See Universal Service Report, 13 FCC Rcd. at 11543-44 (¶ 88).

¹³ See *id.* at 11539 (¶ 79).

¹⁴ See *id.* at 11546 (¶ 95).

¹⁵ Vonage Petition at 13.

¹⁶ See *id.* at 28.

devices ... into any Ethernet port connected to a broadband Internet connection,” allowing the customer to use the service almost anywhere.¹⁷

The Commission has previously preempted state commission jurisdiction where, as here, it is impossible to separate a service into interstate and intrastate components and the amount of interstate traffic is not *de minimis*.¹⁸ Under the same rationale, Vonage provides an interstate service: the underlying technology makes it impossible to determine the jurisdiction of a call, and clearly, more than a *de minimis* amount of traffic will be interstate given that Vonage allows its customers to make “local” and “long distance” calls.¹⁹

CONCLUSION

If there was any question about whether Vonage offers a “telecommunications service,” the Minnesota District Court provided the answer: “VoIP services necessarily are information services, and state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated.”²⁰ Nevertheless, the Commission should tackle the issue presented by Vonage’s petition – namely, whether the FCC should preempt state commission regulation. Vonage’s VoIP service is an “information service” and it is also an “interstate service.” However, while state commissions lack jurisdiction to regulate both the former and the latter, many are prepared to do so absent a declaratory ruling from the FCC.

Importantly, Cisco agrees that VoIP – in all its forms – can and should help resolve important public policy concerns, particularly those related to public safety, law enforcement,

¹⁷ *See id.*

¹⁸ *See MTS and WATS Market Structure*, 4 FCC Rcd. 5660 (1989). *See also GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd. 22466 (¶ 1) (1998) (“GTE ADSL Order”) (finding that a DSL product that permits ISPs to provide their customers with high-speed access to the Internet “is an interstate service and is properly tariffed at the federal level.”).

¹⁹ *See Vonage Petition at Attachment, Docket No. P6214/C-03-108, Exhibit 1.*

²⁰ *Vonage Injunction Order*, 2003 U.S. Dist. Lexis 18451 at *27.

and national security. The Commission should begin considering refinements to the existing federal regulatory framework to accommodate these issues. However, imposing the full gamut of common carrier regulation is not a short-term solution.

Therefore, Cisco urges the Commission to promptly issue a declaratory ruling that Vonage offers an interstate “information service.” In the absence of such guidance, state commissions have been forced to grapple with VoIP issues, and the MPUC order will be the first of many. The uncertainty created by multiple, inconsistent state regulations will make it difficult for VoIP providers to offer services on a national basis. It will also hinder the development of new equipment to deploy these services. In short, Commission inaction on Vonage’s petition risks an immediate adverse impact on the high-tech industry, telecommunications carriers, VoIP providers, consumers, and the overall economy.

Respectfully submitted,

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