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

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

JOINT COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE AND THE FEDERAL BUREAU OF INVESTIGATION

Patrick W. Kelley
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Room 7427
Washington, D.C. 20535
(202) 324-8067

and

John G. Malcolm
Deputy Assistant Attorney General,
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 2113
Washington, D.C. 20530
(202) 616-3928

TABLE OF CONTENTS

SUMMARY

The United States Department of Justice and the Federal Bureau of Investigation are interested parties in this proceeding pursuant to their authority to implement the Communications Assistance for Law Enforcement Act ("CALEA"). CALEA's purpose is to preserve law enforcement's ability to conduct lawful electronic surveillance despite changing telecommunications technologies. CALEA applies to all telecommunications services, and is technology neutral.

Vonage Holdings Corporation ("Vonage") provides a form of service known as "voice-over-internet-protocol" ("VOIP") in a number of states, including Minnesota. In September 2003, the Minnesota Public Utilities Commission ("Minnesota PUC") deemed Vonage's VOIP service to be a telephone service under Minnesota law and required Vonage to comply with relevant Minnesota rules and regulations if Vonage wished to continue providing service in Minnesota. In response to the Minnesota PUC's decision, Vonage filed a Petition for Declaratory Ruling requesting that the Commission preempt the decision, and also sought injunctive relief from the United States District Court for the District of Minnesota.

The District Court recently issued a permanent injunction against enforcement of the Minnesota PUC's decision. In response to the District Court's ruling, the Minnesota PUC issued an order staying its earlier decision concerning Vonage's VOIP service until such time as the permanent injunction is lifted. As a result of these intervening events, the threat of harm to Vonage that forms the basis of its petition has been removed. Accordingly, Vonage's petition is premature and should be dismissed.

Even if Vonage's petition is not deemed premature, Vonage still does not qualify for declaratory relief. Not only has the Commission not resolved the preliminary and more fundamental regulatory questions concerning broadband access to the Internet raised in its pending broadband rulemaking proceedings, it must also revisit its determination that cable

modem service is only an information service in response to the Ninth Circuit Court's recent remand of the Commission's *Cable Modem Declaratory Ruling*. The Commission will likely also need to revisit its tentative conclusion in the pending wireline rulemaking concerning the regulatory status of digital subscriber line service in light of the Ninth Circuit Court's decision.

Granting Vonage's requested relief will require the Commission to evaluate and render a decision on Vonage's VOIP service offering. Doing so, however, would not only frustrate the resolution of several pending proceedings, but would also prejudge a future national policy that is expected to shape the telecommunications landscape for decades to come. Therefore, consistent with its policy of not to granting petitions for declaratory relief where the subject matter relates to a matter already under consideration in a pending rulemaking, the Commission should either hold the petition in abeyance or dismiss it without prejudice.

Regardless of the impact that classifying Vonage's VOIP service as an information service will have on resolution of the various pending broadband proceedings and future national telecommunications policy, such a finding would clearly undercut CALEA's very purpose, and jeopardize the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats. If Vonage's VOIP service is deemed to be an information service, there will be a serious risk that certain call content and call identifying information would evade lawful electronic surveillance, because it would preclude CALEA-compliant surveillance of telephone calls merely because the call transmission happened to employ an alternate protocol, such as Internet Protocol. The Commission should not classify Vonage's VOIP service offering in a manner that conflicts with CALEA's Congressional intent of facilitating lawfully-authorized surveillance. At the very least, the Commission must not find that Vonage's VOIP service is an information service for purposes of CALEA.

Vonage's VOIP service meets all of the criteria of a telecommunications service, and Vonage performs all of the same functions as traditional circuit-mode carriers in direct

competition with such carriers. Moreover, it is expected that VOIP will likely displace traditional circuit-mode telecommunications as the most common form of telephony. Therefore, any declaratory relief that classifies Vonage as an information service provider would not only violate CALEA, but also render Title II of the Communications Act obsolete.

Even if Vonage qualified for declaratory relief, and even if such relief did not conflict with CALEA, Vonage has failed to meet the criteria that would justify preemption in this case. The Commission has deemed neither VOIP generally, nor Vonage's specific VOIP service offering, to be an "information service." Therefore, Vonage's compliance with the Minnesota PUC's decision is neither an "outright or actual conflict" between federal and state law, nor "physically impossible." Similarly, application of Minnesota law to Vonage's VOIP service offering is not an "obstacle" to federal law policy, because the Commission has not yet determined the regulatory status of VOIP and there is no federal law preempting state law with respect to telephone service provided using VOIP technology. Finally, requiring Vonage to comply with certain regulatory prerequisites in no way "prohibits" Vonage from providing its VOIP service in Minnesota. Accordingly, there is no basis for preemption.

In light of foregoing, Vonage's petition should be dismissed as premature, or in the alternative, denied.

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

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

JOINT COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE AND THE FEDERAL BUREAU OF INVESTIGATION

The United States Department of Justice ("USDOJ") and the Federal Bureau of Investigation ("FBI") hereby submit the following joint request for dismissal and comments in response to the Commission's *Public Notice*, DA 03-2952, released September 26, 2003, requesting comments on Vonage Holdings Corporation's ("Vonage") Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission ("Vonage Petition"). For the reasons discussed below, the USDOJ and FBI believe that the Vonage Petition is premature and request that it be dismissed without prejudice. In the alternative, if the Commission does not grant the USDOJ and FBI's request for dismissal of the Vonage Petition, for the reasons discussed below, the Commission should deny the relief requested in the Vonage Petition.

STATEMENT OF INTEREST

The USDOJ and FBI are interested parties in this proceeding pursuant to their authority to implement the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.* CALEA, enacted in 1994 prior to the advent of the type of service provided by Vonage, was intended to maintain the ability of law enforcement to conduct lawful electronic surveillance despite changing telecommunications technologies. CALEA applies to all

telecommunications services, including those provided by wireline, wireless, and cable operators, but does not apply to services classified as "information services."[1] CALEA ensures that as those telecommunications services migrate to new technologies, lawful electronic surveillance will continue to keep pace. A decision by the Commission in this proceeding that the service provided by Vonage is an information service would pose a serious risk that certain call content and call identifying information would evade lawful electronic surveillance, thereby undercutting CALEA's very purpose and jeopardizing the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats.

I. INTRODUCTION AND BACKGROUND

Vonage provides a form of service known as "voice-over-internet-protocol" ("VOIP")[2] in a number of states throughout the country, including the State of Minnesota. On September 11, 2003, the Minnesota Public Utilities Commission ("Minnesota PUC") issued an order in which it deemed Vonage's VOIP service to be a telephone service under Minnesota law ("*Minnesota PUC Order*").[3] The *Minnesota PUC Order* stated that if Vonage wished to continue providing its VOIP service in Minnesota, Vonage must fully comply with all Minnesota Statutes and Rules related to the offering of telephone service in Minnesota within 30 days and must remit 911 fees to the Minnesota Department of Administration for the period in which Vonage served Minnesota customers but did not pay 911 fees.[4]

---

1 *See* 47 U.S.C. § 1001.

2 Voice-over-internet-protocol refers to the technology used to transmit voice conversations over a data-based network using the Internet Protocol.

3 *In the Matter of Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance, Docket No. P-6214/C-03-108 (issued Sept. 11, 2003) ("*Minnesota PUC Order*").

4 *Id.*

On September 22, 2003, Vonage filed the Vonage Petition with the Commission seeking preemption of the *Minnesota PUC Order*.[5] On September 25, 2003, Vonage filed a complaint with the United States District Court for the District of Minnesota requesting a preliminary injunction to prevent enforcement of the *Minnesota PUC Order*.[6]

On October 7, 2003, the District Court issued a permanent injunction against enforcement of the *Minnesota PUC Order*.[7] On October 13, 2003, the Minnesota PUC issued an order staying the *Minnesota PUC Order* until such time as the permanent injunction issued by the District Court is lifted ("*Minnesota PUC Stay Order*").[8]

II. THE VONAGE PETITION IS PREMATURE AND SHOULD BE DISMISSED

As a result of the recent developments concerning the *Minnesota PUC Order* discussed in Section I, the Vonage Petition is clearly premature and should be dismissed. As discussed above, there is currently a permanent injunction in place that prevents enforcement of the *Minnesota PUC Order*.[9] Moreover, the Minnesota PUC has expressly stated that it will not enforce the *Minnesota PUC Order* as long as the permanent injunction is in effect.[10] Given that the District Court's decision and the *Minnesota PUC Stay Order* have removed the threat of

---

5 *In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003).

6 *Vonage Holding Corp. v. The Minnesota Public Utilities Commission*, Case No. 03- 5287 MJD/JGL (D.M.N.) (filed Sept. 25, 2003).

7 *Vonage Holding Corp. v. The Minnesota Public Utilities Commission*, Memorandum and Order, Case No. 03- 5287 MJD/JGL (D.M.N. Oct. 16, 2003) ("*Minnesota District Court Decision*"). Although the District Court issued its decision on October 7, 2003, the text of the decision was not released until October 16, 2003.

8 *In the Matter of Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Order Staying Order of September 11, 2003, Docket No. P-6214/C-03-108 (issued Oct. 13, 2003) ("*Minnesota PUC Stay Order*").

9 *See Minnesota District Court Decision.*

10 *Minnesota PUC Stay Order* at 2.

harm to Vonage resulting from the *Minnesota PUC Order*, the Commission should dismiss the Vonage Petition as premature.

III. EVEN IF THE VONAGE PETITION IS NOT DEEMED TO BE PREMATURE IN LIGHT OF RECENT DEVELOPMENTS, THE PETITION NONETHELESS DOES NOT QUALIFY FOR DECLARATORY RELIEF

A. There is Considerable Regulatory Uncertainty With Respect to VOIP

As the Commission is aware, there has been (and continues to be) much debate over the regulatory classification of VOIP service on both the federal and state levels.

On the state level, while Minnesota was the first state to formally deem VOIP to be a "telecommunications service," other states appear to be on the cusp of doing so.[11] Other states have proceedings in progress in which regulation of VOIP service is being considered.[12] Still other states have proceedings on-going concerning VOIP service in response to court primary jurisdiction referrals.[13]

---

[11] *See 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 (filed Sept. 10, 2003). In addition, on September 24, 2003, the California Public Utilities Commission ("CPUC") sent letters to VoicePulse, Net2Phone, Packet8, SBC Communications and Vonage directing each to file an application with the CPUC for authority to conduct business as a telecommunications utility no later than October 22, 2003. VOIP matters will also reportedly be addressed at the CPUC's regular October 30, 2003 meeting.

[12] *See, e.g., Petition for a Declaratory Order Regarding Classification of IP Telephony Service*, Alabama Public Service Commission Docket No. 29016 (filed Jul. 31, 2003); *In the Matter of Commission Investigation Into Voice Services Using Internet Protocol*, Ohio Public Utilities Commission Case No. 03-950-TP-COI (Apr. 17, 2003); *Investigation into Voice Over Internet Protocol as a Jurisdictional Service*, Pennsylvania Public Utility Commission Docket No. M-00031707 (May 5, 2003); *Staff Investigation re Voice Over Internet Protocol (VOIP)* (Washington Utilities and Transportation Commission Docket No. UT-030694 (May 13, 2003). In September 2003, the Wisconsin Public Service Commission sent letters to 8x8 Communications, Delta 3 and Vonage in an effort to gather more information on exactly what kind of service the companies offer. In addition, the Illinois Commerce Commission held a workshop in May 2003 to discuss alternative regulatory treatment of voice services using VOIP packet switched technology. Key issues discussed in the workshop included Illinois Commerce Commission jurisdiction, certification, tariffs, and taxes, and standards regarding service quality, 911 and consumer protection.

[13] In September 2003, the U.S. District Court for the Western District of Washington remanded a dispute to the Washington Utilities and Transportation Commission between the Washington Exchange Carrier Association and LocalDial Corp. regarding LocalDial's

On the federal level, the Commission has not yet instituted a proceeding concerning the regulatory status of VOIP, and has yet to resolve the preliminary and more fundamental regulatory questions concerning broadband access to the Internet raised in its pending *Broadband NPRMs*.[14] To compound matters and further unsettle the regulatory issues concerning broadband services, the United States Court of Appeals for the Ninth Circuit recently vacated and remanded the portion of the Commission's March 2002 *Cable Modem Declaratory Ruling* in which the Commission deemed cable modem service to be an "information service."[15] As a result of the Ninth Circuit Court's decision, the Commission must now revisit its determination that cable modem service is only an information service. In addition, the Commission should revisit its tentative conclusion in the *Wireline Broadband NPRM* that digital

---

nonpayment of access charges. In October 2003, the Clackamas County, Oregon Circuit Court dismissed a similar case involving the Oregon Exchange Carrier Association ("OECA") and LocalDial Corp. in which the OECA sought to compel LocalDial to pay access charges, ruling that the Oregon Public Utilities Commission would be a more appropriate place to address the issues.

[14] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*") (collectively, "*Broadband NPRMs*").

[15] *Brand X Internet Services et al. v. Federal Communications Commission et al.*, Case Nos. 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-70, 02-71425 and 02-72251 (9th Cir. Oct. 6, 2003) (per curiam) ("*Brand X*"). The Ninth Circuit Court vacated and remanded the Commission's conclusion in the *Cable Modem Declaratory Ruling* that cable modem service is an information service because the Commission's conclusion was inconsistent with a prior conclusion by the Ninth Circuit Court in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) ("*Portland*"), that cable modem service contains both information service and telecommunications service components. *See Brand X* at 14756-59 and 14765-69.

subscriber line ("DSL") service should be classified as only an information service,[16] in light of the Ninth Circuit Court's decision.

B. It is the Commission's Policy Not To Grant Declaratory Relief Where It Would Undercut a Pending Rulemaking Proceeding

It is the Commission's policy, as a matter of both procedure and administrative efficiency, not to grant declaratory relief pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, where the matter on which the ruling is requested relates to a matter already under consideration by the Commission in a pending rulemaking proceeding. Rather, the Commission's policy has been to either hold such a petition in abeyance until the rulemaking proceeding has been completed,[17] or dismiss it without prejudice.[18] The Commission's

---

16 *Wireline Broadband NPRM* at 3032-34, ¶¶ 23-27.

17 The Commission recently followed this course action where the state commission decision for which the petitioning party sought declaratory relief had been overturned by a Circuit Court but where final resolution of the matter was still pending on further appeal. *In The Matter Of Federal-State Joint Board On Universal Service; Western Wireless Corporation Petition For Preemption Of An Order Of The South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, 15169-70 (2000) ("[w]e note that Western Wireless has raised similar issues in its petition for preemption of a decision of the South Dakota [PUC] . . . In light of the recent South Dakota Circuit Court decision overturning the South Dakota PUC's decision and granting Western Wireless [eligible telecommunications carrier] status in each exchange served by non-rural telephone companies in South Dakota, we believe that it is unnecessary to act on the Western Wireless petition at this time. We acknowledge, however, that the South Dakota Circuit Court Order has been automatically stayed with the filing of the South Dakota PUC's notice of appeal to the Supreme Court of South Dakota. We therefore place Western Wireless' petition for preemption of the South Dakota PUC Order in abeyance pending final resolution of this appeal. The [FCC] will make a determination at that time as to whether it is necessary to proceed consistent with the guidance provided in this Declaratory Ruling").

There are currently two pending petitions for declaratory ruling in addition to the Vonage Petition that raise issues that are related to the issues under consideration in the *Broadband NPRMs*: the petition for declaratory ruling filed by AT&T Corporation in October 2002 concerning its phone-to-phone IP telephony offering (pending under WC Docket No. 02-361) ("AT&T Petition") and the petition for declaratory ruling filed by Pulver.com in February 2003 concerning its Free World Dialup service (pending under WC Docket No. 03-45) ("Pulver.com Petition"). Although the Commission has not taken formal action to hold either the AT&T Petition or the Pulver.com Petition in abeyance pending a decision on the *Broadband NPRMs*,

Bureaus, acting under delegated authority, have also in the past dismissed petitions for declaratory ruling without prejudice where there was "a more appropriate proceeding" in which to address the issue,[19] or where such action would be "premature."[20] Vonage deserves no more special treatment than those other similarly-situated parties were afforded. This is particularly true in Vonage's situation in light of the fact that the District Court's decision and the *Minnesota PUC Stay Order* have removed any threat of harm to Vonage resulting from the *Minnesota PUC Order*.

As a separate matter, in order to grant the declaratory relief requested in the Vonage Petition, the Commission would be required to conduct an evaluation of, and render a decision

---

given that these petitions remain pending after all of this time and given that the issues raised in the petitions relate to the issues under consideration in the *Broadband NPRMs*, the Commission has wisely held these petitions in abeyance and deferred its decision on them pending completion of the *Broadband NPRMs*.

[18] *See, e.g.*, *Petition for Declaratory Ruling That Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation*, Order, 11 FCC Rcd 9051 (1996) (dismissing a petition for declaratory ruling on whether the petitioner was required to comply with certain competitive carrier separation requirements to provide interstate, interexchange service on a non-dominant basis where such separation requirements were already subject to several pending rulemaking proceedings).

[19] *In the Matter of Petition for Declaratory Ruling Regarding AT&T's Network Interconnection Policy*, 13 FCC Rcd 12082 (1998) at ¶ 4 (dismissing a petition for declaratory ruling where the same issues were the subject of a concurrently-pending formal complaint and concluding that the issues were more appropriately addressed in the formal complaint proceeding).

[20] *Petition of Nevadacom for Expedited Declaratory Ruling That Telegraphic Money Order Service is an Information (Enhanced) Service and Not Subject to State Regulation*, 15 FCC Rcd 7567 (2000) at ¶ 2 ("*Nevadacom*") (dismissing as premature a petition for declaratory ruling seeking Commission confirmation that a telegraphic money order constitutes an information service, because no state had yet adopted a law, rule or regulation regulating the entry into, or provision of, money transfer services by record carriers and, therefore, there was not yet any threat of harm to Nevadacom). Although the *Nevadacom* and Vonage fact patterns are not identical, at the end of their respective stories, there was no state law, rule, regulation or decision in effect that would have imposed the regulation from which each sought declaratory relief. The Commission declined in *Nevadacom* to grant declaratory relief where there was no threat of harm present, and should also do so here with respect to Vonage.

on, Vonage's VOIP service offering. Proceeding in this manner, however, would not only frustrate the resolution of several pending proceedings – specifically, the *Broadband NPRMs*, the AT&T Petition, the Pulver.com Petition, the forthcoming *Cable Modem Declaratory Ruling* remand proceeding, and the intercarrier compensation proceeding[21] – but would also prejudge a future national policy that is expected to shape the telecommunications landscape for decades to come. Such an approach has been rejected by the Commission in the past,[22] and this is hardly the occasion to indulge in *ad hoc* decision-making that ignores the abundant evidence already placed on the public record in the above-referenced proceedings or creates a largely duplicative record, particularly where the threat of harm to the petitioning party (Vonage) has been removed and consideration of the declaratory relief sought is no longer necessary.

In addition, although the Commission has the discretion to proceed by rulemaking or adjudication, the rulemaking approach must be viewed as necessary in this case. Only through a rulemaking can the Commission fairly hear the views of all parties with an interest in the significant policy issues surrounding VOIP service.[23] Only through a rulemaking can the Commission avoid creating a conflicting record.

---

[21] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*").

[22] *See, e.g., Letter to Robert H. Jackson, Reed Smith LLP, from W. Kenneth Ferree, Chief, Media Bureau, Regarding Emergency Petition Against Charter Communications, Inc. Kearney, Nebraska*, 18 FCC Rcd 3233 (2003) (denying a request that the Commission assert jurisdiction over a cable and high-speed Internet access service provider and direct that provider to provide adequate cable Internet access service to its customer because cable Internet access consumer protection and customer service regulation were part of a pending rulemaking proceeding, and because it would be impossible to adjudicate the petitioner's issues without prejudging the matters under review in the pending rulemaking).

[23] It should be noted that granting Vonage the relief it requests could also prejudice the rights of other VOIP providers, including both Internet access providers and Internet application providers, if they and their networks are subject to regulation while Vonage is allowed to escape such regulation. For example, although VOIP service providers all provide "VOIP service" in

The Commission would be best served by first resolving the regulatory status of broadband access to the Internet and revisiting its approach to broadband access to the Internet in light of the Ninth Circuit Court's holdings in *Brand X* and *Portland*, and then turning to the more specific issue of how certain services that coincidentally run over the Internet access "pipe," such as VOIP, should be regulated. This course of action is particularly warranted here, not only because the issues in the Vonage Petition relate to issues under consideration in a pending rulemaking, but also because no harm will befall Vonage if its requested relief is not granted.

IV. ANY DECLARATORY RELIEF THAT CLASSIFIES VONAGE AS AN INFORMATION SERVICE PROVIDER WOULD VIOLATE CALEA AND RENDER TITLE II OF THE COMMUNICATIONS ACT OBSOLETE

Section 229(a) of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. § 229(a), requires the Commission to prescribe such rules as are necessary to implement CALEA. As discussed above, CALEA's purpose is to help lawful electronic surveillance keep pace with changes in telecommunications technology as telecommunications services migrate to new technologies.[24] For that reason, CALEA's application is technology neutral.[25] A determination that Vonage offers an information service would achieve just the

---

the generic sense of the term, different providers employ different network and service architectures.

[24] The legislative history of CALEA specifically emphasizes this purpose. Representatives of the telecommunications industry that testified at the Congressional hearings on CALEA specifically acknowledged that "there will be increasingly serious problems for law enforcement interception posed by the new technologies and the new competitive market." CALEA Legislative History, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.C.A.N. 3489, 3495. To combat these increasingly serious problems, CALEA "requires telecommunications common carriers to ensure that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance." *Id.* at 3496. Thus, CALEA is intended to "preserve the government's ability . . . to intercept communications that utilize advanced technologies . . ." *Id.*

[25] "CALEA, like the Communications Act, is technology neutral. Thus, a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA." *In The Matter of Communications Assistance for Law Enforcement Act*, Second

opposite result, because it would preclude CALEA-compliant surveillance of telephone calls merely because the call transmission happened to employ an alternate protocol, such as Internet Protocol.[26]

Report and Order, 15 FCC Rcd 7105, 7120 n. 69 (1999) ("*CALEA Second Report and Order*"). *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, ¶ 23 (1999) ("*Section 706 Report*") (". . . we emphasize that whether a capability is broadband does not depend on the use of any particular technology or nature of the provider.")

[26] *See DOJ and FBI Ex Parte Presentation in the FCC's Broadband Internet Access Proceedings*, CC Docket Nos. 02-33, 95-20 and 98-10 and CS Docket No. 02-52 (Jul. 10, 2003), which is hereby incorporated by reference.

A. Classifying Vonage's VOIP Service as an Information Service Would Violate CALEA

For purposes of CALEA, the Commission should not define information services in a manner that conflicts with CALEA's Congressional intent to facilitate lawfully-authorized surveillance. When Congress enacted CALEA in 1994, it thought of information services as the basic retrieval of stored data files and certain electronic messaging functions.[27] Congress did not foresee that information services would include Internet access service or electronic voice services, such as VOIP. Moreover, a grant of declaratory relief that declares Vonage's VOIP service to be an information service would undercut CALEA's privacy goal,[28] unfairly limit the information law enforcement can obtain under its Title III[29] powers, and contradict the Commission's past pronouncements concerning the application of CALEA, particularly those articulated in the *CALEA Second Report and Order*.[30]

---

[27] *See* CALEA Legislative History, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.C.A.N. 3489, 3498.

[28] In the packet-mode context, Section 103 of CALEA, 47 U.S.C. § 1002, requires telecommunications carriers to "isolate" the communications subject to a given court order, whereas telecommunications carriers proceeding outside of CALEA typically comply with such court orders by delivering a broader scope of information.

[29] 18 U.S.C. §§ 2510 *et seq.*

[30] *In The Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105 (1999) ("*CALEA Second Report and Order*"). For example, the Commission stated in the *CALEA Second Report and Order* that "[w]here facilities are used to provide both telecommunications and information services . . . such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services. For example, [DSL] services are generally offered as tariffed telecommunications services, and therefore subject to CALEA, even though the DSL offering often would be used in the provision of information services." *CALEA Second Report and Order* at 7120, ¶ 27. The Commission also stated in the *CALEA Second Report and Order* that to the extent any entity, including a cable operator, provides telecommunications service it is subject to CALEA. *CALEA Second Report and Order* at 7111, ¶ 11. Congress also emphasized this point. *See* CALEA Legislative History, H.R. Rep. No. 103-827(I), at 21, reprinted in 1994 U.S.C.C.A.N. 3489, 3498. Again, as emphasized in both the *CALEA Second Report and Order* and the *Section 706 Report*, a change of technology does not change a carrier's CALEA obligations. *See CALEA Second Report and Order* at 7120 n. 69; *Section 706 Report*, ¶ 23.

Notwithstanding its impact on law enforcement's ability to deal with general criminal activity, such a policy shift would be especially dangerous in the wake of the events of September 11, 2001 and the nation's increased focus on homeland security. Homeland security is one of the Commission's top priorities. As Chairman Powell stated in his August 11, 2003 speech at an Association of Public Safety Communication Officials, Inc. conference, "[s]pectrum policy and homeland security are at the forefront of my strategic plan for the Commission."[31] For these reasons, the Commission must not find, at least for purposes of CALEA, that Vonage's VOIP service is an information service.

B. Classifying Vonage's VOIP Service as an Information Service Would Devalue Title II of the Communications Act

Classifying Vonage as an information service would not only undercut CALEA, but would also improperly blur the distinction between a "telecommunications service" and an "information service" under the Communications Act. Traditionally, public switched telephone service has been classified as a "telecommunications service"[32] subject to Title II regulation under the Communications Act.[33] Vonage's VOIP service likewise meets all of the criteria of a telecommunications service: it contains an offering of a service that provides transmission,

---

31 *Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Association of Public Safety Communications Officials International 69th Annual Conference, Indianapolis, Indiana*, Speech (rel. Aug. 12, 2003) at 1.

32 "Telecommunications service" is defined as "the offering of telecommunications for a fee to the public . . . regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is defined as "the transmission of, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." 47 U.S.C. § 153(43).

33 A "telecommunications carrier" is defined as "a provider of telecommunications service" and is "treated as a common carrier under [the Communications] Act [] to the extent that it is engaged in providing telecommunications services . . ." 47 U.S.C. § 153(44).

without any net change in form or content, to the public, for a fee.[34] Indeed, Vonage performs all the same "functions" as traditional circuit-mode telecommunications carriers, and directly competes with those carriers. Thus, if the Commission decides that VOIP is an information service, and if VOIP, as expected, displaces traditional circuit-mode telecommunications, eventually, Title II of the Communications Act will no longer apply to the most common form of telephony. In that event, the public will lose the benefit of a wide range of common carrier regulation, not just the public safety benefit of CALEA.

[34] *See* 47 U.S.C. §§ 153(43), (44) and (46). As is made clear in the statutory definition, the technology used to provide a given service is not among the criteria used to determine whether that service should be deemed a telecommunications service. *See* 47 U.S.C. § 153(46). The USDOJ and FBI look forward to the opportunity to elaborate on these definitional themes if and when the Commission opens a rulemaking proceeding on the regulatory status of VOIP.

V. ANY DECLARATORY RELIEF THAT PREEMPTS THE *MINNESOTA PUC ORDER* BASED ON VONAGE'S "INFORMATION SERVICE" THEORY WOULD NOT BE SUPPORTED BY THE FACTS OR LAW

Even if Vonage qualified for declaratory relief, and even if such relief did not conflict with CALEA, there is no justification for granting such relief in the manner requested in the Vonage Petition. Federal preemption of state action is the exception, not the rule, with respect to the dual-jurisdictional scheme set forth in the Communications Act.[35] Although preemption may in some circumstances be necessary, it is not warranted here.[36]

---

[35] *See* 47 U.S.C. § 253(d) (Commission may preempt state action to the extent necessary to correct a violation or inconsistency only if a state or local government has permitted or imposed any statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service or violates the authority granted to it to impose requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers).

"The critical question in any preemption analysis is always whether Congress intended that federal regulation supercede state law." *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 370 (1986). While Section 151 of the Communications Act, 47 U.S.C. § 151, does grant the Commission the authority to ". . . regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . a Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," Section 152(b) of the Communications Act serves to clarify and narrow the seemingly broad scope of the Commission's authority. Section 152(b) provides in relevant part that ". . . nothing . . . shall be construed to apply to or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulation for or in connection with *intrastate* communication service . . ." 47 U.S.C. § 152(b) (emphasis added). Because the Minnesota PUC and the *Minnesota PUC Order* attempt to regulate Vonage on an intrastate basis only, there is no conflict justifying preemption.

[36] This is particularly true given that the Commission has not yet determined whether, and pursuant to what preemption authority, the Commission would consider preempting specific state laws and local requirements. *See Cable Modem Declaratory Ruling* at 4849, ¶ 99 ("[s]pecifically, we seek comment as to whether we should use our preemption authority to preempt specific state laws or local regulations. We ask commenters to specify what preemption authority we would rely on in each case").

A. Vonage Does Not Meet the Criteria For Preemption Under *Louisiana Public Service Commission v. FCC*

Contrary to Vonage's assertion, there is currently no "outright or actual conflict" between federal and state law.[37] Not only has the Commission not even opened a proceeding to evaluate the regulatory status of VOIP, it has yet to resolve the preliminary and more fundamental legal issues concerning the regulatory status of broadband access to the Internet and revise its approach to broadband access to the Internet to make it consistent with the holdings in *Brand X* and *Portland*. Therefore, federal law with respect to the regulatory status of broadband access to the Internet, VOIP service, and Vonage's specific VOIP service offering are all unsettled at this point. Moreover, the *Minnesota PUC Order* is in harmony with the Ninth Circuit Court's findings in *Brand X* and *Portland* and, therefore, cannot be viewed as being in outright or actual conflict with federal law.

Contrary to Vonage's contentions in the Vonage Petition, compliance with both federal law and the *Minnesota PUC Order* is not "physically impossible."[38] The Commission has not yet opened a proceeding to evaluate the regulatory status of VOIP service, let alone issued a decision on the matter. Therefore, VOIP service has not been formally deemed to be an information service. As a result, there is no federal law concerning VOIP service that would make compliance with Minnesota state law and the *Minnesota PUC Order* physically impossible. Accordingly, there is no federal-state conflict of law that would prevent Vonage from complying with the *Minnesota PUC Order* and Minnesota state law.

Vonage's claim that application of Minnesota state law to Vonage's VOIP service offering is "an obstacle" to the federal policy of leaving interstate Internet services unfettered by

---

37 Vonage Petition at 18.

38 *Id*.

state regulation[39] is without merit. First and foremost, the Minnesota PUC and the *Minnesota PUC Order* seek to regulate Vonage's VOIP services on an intrastate basis only. Thus, it was appropriate for the Minnesota PUC to consider Minnesota law in evaluating whether Vonage's VOIP service offering constitutes "telephone service." However, in evaluating Vonage's VOIP service, the Minnesota PUC was also careful to consider determinations made by the Commission concerning whether Internet Protocol telephony is a telecommunications service.[40] The Minnesota PUC correctly found that there was no evidence that the regulatory status of VOIP technology had been decided by the Commission, and that there was no federal law preempting state law with respect to telephone services provided using VOIP technology.[41] Thus, there is no reason to invoke the information services preemption doctrine articulated by the Commission in *Computer II*.[42]

B. Vonage is Not Prohibited from Providing Service in Minnesota Under the *Minnesota PUC Order*

Vonage also complains that if it is "prohibited" from offering its VOIP service in Minnesota, Internet access customers in Minnesota will be disadvantaged as compared to their counterparts in other states.[43] However, Vonage appears to confuse the concept of regulation as a condition of providing service with the concept of an outright prohibition on providing service. The *Minnesota PUC Order* does not contain an outright prohibition on Vonage providing its VOIP service in Minnesota. Rather, the *Minnesota PUC Order* simply conditions Vonage's

---

39 *Id*. at 18.

40 *See Minnesota PUC Order* at 4-5.

41 *Id.* at 8. As discussed herein, the Commission has not yet instituted a proceeding concerning the regulatory status of VOIP, and has yet to resolve the preliminary and more fundamental regulatory questions concerning broadband access to the Internet raised in its pending *Broadband NPRMs*.

42 *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC.2d 384 (1980).

ability to provide its VOIP service in Minnesota on compliance with certain regulatory prerequisites, *i.e.,* certification and a 911 plan. Thus, contrary to Vonage's contention, there is nothing in the *Minnesota PUC Order* that in fact "prohibits" Vonage from providing its VOIP service in Minnesota.

VI. VONAGE HAS NOT EXHAUSTED ITS ADMINISTRATIVE REMEDIES WITH RESPECT TO COMPLIANCE WITH MINNESOTA'S 911 REQUIREMENT

Vonage also claims that it cannot comply with the *Minnesota PUC Order* because Vonage is not able to fully comply with the Minnesota 911 requirement and, as a result, the requirement interferes with federal policy.[44] In fact, Vonage's inability to fully comply with Minnesota's 911 requirement does not interfere with any federal policy.

Although the *Minnesota PUC Order* does require Vonage to comply with "all of the Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service,"[45] the issue of whether Vonage can comply with these requirements is a highly technical question of fact that only the Minnesota PUC is authorized to decide. Moreover, there is nothing that would prevent Vonage from complying with these requirements to the extent possible, and seeking a waiver from the Minnesota PUC for any requirement with which Vonage believes it cannot reasonably comply.[46] In any event, a party's technical inability to comply with a

---

43 Vonage Petition at 23.

44 *Id.* at 24-27.

45 *Minnesota PUC Order* at 8.

46 For example, Vonage claims that it cannot comply with Minnesota's 911 requirements because it does not interconnect with local exchange carrier 911 trunks. Vonage Petition at 25. Assuming *arguendo* that Vonage's claim is valid, Vonage had several options with respect to Minnesota's 911 requirement, none of which it seems to have reasonably explored. Vonage could have asked the Commission or the Minnesota 911 Department of Administration for a total waiver 911 requirement, a temporary waiver of the 911 requirement until such time as Vonage is able to fully comply with the requirement, a partial waiver of the 911 requirement with respect to the specific elements of the 911 requirement with which Vonage cannot currently comply, or approval of a modified 911 plan tailored to reflect Vonage's particular 911 service capabilities.

particular common carrier requirement is no reason to relieve that party of all other common carrier requirements.

See Minnesota Rules, Part 7829.3200 ("The commission shall grant a variance to its rules when it determines that . . . A. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule; B. granting the variance would not adversely affect the public interest; and C. granting the variance would not conflict with standards imposed by law"); Minnesota Statutes, Section 403.06, Subd. 2 (permitting telecommunications service providers to petition the Department of Administration for a waiver of all or portions of the state's 911 requirements). Vonage must first exhaust its administrative remedies with the Minnesota PUC before Vonage can reasonably claim it is unable to comply with Minnesota's 911 requirement.

CONCLUSION

Every new entrant to a market presumably wants to introduce its service with the fewest regulatory burdens. But when a company enters a line of business as vital to the public interest as telecommunications service, it must bear certain responsibilities such as compliance with the 911 and CALEA public interest mandates. Otherwise, the public may suffer serious harm.

In this case, Vonage has not merely introduced some minor new innovation to the telecommunications service market. It has leveraged a new technology to replicate the entire end-to-end common carrier telephone calling experience, including all the same adjunct calling features and the same geographic reach. Under these circumstances, for Vonage to claim some theoretical exemption from the common carrier obligations it incurred is a denial of both the letter and spirit of the Communications Act. To request such special treatment based on the nature of its back-office technology, which has already been employed to varying degrees by many preexisting telecommunications service providers, is presumptuous at best. And to seek such favoritism in a manner that would effectively censor all state-level consideration of the issues involved would offend the dual jurisdictional scheme that has shaped the regulation of telecommunications since the inception of the Communications Act.

For these reasons, the United States Department of Justice and the Federal Bureau of Investigation respectfully request that Vonage's Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission be dismissed as premature, or in the alternative, denied.

Dated: October 27, 2003

Respectfully submitted,
THE FEDERAL BUREAU OF INVESTIGATION

/s/ Patrick W. Kelley
Patrick W. Kelley
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Room 7427
Washington, D.C. 20535
(202) 324-8067

and

THE UNITED STATES DEPARTMENT OF JUSTICE

/s/ John G. Malcolm
John G. Malcolm
Deputy Assistant Attorney General,
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 2113
Washington, D.C. 20530
(202) 616-3928

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2003, I caused a copy of the foregoing Joint Comments of the United States Department Of Justice and the Federal Bureau Of Investigation to be sent by electronic mail to each of the following:

Electronic Mail:

Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
445 12th Street, S.W.
Room 5-C327
Washington, D.C. 20554
E-mail: janice.myles@fcc.gov

Qualex International, Inc.
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
E-mail: qualexint@aol.com

William B. Wilhelm
Russell M. Blau
Tamar Finn
Swidler Berlin Sherreff Friedman, LLP
The Washington Harbour
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
E-mail: wbwilhelm@swidlaw.com
rmblau@swidlaw.com
tefinn@swidlaw.com

Counsel for Vonage Holdings Corporation

/s/ Valerie M. Furman
Valerie M. Furman