BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Require Interconnected Voice Over Internet Protocol Service Providers to Contribute to the Support of California's Public Purpose Programs	Rulemaking 11-01-008 (filed January 13, 2011)

RESPONSE OF VONAGE HOLDINGS CORP. TO PETITION OF THE CONSUMER PROTECTION AND SAFETY DIVISION FOR MODIFICATION OF THE SCOPE OF THE RULEMAKING

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The Consumer Protection and Safety Division ("CPSD") has built its petition to expand this rulemaking on a false premise. According to the CPSD, ever since the Federal Communication Commission's ("FCC") *Vonage Preemption Order*,[1] "the FCC and the courts have clarified that *Vonage* preemption only applies where it is not possible to distinguish between interstate and intrastate calls."[2] The truth, however, is that a long string of federal court decisions, which the CPSD neglects to cite, have held exactly the opposite. Because the CPSD petition is based on a fundamental misunderstanding of state and federal jurisdiction over VoIP, it must be rejected.

In this Response, we supply the background legal principles the CPSD would prefer to ignore. In summary, the *Vonage Preemption Order* established that the FCC has *exclusive jurisdiction* over regulation of VoIP, and that the states have no authority to regulate VoIP other

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1 *Vonage Holdings Corporation's Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004) ("*Vonage Preemption Order*").

2 Petition of the Consumer Protection and Safety Division for Modification of the Scope of Rulemaking to Include Consumer Protection, Rulemaking 11-01-008, at 17 (March 3, 2011) ("CPSD Petition").

than that granted them by the FCC. The FCC's recent *USF Declaratory Ruling*[3] is one such exercise of federal jurisdiction to permit state regulation, but it is, in the FCC's own words, "narrowly focused" on universal service.[4] The CPSD's effort to broaden the scope of this Commission's current rulemaking to encompass consumer protection therefore asks the Commission to exercise authority it does not have. The Commission must deny CPSD's petition.

I. The California Public Utilities Commission Has No Authority to Extend Consumer Protection Regulation to VoIP Providers.

The *Vonage Preemption Order* makes clear that the FCC has preempted "traditional telephone company" regulation of VoIP by the states, except to the extent the FCC specifically permits state regulation. Federal courts have agreed. The FCC is therefore the only arbiter of what regulation may be imposed on VoIP services. The FCC's recent *USF Declaratory Ruling* underscores and clarifies that holding – the FCC, and the FCC alone, has the authority to determine what regulations should apply to VoIP providers. The *USF Declaratory Ruling* delegates authority to the states to treat VoIP providers like other telephone companies *for purposes of universal service contributions,* but it does not authorize the extension of traditional telephone company regulation urged by the CPSD here.

A. The *Vonage Preemption Order* Extends to All Traditional Telephone Company Regulations.

Contrary to CPSD's arguments, the FCC did not preempt only regulations that operate as "conditions to entry," nor did it allow that states could regulate VoIP "so long as there was no

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[3] *Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues,* Declaratory Ruling, 25 FCC Rcd. 15651 (2010) ("*USF Declaratory Ruling*").

[4] *Id.* at 15656,¶ 11.

direct frustration of federal policies."[5] Rather, the FCC held that "this Commission, *not the state commissions,* has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."[6] The FCC recognized that it would be impossible for states to regulate VoIP without impermissibly "reaching the interstate components of the [VoIP] service that are subject to exclusive federal regulation."[7] It therefore preempted *all* "traditional 'telephone company' regulations"[8] without qualification.

Because of the breadth of the FCC's preemption of state regulation of VoIP services, all traditional telephone company regulations are covered by the preemption. This is plain from federal court decisions that the CPSD neglects to cite, let alone to distinguish. Principally, in *Vonage Holdings Corp. v. Nebraska Public Services Commission,* the Court of Appeals for the Eighth Circuit recognized that the *Vonage Preemption Order* gave the FCC "sole regulatory control" over VoIP. [9] CPSD nonetheless asks the Commission to find that VoIP providers are "telephone corporations" and therefore potentially subject to the Public Utilities Code provisions governing telephone corporations.[10] That is precisely what the Commission may not do. It is precisely what the FCC told Minnesota it could not do in the *Vonage Preemption Order,* and it is precisely what the Eighth Circuit and other federal courts in Nebraska and New Mexico have told those states that they may not do.[11]

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5 CPSD Petition at 15.

6 *Vonage Preemption Order,* 19 FCC Rcd. at 22404, ¶ 1 (emphasis added).

7 *Id.* at 22418, ¶ 23.

8 *Id.* at 22404, ¶ 1.

9 564 F.3d 900, 905 (8th Cir. 2008).

10 *See* CPSD Petition at 2-3 ("If VoIP providers are recognized as 'telephone corporations,' provisions in the Public Utilities Codes that relate to consumer protections would become applicable.").

11 *See New Mexico Pub. Regulation Comm'n v. Vonage Holdings Corp.,* 640 F. Supp. 2d 1359 (D.N.M. 2009), *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n,* 543 F. Supp. 2d 1062 (D. Neb. 2008).

The relevant distinction is between "traditional 'telephone company' regulations," which are preempted, and laws of general applicability, which are not. The CPSD will no doubt respond that the rules they want to apply to VoIP are "consumer protection" rules, but that label is of no significance. If the only rules preempted by the *Vonage Preemption Order* were rules that the state believes do *not* protect consumers, the scope of the preemption would be vanishingly small – much smaller than the FCC and the courts have found it to be. The specific consumer protection rules at issue here apply to "telephone corporation[s],"[12] to the "billing telephone company," and to "[a]ny person, corporation, or billing agent that charges subscribers for products or services on a telephone bill."[13] These rules are not the "laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices"[14] that the FCC recognized are beyond the scope of the *Vonage Preemption Order*. They are, instead, precisely the kind of "traditional 'telephone company' regulations" the FCC preempted, and the Commission has no authority to impose them on VoIP providers.

Nor are these consumer protection rules exempted from the scope of the *Vonage Preemption Order* because the FCC defers administration of slamming and cramming complaints against telecommunications carriers to state commissions. First, the FCC's orders interpreting Section 258 of the Telecommunications Act of 1996 apply only to *telecommunications carriers*, and the FCC has repeatedly declined to classify VoIP services as "telecommunications services."[15] Second, the Commission's consumer protection rules are still

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12 Cal. Pub. Util. Code § 2889.5.

13 *Id.* § 2890.

14 *Vonage Preemption Order*, 19 FCC Rcd. at 22404, ¶ 1.

15 *See id.* at 22411, ¶ 14 n.46. Though the FCC has imposed some federal common carrier obligations on interconnected VoIP providers, it has done so only on a case-by-case basis, further confirming the total preemption by the FCC of "traditional 'telephone company' regulation" of VoIP.

"traditional 'telephone company' regulations," even when considered in the context of the federal/state partnership between the FCC and the state commissions addressing consumer protection rules. They are precisely the kind of regulations over which the *Vonage Preemption Order* reserves jurisdiction to the FCC. CPSD's suggestion that the Commission's authority to regulate slamming and cramming of telecommunications carriers means it can regulate VoIP in the same way is an attempt to sneak impermissible state regulation of VoIP services through a back door.

The plain fact is that states may not regulate VoIP providers as they do telephone companies. Though states "continue to play their vital role" in applying their "general laws governing entities conducting business within the state,"[16] the consumer protection rules CPSD is asking the Commission to apply are not those general business laws that the FCC recognized are beyond the scope of the *Vonage Preemption Order*. Rather they are explicitly the "traditional 'telephone company' regulations" expressly preempted by the *Vonage Preemption Order.*

B. Only the FCC Can Act to Allow States to Impose Regulation on Nomadic VoIP.

The FCC has the sole authority to delegate regulation of VoIP to the states. The *USF Declaratory Order* illustrates this. In that ruling, the FCC concluded that states could impose a narrow class of traditional telephone company regulation – specifically, state USF assessments meeting certain enumerated conditions – in a manner consistent with federal policies, and only then authorized states to require such assessments. The FCC carefully delineated the conditions under which states could require USF contributions from VoIP providers: those contributions must be consistent with the FCC's own rules for federal USF contribution by VoIP providers,

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[16] *Id.* at 22404, ¶ 1.

and no state is permitted to seek to collect state USF contributions for services provided in another state.[17] The FCC's grant of authority, in other words, makes it clear that the FCC, not the states, must determine when and under what conditions states may regulate nomadic VoIP providers.

Further, the *USF Declaratory Ruling* affirms the general preemption of VoIP regulation made in the *Vonage Preemption Order*. The FCC's ruling on USF contribution does not rewrite the *Vonage Preemption Order* to apply only to conditions of entry. In fact, the FCC explicitly stated that nothing in the *USF Declaratory Ruling* should "be construed as interpreting or determining the scope of the *Vonage Preemption Order*."[18] Nothing in the *USF Declaratory Ruling*, then, grants any authority to states other than what is explicitly granted – the right to regulate state USF contributions, and state USF contributions only.

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[17] *USF Declaratory Ruling*, 25 FCC Rcd. at 15651, ¶ 1.

[18] *Id.* at 15671, ¶ 23.

Conclusion

The Commission may not extend its traditional telephone company regulation to nomadic VoIP providers like Vonage. The *Vonage Preemption Order* preempted all "traditional 'telephone company' regulation" of VoIP by the states. The FCC's *USF Declaratory Ruling* granted states limited authority to impose state USF assessments on nomadic VoIP providers under narrow circumstances, but did not otherwise modify the preemption of state regulation adopted in the *Vonage Preemption Order*. Because the Commission cannot take the action requested by the CPSD, the CPSD's Petition should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **RESPONSE OF VONAGE HOLDINGS CORP. TO PETITION OF THE CONSUMER PROTECTION AND SAFETY DIVISION FOR MODIFICATION OF THE SCOPE OF THE RULEMAKING** on all known parties to **R. 11-01-008** by e-mail to each person named in the official service list.

Executed on April 4, 2011 in Washington, D.C.

/s/

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