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	)	

Comments of the ICORE Companies

The consulting firm of ICORE, Inc. (ICORE), on behalf of a number of small, rural incumbent local exchange carriers (ILECs)[1], offers these comments in the above-captioned proceeding. ICORE provides a variety of consulting, regulatory and network – related services to many of the nation's smallest, most rural ILECs.

[1] ILECs participating in this filing include: Baraga Telephone Company, Baraga, MI; Community Service Telephone Co., Winthrop, ME; Doylestown Telephone Company, Doylestown; OH; Dunbarton Telephone Company, Dunbarton, NH; Home Telephone Company – IL, St. Jacob, IL; Hot Springs Telephone Co., Kalispell, MT; Ironton Telephone Company, Coplay, PA; McClure Telephone Company, McClure, OH; New Lisbon Telephone Company, New Lisbon, IN; Palmerton Telephone Company, Palmerton, PA; Pennsylvania Telephone Co., Jersey Shore, PA; Phillips County Telephone Co., Holyoke, CO; Ronan Telephone Company, Ronan, MT; Southern Montana Tel. Co., Wisdom, MT; State Telephone Company, Coxsackie, NY; Summit Telephone Company, Fairbanks, AK; Sycamore Telephone Company, Sycamore, OH; Van Horne Telephone Co., Van Horne, IA; Wisconsin Telecommunications Assoc., Madison, WI.

I. INTRODUCTION

Vonage Holding Corporation, on September 22, 2003, filed a petition requesting that the Commission preempt an order of the Minnesota Public Utilities Commission (MPUC) requiring Vonage to comply with state laws governing providers of telephone service.[2]

Vonage claims that it is a provider of information services, and is not a telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934. Further, Vonage asks the Commission to find that certain 911 requirements imposed by the MPUC are in conflict with federal policies, and states that preemption is necessary because it is impossible to separate the Internet, or any service offered over it, into intrastate and interstate components.

The ICORE companies totally disagree with the basic premises of the Vonage petition. Vonage is, in almost every respect, offering the exact functional equivalent of basic local and long distance telephone service, albeit using in part an Internet platform.

This is evident from the information on rates and services set forth in Vonage's website. It is interesting, indeed, to read this information – which encourages potential customers to "Keep Your Phone, Lose Your Old Phone Company" and offers unlimited local and regional calling, as well as 500 long distance minutes for $24.99 per month[3] – in contrast to the Vonage petition.

A reading of that petition would lead one to believe that the Vonage described on the website is a totally different entity. The ICORE companies ask the Commission to

---

[2] Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket 03-211 (filed September 22, 2003). (Vonage petition)
[3] Website available at http://www.vonage.com (last visited October 27, 2003).

give careful consideration to the information contained on the Vonage website – which gives a true picture of Vonage's service offerings – as it considers this very critical matter.

II. VONAGE IS PROVIDING TELECOMMUNICATIONS SERVICES

If we are to believe the information from the Vonage website – and we have no reason not to – it is engaged in the transmission of basic local and long distance telephone calls, and the provision of certain other standard telecommunications services. It simply uses a different medium, the Internet platform, for a portion of its services, rather than using the Public Switched Telephone Network (PSTN) exclusively.

Vonage does, however, use the PSTN in combination with the Internet platform. According to its petition, "Vonage users can initiate and receive communications to and from PSTN users,"[4] and, where "the communication is destined to a station on the PSTN, Vonage…obtains a connection to the PSTN station using the services of an unaffiliated common carrier."[5]

In addition, "(b)ecause Vonage customers may receive calls from users on the PSTN, Vonage associates each of its customers with one or more telephone numbers."[6] These customers also "can connect conventional analog telephone sets to the MTA computer for use with Vonage's service."[7]

Thus Vonage's petition, which spends most of its time telling us that it is providing an information service, has to admit that customers of its services use their

[4] Vonage petition, at 6.
[5] Id, at 7.
[6] Id, at 7-8.
[7] Id, at 5.

conventional telephone sets, with conventional telephone numbers, to originate and terminate calls on the public switched telephone network.

This sounds very much like the traditional telephone services provided by ILECs, CLECs and IXCs, except that these carriers use the PSTN exclusively, where Vonage uses a combination of the Internet and the PSTN. It is not surprising that Vonage, in its petition, must point out that its service "resembles traditional telephone service in some respects…"[8]

Its website is far less guarded. From its exhortation to "Keep Your Phone, Lose Your Old Phone Company," to its $24.99 per month plan offering unlimited local and regional calling plus 500 long distance minutes, to its listings of state NPAs and international rates, it is selling plain old telephone service. It is selling basic local and long distance services, plus call waiting, call forwarding, caller ID blocking and similar telecommunications services.

The Vonage petition, in an effort to prove it is <u>not</u> providing telecommunications services, tells us that Vonage purchases both local telephone services and telecommunications services from interexchange carriers.[9] But this is exactly how other common carriers – including CLECs and IXCs – supplement their facilities and services in order to provide a full range of telecommunications services to their customers. In fact, many CLECs operate almost exclusively this way, purchasing ILEC services, repackaging them, and reselling them.

---

[8] Vonage petition, at 4.
[9] Id, at 7.

Vonage simply combines its Internet platform with more traditional telecommunications facilities and services, and resells the total package as would any CLEC or IXC.

But, according to its petition, it is not providing telecommunications services at all. The crux of its argument lies in what it characterizes as the MPUC's "duck is a duck" analysis. Vonage states that "even if an Internet application walks like a duck and quacks like a duck, the very fact that it is offered over the Internet gives it scales like a reptile."[10] In other words, Vonage's service may be the exact functional equivalent of a telecommunications service, but Vonage will use the Internet shield to protect it from paying its fair share of reciprocal compensation, access charges and USF. It will further use that shield as a means of avoiding its regulatory and social responsibilities. It will reap the rewards of providing telecommunications services, but will not shoulder the risks, burdens and obligations that go hand in hand with providing those services.

More globally, the ICORE companies are aware that Sprint has announced that it will begin using packet technology to transmit calls between central offices.[11] If the Commission were to determine that the Vonage offering is outside of its jurisdiction, would this then remove Sprint from the Commission's jurisdiction? If so, the ICORE companies would suggest that telephone companies everywhere may morph into "information service providers".

According to Vonage, it is an information service provider under "Commission precedents," because it "performs a net protocol conversion"[12] Yet the Commission, in

---

[10] Vonage petition, at 2.
[11] Mark Berniker, Sprint Migrating to Packet-Switched Network, InternetNew.com (May 27, 2003) available at http://www.internetnew.com/wireless/article.php/2212321.
[12] Vonage petition, at 6.

1998, found that the regulatory classification of Internet Protocal (IP) telephony services must be based on a "complete record focused on individual service offerings."[13] The Joint Board also wrote that "we should avoid creating regulatory distinctions based purely on technology. Congress did not limit "telecommunications" to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users"[14]. More specifically, the FCC has written that the statutory definitions and distinctions between "information services" and "telecommunications services" rest on function, not on facilities[15].

Throughout history, various technologies have been developed, subsequently become obsolete, and replaced by new technologies. By focusing on the essential functionality provided to users, the Commission can promote a competitively neutral environment in which the best provider of service will ultimately be the winner. Clearly, in light of the Universal Service Report, it is premature for Vonage to claim the mantle of information service provider.

In fact, that 1998 report distinguished two separate classes of IP telephony: "phone-to-phone IP telephony" and "computer-to-computer IP telephony." The Commission found that phone-to-phone calls, even if routed over an IP network or the Internet itself, "lack[] the characteristics that would render them information services within the meaning of the statute."[16]

Thus, the Commission is already well on its way to finding Vonage's phone to phone service to be a telecommunications service, rather than an information service.

---

[13] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501¶90 (1998) (Universal Service Report).
[14] Id. ¶1.
[15] Internet Over Cable Declaratory Ruling, FCC 02-77, ¶35 (March, 2002).
[16] Universal Service Report, at ¶89.

And this makes perfectly good sense. Phone to phone IP calls, even though they use the Internet platform, also use the PSTN. ILEC facilities are used for the origination and termination of these calls and, absent a ruling that they constitute a telecommunications service, ILECs will be deprived of their appropriate reciprocal compensation, access charges and USF.

At any rate, given the wording in the Universal Service Report, coupled with Chairman Powell's October 1 announcement that the Commission would begin a broad inquiry into VoIP, it is far too early for Vonage to claim that it is offering information services only.

On the contrary, it appears to the ICORE companies that a significant portion of Vonage's offerings are actually telecommunications services. They walk, quack, swim, fly and in every other way are the exact functional equivalent of a "duck." That is, they use conventional telephone sets, telephone numbers, underlying telecommunications services and facilities, and the PSTN to originate and terminate calls. They use rate plans that provide local, regional and long distance minutes, and offer call waiting, call forwarding, call transferring and similar telecommunications services.

Should there yet be any additional uncertainty, a simple game of connect the dots will help illustrate that Vonage is providing telecommunications services. Telecommunications service is defined in TA-96 as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[17] Drilling deeper, telecommunications is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the

[17] 47 C.F.R. §3(51).

information as sent and received[18]. Information service is defined as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any such use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service[19]. The Vonage petition would have us believe that "it processes and transforms the information transmitted by its users"[20]. However, the ICORE companies assert that any processing and transforming is done by Vonage expressly to manage, control, or operate its telecommunications system or to manage its telecommunications services. As such, this offering is expressly exempted from information services as defined in 47 U.S.C. 153. This duck is a duck.

In light of the above, the simple fact that Vonage uses the Internet platform to transmit, switch or convert these calls does not give it "scales like a reptile." Instead, the Commission should find Vonage to be providing telecommunications services, and should direct Vonage to pay all relevant reciprocal compensation, access charges and USF, and to meet all of the other regulatory obligations that apply to interstate carriers.

III. ABSENT A DEFINITIVE RULING, THE MPUC ORDER SHOULD NOT BE PREMPTED

Even if the Commission decides to develop a more complete record before making its determination as to whether Vonage provides telecommunications or information services, it should allow the MPUC ruling to stand.

---

[18] 47 C.F.R. §3(48).
[19] 47 U.S.C 153.
[20] Vonage Petition at Page 12.

The MPUC has made a decision, based on Minnesota laws and statutes, that the intrastate portion of Vonage's service is a telephone service, and therefore subject to its authority. The FCC has no authority to preempt state authority under section 152(b) of the Communications Act.

While Vonage argues that the Commission must preempt the Minnesota ruling on the basis that it cannot separate the intrastate and interstate components of its service – even if the Commission does not at this time decide whether that service is telecommunications or information – Vonage is wrong.

The Vonage website (Exhibit 1), under Local Regional Calling, contains seven pages of state by state NPAs which "determine your local calling area." Calls within these states – both InterLATA and IntraLATA – are clearly intrastate. For many carriers, some of these calls would be local, while others would be intrastate long distance. Vonage simply combines these minutes into a package of unlimited "Local Regional Calling."

Vonage also provides its customers with long distance minutes. Its seven pages of state by state NPAs indicate that in some states, all NPAs are included in its "local (regional) calling area." In others, not all NPAs are included. Thus, long distance applies to InterLATA calls within some states. Vonage clearly provides intrastate services - - long distance as well as local.

It also provides intestate long distance services, since calls between states (with a few IntraLATA exceptions) are not included in a customer's "local calling area."

The Vonage petition attempts to obfuscate the interstate/intrastate separation issue with much palaver concerning the physical location of its customers, the fact that they

sometimes call while traveling, that some live outside of Minnesota but have Minnesota numbers, and that some live in Minnesota but have out of state numbers.[21] But the fact that its customers are assigned traditional telephone numbers is the very thing that makes the interstate vs. intrastate separation possible.

Vonage uses NPAs for distinguishing its "local regional" minutes from its long distance minutes. These same NPAs can be used – as they are used by the rest of the telecommunications industry – to distinguish intrastate calls from interstate calls. This is not a new or revolutionary concept. Just like the rest of the industry, Vonage should use calling and called numbers to determine the jurisdiction of its customers' calls.

In addition, Vonage provides twenty-three pages of international rates (Exhibit 1), for countries from Afghanistan to Zimbabwe. Such calls are treated as interstate for other IXCs, and should be for Vonage as well.

It is somewhat disingenuous, then, for Voange to claim that its services cannot be separated jurisdictionally between intrastate and interstate, when its website provides a wealth of information to the contrary. Its rate plans are divided into local/regional calling and long distance minutes. Its seven pages of NPA information define which calls are local/regional (intrastate), which are intrastate long distance, and which are interstate long distance. It also gives us twenty-three pages of international (jurisdictionally interstate) rates.

The Commission should not preempt the MPUC ruling because of the purported inability of Vonage to distinguish its services between interstate and intrastate. Vonage clearly provides distinct interstate and intrastate services. The MPUC has properly determined that a readily identifiable portion of Vonage's services are intrastate, and has

[21] Vonage petition, at 28-29.

ruled them to be telephone services. This Commission, if it decides to defer its ruling on whether of not Vonages's services are telecommunications or information, should at least find that those services are both intrastate and interstate in jurisdiction, and that the MPUC is within its authority in regulating the intrastate components.

IV. THE COMMISSION MUST TAKE A FRESH LOOK AT INTERNET SERVICES

Like all technologies, the Internet has grown, and changed and evolved over many years. Early Commission rulings and precedents that were meant to protect a nascent technology must be reevaluated, particularly in cases such as the one at hand.

Vonage has simply found a way to use the Internet platform, coupled with telecommunications facilities and services, to provide the exact functional equivalent of traditional telephone service. There is no doubt that Vonage is transmitting local and toll minutes, both interstate and intrastate, and providing other conventional telephone services.

Yet Vonage would hide behind the safeguards previously afforded the Internet by the Commission[22], safeguards that were put in place long before companies figured out how to use the Internet for such things as traditional telephone service.

If previous Commission precedents and rulings lead inevitably to the conclusion that Vonage is an information service provider – when any reasonable man would find Vonage to be, in the case at hand, a telecommunications service provider – those precedents and rulings must be changed.

The classification of Vonage as an unregulated information service provider will have catastrophic effects on those common carriers that are providing exactly the same

[22] Vonage petition at Page 22.

services, but are subject to regulation as telephone or telecommunications service providers. Those ILECs providing intrastate telephone services, for example, will bear the heavy burden of regulatory costs – for tariff filings, reporting requirements, service standards, 911 services and the like – while Vonage gets away scot free.

In the interstate jurisdiction, where Vonage is offering IXC services, it will not have to pay access fees and USF assessments. This will give it a tremendous advantage over more traditional IXCs, while depriving ILECs of their rightful access charges and USF payments.[23]

The Commission cannot, under any circumstances, treat functionally equivalent services in different ways, such that one set of providers is arbitrarily and capriciously disadvantaged to the benefit of another set.

V. CONCLUSION

Vonage is providing telecommunications services. If the Commission, under existing rules and precedents, cannot reach this conclusion, it must change these rules and precedents to reflect the current state of the Internet, and the services being offered over it.

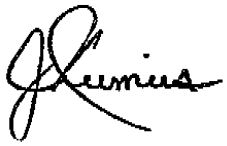
---

[23] A "window" on the Vonage website explains that a $1.50 per line "Regulatory Recovery Fee" is charged "to recover required costs of Federal and State Universal Service Funds as well as other related fees and surcharges." Its petition, however, on page 30 claims that "Vonage would be unable accurately to ascertain its liability for fees, taxes and other charges applicable to intrastate telephone services, or (if it were considered a telecommunications carrier) for regulatory fees administered by this Commission and assessed on interstate revenues."

Presumably, Vonage collects this $1.50 per line Regulatory Recovery Fee, but since it does not consider itself a telecommunications service provider – and would not know where to send these fees, even if it were – it simply keeps the resultant revenue for itself.

In the meantime, this Commission should not preempt the ruling of the Minnesota Public Utilities Commission, which has found the intrastate components of Vonage's services to be intrastate, and within its regulatory authority.

Respectfully submitted,
ICORE, Inc.



Jan F. Reimers
President
326 S. 2nd Street
Emmaus, PA 18049
610-928-3944

Gary M. Zingaretti
Sr. Vice President
326 S. 2nd Street
Emmaus, PA 18049
610-928-3944