BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Time Warner Cable Information Services (Missouri), LLC for a Certificate of Service Authority to Provide Local and Interexchange Voice Service in Portions of the State of Missouri and to Classify Said Services and the Company as Competitive	)	Case No. LA-2004-0133

RESPONSE OF SPRINT
TO ORDER DIRECTING FILING

COMES NOW Sprint Missouri, Inc. and Sprint Communications, L.P. (collectively "Sprint"), and hereby files its response to the Commission's Order in this case.

1. On September 12, 2003, Time Warner Cable Information Services (Missouri), LLC ("Time Warner") filed its Application for Certificate of Service Authority to provide local and interexchange voice services in portions of Missouri and for competitive classification. In its Application, Time Warner stated that it would be providing certain services via facilities-based local Internet Protocol ("IP"; also commonly termed voice over Internet protocol or "VoIP"). Subsequently, an Order was issued by the Commission on November 4, 2003 which, among other things, included a statement that the Commission intended to address the policy and public interest aspects of VoIP in the course of this case. At that point Sprint petitioned for, and was subsequently granted late intervention in this proceeding by an Order dated November 13, 2003. In that Order, the Commission directed all parties, including Sprint,

to file briefs setting forth their positions with regard to the threshold matter of the Commission's jurisdictional authority over VoIP. Sprint hereby submits its brief, in compliance with the Commission's directive.

2. As an initial matter, prior to addressing jurisdiction related to VoIP in these comments, Sprint reiterates its fundamental concern[1] with the Commission's stated intention to conduct an analysis of policy and public interest issues surrounding VoIP in the context of this particular case — particularly given the fact that Time Warner has already stated that access charges will be paid, and that it will abide by current Missouri rules and statutes applicable to competitive carriers[2]. Given Time Warner's declaration, Sprint believes that the Commission's examination of overarching potential VoIP policy and public interest matters in the context of what should be a competitive certification case is misplaced. The effort and time necessary for a comprehensive evaluation of any unique regulatory matter presented by VoIP in Missouri would be better spent in a proceeding with a broader focus not constrained by the facts of a particular carrier's deployment methodology.

3. With respect to the question posed by the Commission regarding jurisdictional authority over VoIP, Sprint offers the following. As a local exchange carrier ("ILEC"), interexchange carrier ("IXC"), and competitive exchange carrier ("CLEC") certificated to provide services in Missouri, Sprint has analyzed this issue from several divergent perspectives and takes a balanced approach not unlike the task required of the Commission in addressing VoIP at this time. Services utilizing VoIP technology are quickly becoming a significant issue for the telecommunications industry.

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1 See Sprint's Application to Intervene Out of Time, Case No. LA-2004-0133, November 7, 2003, ¶ 6.

2 See Time Warner's Application for Service Authority, Case No. LA-2004-0133, September 12, 2003, ¶ 8; Also, Time Warner's Motion For Rehearing or Reconsideration, November 7, 2003, ¶ 2 and ¶ 5.

4. For purposes of this filing the Commission has presented one primary issue: does the Commission have jurisdiction over this service? In order to answer this primary question in the affirmative there is essentially a two-part test: 1) Does the VoIP service proposed by Time Warner fit the definition of a telecommunications service subject to the jurisdiction of the Commission pursuant to Missouri statutes; and, if true 2) Has the FCC or Federal law in any way preempted the Commission from exercising its state granted authority.

5. Sprint submits that the VoIP service proposed by Time Warner does, indeed, meet the current Missouri statutory tests[5] and should be subject to this Commission's regulation and all appropriate compensation requirements for the exchange of such telecommunications traffic. First, VoIP service falls within the definition of telecommunications service. This definition is provided in Section 386.020(53). This section defines telecommunications services in relevant part as:

> [T]he transmission of information by wire, radio, optical cable, electronic impulse, or other similar means. As used in this definition, "information services" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

Clearly, where VoIP services are offered as a real-time, two-way voice service for a fee directly to the public, with no change in content or interaction with stored data, and uses the North American Numbering Plan resources (10-digit telephone numbers), they are a telecommunications service as defined by Missouri law. As such, the services are subject to the jurisdiction of the Commission under Section 386.250 RSMo. Therefore, Missouri law allows the Commission to exercise jurisdiction over VoIP services.

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[5] See also RSMo 386.220 (1) and 386.320 (1).

6. Regarding the second test, neither the FCC nor Federal law has preempted this Commission from exercising its authority under sate law to determine the proper regulatory status of VoIP. The number of proceedings before the FCC and other states is a clear indication that the status of regulation of VoIP is not a settled issue. As explained by Sprint in its Comments before the FCC in WC Docket No. 03-211[6], and equally applicable here, "in its 1998 Report to Congress, the Commission stated that it did not believe 'that it is appropriate to make any definitive pronouncements [regarding the regulatory classification of IP telephone services] in the absence of a more complete record focused on individual service offerings'". In that same report, the FCC stated that "the classification of a service under the 1996 Act depends on the functional nature of the end-user offering."[7] Clearly, to the extent that VoIP services offer a two-way voice service that allows both local and intrastate services, it should be classified and treated as any other intrastate service. Further, in a November 6, 2003 Press Release, the FCC announced a forum on VoIP issues to be held December 1, 2003. The Press Release states that "it will also explore regulatory classification issues" among other things. The Press Release in no way suggests what the outcome of that determination will be. Clearly, the regulation of VoIP is not a settled matter at the FCC. Until there is some definite statement from the FCC that clearly pre-empts the states, there is no issue of pre-emption. No party to this case can legitimately claim to know what the FCC will do or when it will do it.

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[6] Comments of Sprint Corporation, October 27, 2003, In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, page 8 - 9. Copy is attached.

[7] 13 FCC RCD at 11543 (para.86).

7. The Commission has the requisite jurisdiction to regulate VoIP based services where they are offered as a telecommunications service. As stated above, when VoIP services are offered as a real-time, two-way voice service for a fee directly to the public, with no change in content or interaction with stored data, and uses the North American Numbering Plan resources (10-digit telephone numbers), they are a telecommunications service.

8. In evaluating the regulation applied to VoIP by the Commission, it should be recognized the VoIP is not merely a "new service" or technology, but also serves as a direct substitute for existing voice services. As such, it should be regulated consisted with the Commission's rules for traditional circuit-switched based CLECs. Sprint looks forward to participating in the analysis of this important matter in Missouri, albeit in what is felt to be the inappropriate context of this specific case.

WHEREFORE, Sprint respectfully asks the Commission to consider its position on this matter.

Respectfully submitted,

SPRINT

Lisa Creighton Hendricks
6450 Sprint Parkway, Bldg. 14
Mail Stop: KSOPHN0212-2A253
Overland Park, Kansas 66251
Voice: 913-315-9363
Fax: 913-523-9829
lisa.c.creightonhendricks@mail.sprint.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on each of the following parties by first-class/electronic/facsimile mail this 20th day of November, 2003:

Southwestern Bell Telephone, L.P.
d/b/a SBC Missouri
Paul G. Lane
Leo J. Bub
Anthony K. Conroy
Mimi B. MacDonald
One SBC Center, Room 3520
St. Louis, MO 63101

John B. Coffman
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65101

Dana K. Joyce
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

Sheldon K. Stock
Jason L. Ross
Greensfelder, Hemker & Gale, PC
10 South Broadway, Suite 2000
St. Louis, MO 63102

Craig S. Johnson
Bryan D. Lade
Andereck, Evans Milne,
Peace & Johnson
P.O. Box 1438
Jefferson City, MO 65102

James M. Fischer
Larry Dority
Fischer & Dority, PC
101 Madison, Suite 400
Jefferson City, MO 65101

William R. England, III
Brian T. McCartney
Brydon, Swearengen & England P.C.
P.O. Box 456
Jefferson City, MO 65102

J. Steve Weber
AT&T Communications of the
Southwest, Inc.
101 W. McCarty, Suite 216
Jefferson City, MO 65101

Rebecca B. DeCook
AT&T Communications of the
Southwest, Inc.
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Lisa Creighton Hendricks

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 SPRINT CORPORATION

Norina Moy
Richard Juhnke
401 9th St., NW, Suite 400
Washington, DC 20004
(202) 585-1915

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Concerning an Order of the Minnesota	)	
Public Utilities Commission	)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation, pursuant to the Public Notice released September 26, 2003 (DA 03-2952), hereby respectfully submits its comments in the above-captioned proceeding. Although Vonage's petition may be rendered moot by the October 16, 2003 decision issued by the U.S. District Court of Minnesota[1] (unless that decision is appealed and set aside), both the *Minnesota Court Order* and Vonage's petition misconstrue federal regulations and overstate the alleged federal interest which would warrant preemption of state law by the FCC. Thus, the FCC should deny Vonage's petition and act expeditiously to clarify and update the appropriate regulatory treatment of voice over IP (VoIP) services.

I. INTRODUCTION AND SUMMARY.

In its petition (pp. 1-2), Vonage claims that its VoIP service, DigitalVoice, is an information service because it uses broadband Internet connections, requires specialized

[1] *Vonage Holdings Corp. v. The Minnesota Public Utilities Commission and Leroy Koppendrayer, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as the commissioners of the Minnesota Public Utilities Commission and not as individuals*, Civil No. 03-5287 (MJD/JGL), *Memorandum and Order* released October 16, 2003 ("*Minnesota Court Order*").

CPE and software, and involves a net protocol conversion for calls between its subscribers and users of the public switched telephone network (PSTN). Vonage does not provide 911 service (*id.*, p. 8), and did not obtain a certificate of authority from the Minnesota PUC or file tariffs in that state (*id.*, p. 11) prior to the date on which it began offering service in Minnesota. In September 2003, the Minnesota PUC concluded that Vonage was providing telephone service as defined in Minnesota law, and ordered Vonage to obtain a certificate of authority from the PUC (which requires approval of a 911 service plan) and to file a tariff.[2] Vonage challenged the *Minnesota PUC Order* in U.S. District Court, which subsequently issued a permanent injunction against implementation of the *Minnesota PUC Order*, concluding that Vonage was offering "an information service, as defined by Congress and interpreted by the FCC," and that pre-emption was necessary because of the conflict between state and federal laws.[3]

Vonage here also requests that the FCC preempt the *Minnesota PUC Order*. As it did before the U.S. District Court in Minnesota, Vonage argues that because it is offering an information service, it is not subject to Title II common carrier or "telecommunications service" regulation (p. 12); that the *Minnesota PUC Order* conflicts with federal laws and policies (p. 17); and that federal preemption is required because Vonage's service cannot be separated into interstate and intrastate components (p. 27). The relief which Vonage sought in the instant petition has already been granted by the U.S. District Court of Minnesota. Although Sprint disagrees with the reasoning behind

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[2] *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108, Order* released September 11, 2003 ("*Minnesota PUC Order*"), p. 8.
[3] *Minnesota Court Order*, p. 17.

the permanent injunction preventing enforcement of the *Minnesota PUC Order,* and is deeply concerned about the competitive and USF implications of the Court's decision, we believe that the Court was absolutely correct in asserting that "[t]his case illustrates the impact of emerging technologies evolving ahead of the regulatory scheme intended to address them" (*Minnesota Court Order*, p. 1). The proliferation of computer-to-phone, phone-to-computer, and computer-to-computer VoIP services such as that offered by Vonage requires that the FCC clarify and update its policies regarding the regulatory treatment of such services.

As discussed below, Sprint also believes that both Vonage and the Minnesota Court have misconstrued the FCC's findings regarding VoIP in the *1998 USF Report to Congress*.[4] Because any conclusions about the federal regulatory status of VoIP service as a telecommunications or an information service included in that Report were either tentative or inapplicable to Vonage's services, there are no well-defined federal objectives at issue here which would warrant broad federal preemption. Vonage holds itself out as a provider of local and intrastate end user telephone services -- services over which the Minnesota PUC has undisputed regulatory authority. In the absence of any well-defined federal interest, Vonage's local and intrastate service offerings in Minnesota should fall under the jurisdiction of the Minnesota PUC, and should be subject to state law.

Sprint also recommends that the Commission's standards for distinguishing between telecommunications services and information services be updated to include an

[4] *Federal-State Joint Board on Universal Service, Report to Congress,* 13 FCC Rcd 11501 (1998).

element of functional equivalency. Where a real-time, two-way voice service is offered for a fee directly to the public, with no change in content or interaction with stored data, and uses North American Numbering Plan resources (10-digit telephone numbers), that service should be considered to be a telecommunications service even if it involves a net protocol conversion, and should be subject (absent explicit exemption) to the same rules and regulations which apply to the provision of traditional circuit-switched voice services. This standard will help to ensure competitive regulatory parity among all functionally equivalent services. Sprint believes that updating federal regulation of VoIP along these lines will do much to clarify matters and provide needed certainty in the marketplace.

II. UNDER A "FUNCTIONAL EQUIVALENCY" STANDARD, THE MINNESOTA PUC ACTED APPROPRIATELY IN ASSERTING JURISDICTION OVER LOCAL AND INTRASTATE END USER SERVICES OFFERED BY VONAGE.

In its September 11, 2003 order (p. 8), the Minnesota PUC concluded that:

> ... Vonage is offering...two-way communication that is functionally no different than any other telephone service. This is telephone service within the meaning of Minnesota Stat. Sections 237.01, subd. 7, and 237.16, subd. 1(b) and is clearly subject to regulation by the Commission.... [T]he Commission finds it has jurisdiction over Vonage as a company providing telephone service in Minnesota, and the Commission will require that Vonage comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service.

As is evident from its order, the Minnesota PUC relied upon relevant state law, not federal rules and regulations, in considering the appropriate treatment of Vonage's local and intrastate service offerings. The Telecommunications Act of 1996 did not eliminate the States' right and responsibility to regulate local and intrastate end user services under state law,

and the FCC does not have the unfettered ability to preempt state laws. Because the service being offered to Minnesota consumers and businesses was positioned by Vonage as a local/intrastate telephone service, the Minnesota PUC properly evaluated that service through the lens of state law. Under these circumstances, Vonage's references to common carrier regulation under Title II as the basis for overturning the Minnesota ruling are inapt.

Although Vonage repeatedly asserts in the instant petition that it is providing an information service, it is clear from its marketing information that Vonage has held and continues to hold itself out as a provider of local and long distance telephone service. For example, its website (www.vonage.com) describes its DigitalVoice service as "an all-inclusive home phone service that replaces your current phone company. This is like the home phone service you have today – only better!" In its press release announcing the introduction of service in Minneapolis, Vonage states that it is "offering residents and small businesses an alternative to their local phone companies and free unlimited local and long distance phone service" for a flat monthly fee,[5] and that "utilizing proprietary technology, subscribers use a high-speed Internet connection and a standard telephone to make calls anywhere in the world" (*id.*). And, in September 2003, Vonage began assessing a $1.50 "Regulatory Recovery Fee" per phone number (for primary voice lines, second lines, fax lines, Toll Free Plus numbers and Virtual Phone numbers) to recover "required costs of Federal

[5] "Vonage DigitalVoice Comes to Minneapolis," press release issued December 16, 2002, quoting Jeffrey Citron, chairman and CEO of Vonage.

and State Universal Service Funds as well as other related fees and surcharges."[6] Because federal USF contributions are assessed on telecommunications services revenues (not on revenues earned from the provision of enhanced or information services), Vonage's decision to implement a specific rate element to recover its USF contributions appears to be an acknowledgement that at least some of its services fall within the telecommunications category.[7]

Although the Court found that the Minnesota PUC's "quacks like a duck" analysis was overly simplistic (*Minnesota Court Order*, pp. 16-17), use of a functional equivalency standard to help determine the regulatory status of a service is not a dramatic departure from existing practice. In its *1998 Report to Congress*, the Commission stated that "the classification of a service under the 1996 Act depends on the functional nature of the end-user offering."[8] In applying this test to IP telephony, the FCC tentatively concluded that certain

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[6] *See "Frequently Asked Questions: Regulatory Recovery Fee,"* www.vonage.com/help/. In a customer notification sent by Ingrid Pettigrew, VP Vonage Customer Care, Vonage explained that its decision to begin assessing the $1.50 Regulatory Recovery Fee was based in part to "dispel the misconception within the industry that we do not pay into various universal service funds and the like." It is passing strange that a service provider would revise its retail rate structure to dispel "industry" misconceptions; however, such revision does make Vonage's price structure look more like that associated with telephone service packages offered by traditional common carriers.

[7] It remains unclear, however, on what portion of its revenues Vonage is making USF contributions, since its regulatory fee as a percentage of its base monthly recurring charge ($34.99) is only about half the federal USF contribution rate. Sprint would also note that entities that contribute to the federal USF are required to file a Form 499A, and that according to the Form 499A database on the FCC's website, Vonage has not filed such a form.

[8] 13 FCC Rcd at 11543 (para. 86).

forms of phone-to-phone IP telephony are telecommunications services which should be subject to access charges and USF payments.[9]

Formalizing the use of a functional equivalency analysis to determine regulatory classifications has two other important public interest benefits: it helps to ensure a level competitive playing field – a concept which Vonage itself endorses, at least in theory;[10] and it contributes to the on-going viability of the Universal Service Fund. As described above, Vonage seeks to persuade consumers to use its DigitalVoice service in place of services offered by the incumbent LEC and traditional IXCs. Allowing Vonage to provide DigitalVoice service without bearing the costs of complying with common carrier requirements (filing local tariffs, providing 911 service, paying access charges, contributing fairly to USF, complying with CALEA requirements, etc.) gives Vonage a tremendous competitive advantage over LECs and IXCs that are acknowledged common carriers. Furthermore, allowing Vonage and other VoIP providers to avoid the full burden of contributing to the USF threatens the viability of the USF. Service providers who are able to reclassify their telecommunications revenues as information service revenues will reduce the funding base for USF, thereby placing increasing pressure (in the form of a higher contribution factor) on the remaining base of contributory revenues.

[9] *Id.* at 11544-11545, paras. 91-92.

[10] In its petition (p. 23), Vonage urges federal preemption of state law "to assure regulatory parity among companies that provide exactly the same service over exactly the same facilities in exactly the same manner."

Such a result is incompatible with long-term sustainability of the Universal Service Fund.

III. VONAGE AND THE MINNESOTA COURT MISCONSTRUE THE FCC'S *1998 USF REPORT TO CONGRESS.*

If the number of proceedings relating to VoIP is any indication, it would be safe to assert that the status of federal regulation of VoIP services remains unsettled. There are currently two petitions for declaratory ruling pending before the FCC, filed by AT&T and pulver.com regarding their specific versions of VoIP.[11] In addition, the FCC is expected to initiate a rulemaking proceeding on more general VoIP issues in the near future.[12] And, broad proceedings relating to intercarrier compensation and USF reform (both of which have significant implications for the provision of VoIP services) remain open. If federal regulations governing the various types of VoIP were as clear as Vonage asserts (and as the Minnesota Court mistakenly assumed), there would be little need to resolve the proceedings currently before the FCC, much less for the FCC to institute a broad rulemaking proceeding on VoIP.

Both Vonage and the *Minnesota Court Order* rely heavily on the FCC's *1998 Report to Congress* as the basis for asserting that Vonage's VoIP offering is an information rather than a telecommunications service. However, this reliance is

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[11] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, filed October 18, 2003; *Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, filed Feb. 5, 2003.

[12] "Powell Says It's Time to Tackle VoIP," *Communications Daily*, October 2, 2003, p. 3; "Comr. Abernathy Says VoIP Is Ripe For FCC At This Point," *id.*, p. 4; "Forbearance for Cable Modem Service Called 'Tricky,'" *Communications Daily*, October 16, 2003, p. 2 (quoting Christopher Libertelli of Chairman Powell's office that a rulemaking on VOIP is likely by the end of the year).

misplaced. In its *1998 Report to Congress,* the Commission stated that it did not believe "that it is appropriate to make any definitive pronouncements [regarding the regulatory classification of IP telephony services] in the absence of a more complete record focused on individual service offerings."[13] Because the Commission never "formally considered the legal status of IP telephony" (*id.*) prior to the *1998 Report to Congress*, and has not subsequently issued any decisions on IP telephony, the lack of "definitive pronouncements" in this *Report* means that the status of VoIP as an information service or a telecommunications service remains unsettled. The *1998 Report to Congress* simply does not support a finding that Vonage's DigitalVoice offering is an information service; in fact, the Commission's preliminary analysis of IP telephony does not, for the most part, even address the type of service offered by Vonage:

- **computer-to-phone or phone-to-computer VoIP services:** The *1998 Report to Congress* did not even consider this form of VoIP; therefore, it provides no clarification at all as to the regulatory status of voice calls between Vonage subscribers and users of the PSTN (assuming that DigitalVoice falls into this category of VoIP service).

- **computer-to-computer VoIP services:** In the *1998 Report to Congress*, the Commission did comment that Internet service providers over whose networks computer-to-computer information passes "do[] not appear to be provid[ing] telecommunications" to their subscribers, noting that the ISP "might not even be aware that particular customers are using IP telephony software" and hardware at their premises to place calls between two computers connected to the Internet (13 FCC Rcd 11543, para. 87). However, because Vonage "does not provide the Internet connection and is not an ISP itself" (Petition, p. 15), this analysis would not apply to calls between Vonage subscribers which do not touch the PSTN, Vonage's assertion to the contrary notwithstanding (*id.*, p. 16). Indeed, the computer-to-computer VoIP service which Vonage provides when one Vonage customer calls another Vonage customer is more properly considered a *basic* telecommunications service – real-time voice service is being offered for a fee; there is no net change in form or content (no net protocol conversion occurs); and the subscriber is not provided with additional, different, or restructured

[13] 13 FCC Rcd at 11541, para. 83.

information. Regulating a basic telecommunications service which happens to be provided using the Internet is *not* the same thing as regulating "the Internet," and any preemption decision made on the basis of this distortion should be overturned.

- **phone-to-phone VoIP service:** In the *1998 Report to Congress*, the Commission "acknowledge[d] that there may be telecommunications services that can be provisioned through the Internet" (13 FCC Rcd at 11550, para. 101), and tentatively remarked that "this type of IP telephony lacks the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services'" (*id.* at 11544, para. 89). However, Vonage claims that it does not offer phone-to-phone VoIP service (Petition, p. 13, n. 21); thus, the Commission's interim findings regarding this flavor of VoIP are not relevant here.

Given the lack of resolution regarding the regulatory status of the different types of VoIP, it is difficult to understand how either Vonage or the Minnesota Court can rely upon the *1998 Report to Congress* to support their view that Vonage's DigitalVoice service is an information service. Far from providing "enhanced clarity with regard to the distinction between traditional telephone services offered by common carriers, and the continuously growing universe of information services,"[14] the *1998 Report to Congress* simply deferred to a future proceeding decisions on most of the issues raised by the Vonage petition. And, as discussed in Section IV below, this lack of clarity on the FCC's part necessarily means that there is no well-defined federal objective which needs to be protected by means of federal preemption of state laws.

Vonage also cites the *1998 Report to Congress* to support its contention that its DigitalVoice service is "fundamentally inseparable from the enhanced nature of Internet access itself" (Petition, p. 13, quoting the Commission's finding that Internet access providers cannot be deemed to be providing separate services with separate legal statuses

[14] *Minnesota Court Order*, p. 11.

(as a telecommunications service and as an information service)).[15] However, this portion of the *1998 Report to Congress* concerned services provided by *ISPs*, not by entities which happen to provide service using the Internet. Vonage is not an ISP; on the contrary, it requires its customers to obtain Internet access from another entity. Vonage has chosen to use the Internet as a means of transporting calls, nothing more, nothing less. This distinction does not warrant its being treated differently than other carriers that utilize other forms of transport. Moreover, the Commission recognized that Internet-based services "might fall within the statutory definition of 'telecommunications,'"[16] and cautioned that, to the extent it concluded that certain forms of IP telephony are telecommunications services, those services might be subject to access charges, and would be subject to mandatory USF contributions under section 254(d) of the Act.[17]

Although classification of its DigitalVoice service would impose certain responsibilities on Vonage which it might prefer to avoid, it is important to note that classification of its VoIP offering as a telecommunications service also confers valuable rights upon Vonage. As a carrier, Vonage would be entitled to directly obtain numbering resources, to interconnect with other carriers, and to purchase UNEs. In an increasingly competitive telecommunications market, these rights are of critical importance. Lacking

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[15] Vonage also cites (Petition, n. 24) the Commission's *Cable Modem Declaratory Order* as further support for the proposition that end user services offered over the Internet are information services. Here again, however, the FCC order cited involved services offered by the cable provider, not applications provided by entities that happen to utilize the Internet. In any event, the *Cable Modem Declaratory Order* has been vacated in part (to the extent that the order concluded that cable modem service is not in part telecommunications service) by the Ninth Circuit Court of Appeals (*Brand X Internet Services v. FCC*, No. 02-70518, Opinion released October 6, 2003).

[16] 13 FCC Rcd at 11541 (para. 83).

[17] 13 FCC Rcd at 11545 (paras. 91-92).

these rights on their own, non-carrier VoIP providers would be required to utilize third parties which have these rights in order to interconnect or acquire numbering resources.

IV. FEDERAL PREEMPTION IS PREMATURE AND UNWARRANTED.

In its petition, Vonage argues (p. 27) that federal preemption of state laws which regulate Internet applications is warranted because it is impossible to separate Vonage's service into interstate and intrastate components. However, the preemption which Vonage sought (and which was granted by the Minnesota Court) is overly broad and certainly premature.

Vonage states (Petition, p. 20) that the FCC has been allowed to "significantly limit[] the scope of the states' regulatory authority" to impose common carrier rules on enhanced and information services. In support thereof, Vonage quotes a decision of the U.S. Court of Appeals for the D.C. Circuit which, according to Vonage, concluded that "[f]or the federal program of deregulation to work, state regulation of CPE and enhanced services ha[ve] to be circumscribed."[18] However, the language quoted by Vonage is included in the background section of that opinion, and is nothing more than a quotation from the Commission's Computer II *Order on Further Reconsideration* (88 FCC 2d 512, 541 (n. 34)). It was not, as Vonage incorrectly characterizes it, a conclusion or decision of the Court. Although the U.S. Court of Appeals upheld the Commission's preemption of state regulation of CPE, the Court did not, in fact, address the federal preemption of enhanced services at all in this case.

[18] *Computer & Communications Indus. Ass'n. v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982).

The 9th Circuit Court of Appeals has, however, addressed an overly broad attempt by the FCC to preempt state regulation of enhanced services. In *California v. FCC* (a case which Vonage neglects to even mention), the 9th Circuit Court found that the FCC could not preempt the states regarding tariffing of intrastate enhanced services.[19] In that case, the 9th Circuit found (at 1240) that

> ...the broad language of Section 2(b)(1) makes clear that the sphere of state authority which the statute "fences off from FCC reach or regulation," *Louisiana PSC*, 476 U.S. at 370, 106 S.Ct. at 1899, includes, at a minimum, services that are delivered by a telephone carrier "in connection with" its intrastate common carrier telephone services.... That these enhanced services are not themselves provided on a common carrier basis is beside the point. As long as enhanced services are provided by communications carriers over the intrastate telephone network, the broad "in connection with" language of Section 2(b)(1) places them squarely within the regulatory domain of the states.

The 9th Circuit did subsequently uphold a far narrower FCC preemption.[20] In this remanded proceeding, the FCC preempted only state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services, based on specific economic and operational factors. The Court allowed the federal preemption to stand because the FCC had adequately demonstrated that its actions met the impossibility exception to Section 2(b)(1) – that it was impossible to comply with both the states' and the FCC's regulations.

No such showing has been made in the instant proceeding. Vonage has not demonstrated that preemption here would similarly meet the impossibility

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[19] *People of the State of California and Public Utilities Commission of the State of California v. FCC*, 905 F.2d 1217 (9th Cir., 1990).
[20] *People of the State of California, et al., v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994).

standard, and that the state regulation "would negate valid FCC regulatory goals."[21] Given the lack of any "definitive pronouncements" by the FCC regarding the disposition of VoIP as an information service or a telecommunications service, and the states' undisputed jurisdiction over local and intrastate end user services, Vonage cannot reasonably assert that any federal regulatory goal has even been identified, much less compromised by state regulation of DigitalVoice service.

Vonage also asserts that the 911 requirements included in the *Minnesota PUC Order* would interfere with federal policies because enforcement of the state requirement "would effectively make it impossible for Vonage to provide interstate services to customers who travel" (Petition, p. 25). It is not clear why this should be the case, or why advanced location identification technologies could not be deployed in conjunction with VoIP service used by Vonage's traveling subscribers. Certainly, advanced technologies (such as assisted GPS service) are helping to make wireless E911 capability a reality.[22] Vonage's apparent refusal to even consider deployment of similar capability in the hardware or software used to provide DigitalVoice service raises serious public safety concerns, and hiding behind an information service label will do nothing

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[21] *Id.* at 931.

[22] As Commissioners Abernathy and Adelstein have stated, "several technological solutions to identify a wireless 911 caller's location are now available, with more anticipated in the future" (Joint Written Statement of Commrs. Abernathy and Adelstein, Hearing on Wireless E911 before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, March 5, 2003, p. 2). Wireless E911 capability may involve either a handset-based or network-based solution (*id.*, p. 5).

to address those legitimate concerns. Sprint believes that both federal and state regulators would be willing to exercise regulatory flexibility in considering various means of providing 911 capability, and would not force VoIP service providers such as Vonage to implement the exact system employed by incumbent LECs.[23] Thus, the 911 requirement included in the *Minnesota PUC Order* should not be accepted as a valid basis for federal preemption.

V. CONCLUSION.

There can be no dispute that Vonage has positioned its DigitalVoice service as a competitive alternative to the local and long distance services offered by incumbent LECs and traditional IXCs. For reasons of functional equivalency, public safety, competitive parity, and sustainability of the USF, Sprint believes that Vonage's service must be classified as a telecommunications service. Both Vonage and the Minnesota Court have misconstrued the FCC's *1998 USF Report to Congress*; although this *Report* is the only instance in which the FCC has specifically discussed the regulatory status of VoIP services, any conclusions in that *Report* regarding VoIP were either tentative or inapplicable to the type of service offered by Vonage. Because the regulatory status of VoIP services remains uncertain, there is no federal objective to preserve and federal preemption of state regulations governing VoIP (particularly preemption on an

[23] Indeed, the FCC has previously expressed a willingness to be flexible regarding deployment of 911 service for VoIP and other developing communications platforms, seeking comment "on whether and how [it] could structure its E911 rules or similar requirements to encourage entry for these and other new [communications] devices, while taking into account the important public safety concerns relevant to our E911 policies" (*Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, Further Notice of Proposed Rulemaking*, 17 FCC Rcd 25576, 25614 (para. 115) (2002)).

excessively broad basis) is unwarranted. Under these circumstances, the FCC must deny Vonage's petition and should act expeditiously to clarify the rules under which VoIP services will be classified as an information or telecommunications service.

Respectfully submitted,

SPRINT CORPORATION

Norina Moy
Richard Juhnke
401 9th St., NW, Suite 400
Washington, DC 20004
(202) 585-1915

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