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

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SUMMARY

The United States Department of Justice ("USDOJ") and the Federal Bureau of Investigation ("FBI") reiterate their request — as supported by numerous other parties in this proceeding — that the Commission dismiss the Vonage Petition as premature or, in the alternative, deny the relief requested in the Vonage Petition.

As the USDOJ and FBI emphasized in their joint comments in this proceeding, there is no threat of harm to Vonage as a result of the *Minnesota PUC Order* because there is currently a permanent injunction in place that prevents enforcement of the *Minnesota PUC Order*, and the Minnesota PUC has explicitly stated that it will not enforce the *Minnesota PUC Order* as long as that permanent injunction is in effect.

Moreover, it is the Commission's policy not to grant declaratory relief where the matter on which the ruling is requested relates to a matter already under consideration by the Commission in a pending rulemaking proceeding. The issues raised in the Vonage Petition are related to issues under consideration in several proceedings currently pending before the Commission. The tentative conclusions of the Commission in each of these proceedings will necessarily impact, and be impacted by, the Commission's consideration of the Vonage Petition. Therefore, the Commission should, consistent with its longstanding policy, not grant the declaratory relief requested in the Vonage Petition.

Declaratory relief is also inappropriate for Vonage because the regulatory classification of voice-over-internet protocol ("VOIP") service is not uniquely-applicable to Vonage. For this reason, the USDOJ and FBI urge the Commission to dismiss or deny the Vonage Petition, and instead immediately commence a rulemaking proceeding to (1) discuss the regulatory treatment of VOIP service offerings, including Vonage's, and (2) specifically address the application of the

Communications Assistance for Law Enforcement Act ("CALEA") to VOIP service. The Commission should give heed in such a rulemaking (or any other rulemaking in which the Commission addresses CALEA issues) to a critical concern raised by industry and state and local governments, namely, how VOIP service providers comply with requirements of law enforcement, including CALEA. Failure to do so would severely undermine CALEA and Congress' intent in enacting the statute.

Finally, in classifying Vonage's service, the Commission should conclude that it is a "telecommunications service" under the Communications Act. Contrary to Vonage's assertion, it is not a "user" of telecommunications service, but rather, offers "telecommunications service" to the public for a fee. Furthermore, Vonage's argument that it provides an "information service" because net protocol conversion occurs is unsupported by the evidence. For those Vonage calls that originate and terminate on Vonage's network, no net protocol conversion occurs. Furthermore, even where Vonage calls are interconnected to the public switched telecommunications network, the Commission has held in prior decisions that mere protocol conversion, by itself, does not transform a "telecommunications service" into an "information service." Regardless of whether the Commission classifies Vonage's VOIP service as a "telecommunications service" under the Communications Act, the Commission must follow Congress' intent in enacting CALEA and ensure that VOIP services fall under the CALEA definition of "telecommunications carrier" for CALEA purposes.

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JOINT REPLY 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 reply 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"). The USDOJ and FBI hereby reiterate their request — as supported by numerous other parties in this proceeding — that the Commission dismiss the Vonage Petition as premature or, in the alternative, deny the relief requested in the Vonage Petition. Furthermore, the USDOJ and FBI, along with the majority of commenting parties, urge the Commission to immediately commence a rulemaking proceeding to address the regulatory status of voice-over-internet protocol ("VOIP"). Several parties agreed with the USDOJ and FBI that such a rulemaking should specifically address the application of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.* to VOIP service.

I. THE VONAGE PETITION IS PREMATURE AND SHOULD BE DISMISSED

As the USDOJ and FBI emphasized in their comments, there is no threat of harm to Vonage as a result of the *Minnesota PUC Order*[1] because there is currently a permanent injunction in place that prevents enforcement of the *Minnesota PUC Order*, [2] and the Minnesota PUC has explicitly stated that it will not enforce the *Minnesota PUC Order* as long as that permanent injunction is in effect.[3] As the National Association of State Utility Consumer Advocates correctly points out, "[the] stay places Vonage in the same position it had before the [Minnesota PUC] decision; thus Vonage's business is not dependent on the Commission's resolution of [its] petition."[4]

Given that the District Court's decision and the *Minnesota PUC Stay Order* have removed the threat of harm to Vonage resulting from the *Minnesota PUC Order*,[5] the Vonage

[1] *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*"). The *Minnesota PUC Order* ordered Vonage to comply with the directives contained therein within 30 days (*i.e.*, by October 12, 2003).

[2] *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.

[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 Staying Order of September 11, 2003, Docket No. P-6214/C-03-108 (issued Oct. 13, 2003) at 2 ("*Minnesota PUC Stay Order*").

[4] Comments of the National Association of State Utility Consumer Advocates at 2. Other commenting parties echo this sentiment. *See, e.g.*, Comments of SBC Communications, Inc. at 1 (". . . the narrow issue presented by Vonage's petition . . . no longer is of pressing concern . . ."); Comments of the United States Telecom Association at 3 (". . . there is no urgency for a Commission decision on the Vonage Petition because Vonage has received the relief it requested [from the Court]"); BellSouth at 2 ("[i]n light of the permanent injunction, there is no longer any uncertainty for [the] Commission to resolve with respect to the specific relief sought by Vonage in connection with the Minnesota PUC September 11 Order").

[5] On October 30, 2003, the Minnesota PUC filed a motion with the District Court for amended findings of fact, conclusions of law and judgment or, in the alternative, new trial. *See* Motion Of The Minnesota Public Utilities Commission For Amended Findings Of Fact, Conclusions Of Law And Judgment Or, In The Alternative, New Trial, Case No. 03- 5287

Petition is clearly premature and should be dismissed. Most of the commenting parties agreed with the USDOJ and FBI that the Vonage Petition is premature or moot[6] and/or should be dismissed or denied.[7]

II. THE APPROPRIATE REGULATORY CLASSIFICATION OF VOIP SERVICE SHOULD BE ADDRESSED IN A RULEMAKING PROCEEDING, NOT IN AN ADJUDICATION

A. The Vonage Petition Does Not Qualify For Declaratory Relief

As the USDOJ and FBI stated in their comments, and as noted by several commenting parties, the Commission's policy is not to grant declaratory relief where the matter on which the ruling is requested relates to a matter already under consideration by the Commission in a

MJD/JGL (filed Oct. 30, 2003). Notwithstanding the filing of that motion, the Vonage Petition is still premature, because Vonage remains protected by both the District Court's permanent injunction and the *Minnesota PUC Stay Order*.

[6] *See* Comments of BellSouth at 2; Comments of Qwest Communications International Inc. at 2; Comments of the National Association of State Utility Consumer Advocates at 2; Comments of the Independent Telephone and Telecommunications Alliance at 3; Comments of SBC Communications, Inc. at 1; Comments of the Communications Workers of America at 1.

[7] *See* Comments of Montana Telecommunications Association at 14; Comments of the Ohio Public Utilities Commission at 7; Comments of the New York State Department of Public Service at 4; Comments of the National Exchange Carrier Association at 5; Comments of the Communications Workers of America at 1 and 16; Comments of the United States Telecom Association at 3; Comments of the Iowa Utilities Board at 4; Comments of the Texas Coalition of Cities for Utility Issues at 9; Comments of the People of the State of California and the California Public Utilities Commission at 24; Comments of the National Association of State Utility Consumer Advocates at 17; Comments of the Washington Enhanced 911 Program at 1; Comments of the Rural Iowa Independent Telephone Association at 3; Comments of Frontier and Citizens Telephone Companies at 5; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 2; Comments of the Independent Telephone and Telecommunications Alliance at 17; Comments of the Minnesota Statewide 911 Program at 1; Comments of the Metropolitan 911 Board at 1; Comments of the Minnesota Public Utilities Commission at 4; Comments of Sprint Corporation at 16; Comments of Telecom Consulting Associates at 1; Comments of the Minnesota Independent Coalition at 16; Comments of Warinner, Gesinger, & Associates, LLC at 9-10; Comments of the National Telecommunications Cooperative Association at 1 and 9; Comments of CenturyTel at 17; Comments of BellSouth at 9; Comments of the Minnesota Department of Commerce at 25.

pending rulemaking proceeding.[8] As recognized by other commenting parties,[9] the issues raised in the Vonage Petition are related to issues under consideration in several proceedings currently pending before the Commission.[10] Some of these pending proceedings relate to broadband access to the Internet generally, while others deal with the regulation of different types of VOIP service offerings. The tentative conclusions of the Commission in each of these proceedings will necessarily impact, and be impacted by, the Commission's consideration of the Vonage Petition. For this reason, the Commission should, consistent with its longstanding policy, not grant the declaratory relief requested in the Vonage Petition.

[8] *See* Comments of USDOJ and FBI at 7-11; Comments of the United States Telecom Association at 2 and 4; Comments of the Minnesota Office of Attorney General at 6-7.

[9] *See* Comments of the United States Telecom Association at 2; Comments of BellSouth Communications, Inc. at 5-6; Comments of the Ohio Public Utilities Commission at 4-5; Comments of the National Association of State Utility Consumer Advocates at 3; Comments of the New York State Department of Public Service at 4; Comments of Surewest Communications at 14; Comments of Level 3 at 18 and 19; Comments of Time Warner Telecom at 4; Comments of the Minnesota Office of Attorney General at 6; Comments of Sprint Corporation at 8; Comments of the National Exchange Carrier Association at 4; Comments of SBC Communications, Inc. at 3 and 5; Comments of Motorola, Inc. at 2; Joint Comments of MCI and CompTel at 12.

[10] *See, e.g., 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 and NPRM*") (collectively, "*Broadband NPRMs*"); *In the Matter of 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 Oct. 18, 2002) ("AT&T Petition"); *In the Matter of 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) ("Pulver.com Petition"); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*").

B. The Commission Should Deny The Vonage Petition And Instead Initiate A Rulemaking Proceeding To Examine The Appropriate Regulatory Classification Of VOIP Service

The decisions the Commission will make concerning the regulation of broadband access to the Internet will also shape the national telecommunications landscape for decades to come. Accordingly, the Commission must make its decisions carefully and in the proper order. 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 NPRMs*, the Commission must also revisit its determination in the *Cable Modem Declaratory Ruling and NPRM* that cable modem service is only an "information service" as a result of the Ninth Circuit Court's recent decision in the *Brand* X case.[11] This important point was also recognized by the United States Telecom Association in its comments.[12]

If the Commission makes a decision on the appropriate regulatory classification of VOIP service in response to the Vonage Petition before it resolves the "big picture" issues concerning broadband Internet access raised in the pending *Broadband NPRMs*, the Commission will, in effect, be starting the process at the end. Thus, Vonage will be able to continue to provide its VOIP service without the Commission having addressed a number of critical issues associated

[11] *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), that cable modem service contains both information service and telecommunications service components. *See Brand X* at 14756-59 and 14765-69. The Commission may also need to revisit its tentative conclusion in the *Wireline Broadband NPRM* that digital subscriber line ("DSL") service should be classified as only an information service, *see Wireline Broadband NPRM* at 3032-34, ¶¶ 23-27, in light of the *Brand X* decision.

[12] *See* Comments of the United States Telecom Association at 2-4.

with the provision VOIP service generally, including, among others, CALEA, universal service, 911, intercarrier compensation, and access charge obligations. As the USDOJ, FBI and other commenting parties emphasized in their comments, the Commission would be best served by first resolving the regulatory status of broadband access to the Internet, 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.[13]

As the USDOJ and FBI acknowledged in their comments, the Commission has the discretion to proceed by rulemaking or adjudication. The USDOJ and FBI believe that proceeding by rulemaking versus adjudication is necessary here, not only because the issues raised in the Vonage Petition relate to issues under consideration in various pending proceedings, but also because the Commission's decision concerning regulation of VOIP service will apply to providers other than just Vonage.[14] Several commenting parties agreed with the USDOJ and FBI position that declaratory relief is inappropriate for Vonage because the regulatory classification of VOIP service is not uniquely-applicable to Vonage.[15] There is also overwhelming support among the commenting parties for denying/dismissing the Vonage Petition and instead

[13] *See* Comments of USDOJ and FBI at 11; Comments of the Ohio Public Utilities Commission at 3-4; Comments of Qwest Communications International Inc. at 3.

[14] As the Commission is aware, Vonage is not the only company that offers VOIP service. A rulemaking is the only appropriate forum in which the Commission can gain an accurate and complete understanding of the similarities and differences between VOIP service providers' networks and service architectures, and fairly hear the views of all parties with an interest in the significant policy issues surrounding VOIP service. Other commenting parties support this approach. *See, e.g.*, Comments of the Ohio Public Utilities Commission at 5-6; Comments of the Minnesota Public Utilities Commission at 4-5.

[15] *See* Comments of Qwest Communications International Inc. at 2; Comments of the New York State Department of Public Service at 2.

establishing a specific proceeding to discuss the regulatory treatment of VOIP service offerings, including Vonage's.[16]

Denying the Vonage Petition in favor of establishing a rulemaking proceeding to examine the appropriate regulatory classification of VOIP service is also consistent with the Commission's recent statements concerning VOIP issues. The Commission's recent announcement of a December 1, 2003 public forum to discuss VOIP,[17] as well as the Commission's stated intention to issue a Notice of Proposed Rulemaking on VOIP issues shortly thereafter,[18] suggest that the Commission also believes that proceeding by rulemaking is the best approach.

III. ANY PROCEEDING THAT CONSIDERS THE APPROPRIATE REGULATORY CLASSIFICATION OF VOIP SERVICE MUST ENSURE THAT THE GOALS OF CALEA ARE MET

A. The Commission Has Primary Responsibility for Regulatory Implementation of CALEA

[16] *See* Comments of the Montana Telecommunications Association at 15; Comments of Montana Independent Systems at 2 and 5; Comments of the Ohio Public Utilities Commission at 2-5; Comments of the New York State Department of Public Service at 2-3; Comments of the Communications Workers of America at 16; Comments of the Iowa Utilities Board at 3; Comments of the Texas Commission on State Emergency Communications and Texas Emergency Communication Districts at 3-4; Comments of the National Association of State Utility Consumer Advocates at 2 and 17; Comments of the Rural Iowa Independent Telephone Association at 2; Comments of the Independent Telephone and Telecommunications Alliance at 17; Comments of the Minnesota Public Utilities Commission at 4; Comments of Sprint Corporation at 1 and 16; Comments of Telecom Consulting Associates at 2; Comments of CenturyTel at 17; Comments of BellSouth at 2-4; Comments of SBC Communications, Inc. at 4-7; Comments of Motorola, Inc. at 2; Comments of the Minnesota Office of Attorney General at 5-7; Comments of Verizon at 3; Comments of the Alliance for Public Technology at 1; Comments of DJE Teleconsulting at 1-2 and 4-5; Comments of The ICORE Companies at 11-12; Comments of the United States Telecom Association at 3-4; Comments of Surewest Communications at 15; Comments of the Minnesota Department of Commerce at 25.

[17] *FCC to Begin Internet Telephony Proceedings: VOIP Forum Scheduled for December 1*, News Release (rel. Nov. 6, 2003).

[18] *Id.*

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. CALEA's purpose is to ensure that lawful electronic surveillance keeps pace with changes in telecommunications technology as telecommunications services migrate to new technologies.[19] For that reason, CALEA's application is technology neutral.[20] The Commission, as the agency with primary responsibility for CALEA regulatory implementation, is required to ensure not only that the statute's mandates are met, but also that they are not thwarted.

Any determination by the Commission concerning the regulatory status of VOIP service — whether it be in this proceeding, any of the pending broadband proceedings, the pending AT&T and Pulver.com proceedings, a future VOIP-specific proceeding, or a future CALEA-

[19] 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 ("*CALEA Legislative History*"). 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.*

[20] "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 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) (". . . we emphasize that whether a capability is broadband does not depend on the use of any particular technology or nature of the provider").

specific proceeding — must find that VOIP service is covered by CALEA.[21] To find otherwise would be inconsistent with CALEA's mandate because it would preclude CALEA-compliant surveillance of telephone calls based solely on the type of technology employed by the service provider. The chorus on this issue among the commenting parties is clear: most of the commenting parties that addressed CALEA in their comments agreed with the USDOJ and FBI that VOIP service must be covered by CALEA.[22]

B. VOIP Equipment Manufacturers, VOIP Service Providers, Telecommunications Carriers, and State and Local Governments Agree That VOIP Providers Should Meet the Needs of Law Enforcement, Including CALEA

The Commission should recognize and give heed to a critical concern raised by equipment manufacturers, VOIP service providers, telecommunications carriers, and state and local governments — *i.e.*, the Commission must address the issue of how VOIP providers comply with requirements of law enforcement, including CALEA.[23] As recognized by several

[21] As discussed in Section II.B., above, the USDOJ and FBI urge the Commission to initiate a VOIP-specific rulemaking proceeding to determine the appropriate regulatory classification and address the critical issues associated with the provision VOIP service, in particular, the applicability of CALEA to VOIP services and VOIP service providers. Nevertheless, if the Commission chooses to make a pronouncement on the appropriate regulatory classification of VOIP service in the pending *Broadband NPRMs*, or in the AT&T or Pulver.com petition dockets, the Commission must include as part of that pronouncement that VOIP service is covered by CALEA.

[22] *See* Comments of the Alliance for Public Technology at 4 ("[a]ny VOIP provider should be obligated to . . . comply with CALEA"); Comments of Frontier and Citizens Telephone Companies at 9-10 and 14 (". . . where a carrier like Vonage advertises and provides voice-to-voice POTS, it is fully consistent with existing rules to find that the carrier . . . must comply with CALEA"); Surewest Communications at 12 (". . . regardless of the regulatory classification of the Vonage voice service, the Commission should impose CALEA requirements on such services"); Comments of the National Association of State Utility Consumer Advocates at 16-17; Comments of the Communications Workers of America at 9-10.

[23] Comments of National Association of State Utility Consumer Advocates at 3 and 16-17; Comments of Surewest Communications at 12; Comments of Cisco at 5; Comments of the Communications Workers of America at 3, 7; Comments of Frontier and Citizens Telephone

commenting parties, it is expected that VOIP service will eventually displace traditional circuit-mode telecommunications.[24] In fact, MCI, one of the industry's largest Internet protocol ("IP") communications network operators, called for the Commission to address "law enforcement and national security (taking into consideration that CALEA and other requirements already apply to the underlying telecommunications infrastructure over which VOIP communications transit)."[25] Furthermore, Cisco, one of the largest manufacturers of VOIP equipment, including phones, routers, and media gateways, agrees that VOIP service must take into the account the concerns of law enforcement.[26]

Given the sentiments of the commenting parties, it is clear that the Commission must address CALEA and law enforcement concerns as part of any regulatory proceeding it initiates on VOIP. Any failure by the Commission to address CALEA compliance issues in a future VOIP proceeding, or in any other proceeding in which the Commission addresses CALEA issues, would severely undermine CALEA and Congress' intent in enacting the statute.

Companies at 9-10; Comments of the Minnesota Office of the Attorney General at 7; Comments of Sprint Corporation at 7; Comments of the Alliance for Public Technology at 3-4; Comments of BellSouth at 9; Joint Comments of MCI and CompTel at 4, 15; Comments of Verizon at 2.

[24] Comments of Frontier and Citizens Telephone Companies at 10-11; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 7; Comments of BellSouth at 7; Comments of Verizon at i.

[25] Joint Comments of MCI and CompTel at 15.

[26] Comments of Cisco at 5.

IV. THE COMMENTING PARTIES AGREE THAT VOIP SERVICE SHOULD BE CLASSIFIED AS A "TELECOMMUNICATIONS SERVICE"

A large number of commenting parties agree with the USDOJ and FBI that Vonage's VOIP service is a "telecommunications service" and not an "information service" under Title II of the Communications Act — *i.e.*, it contains the offering of a service that provides transmission without any net change in form or content, to the public, for a fee.[27] Contrary to Vonage's assertion,[28] multiple commenting parties agree that Vonage is not merely a "user" of telecommunications service, but rather, it is offering "telecommunications service" to the public for a fee.[29]

For example, the issue of protocol conversion supports a finding that VOIP is a "telecommunications service." For all Vonage calls that originate and terminate on Vonage's

[27] Comments of the Montana Telecommunications Association at 2-3; Comments of the Minnesota Department of Commerce at 14; Comments of the People of the State of California and the California Public Utilities Commission at 4; Comments of the National Association of State Utility Consumer Advocates at 7-8; Comments of the Washington Enhanced 911 Program at 5; Comments of the Rural Iowa Independent Telephone Association at 2; Comments of Surewest Communications at 4; Comments of Frontier and Citizens Telephone Companies at 5; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 2; Comments of the Independent Telephone and Telecommunications Alliance at 3-4, 10; Comments of the Minnesota Office of the Attorney General at 8; Comments of the Minnesota Statewide 911 Program at 2; Comments of the Minnesota Public Utilities Commission at 3; Comments of Cinergy Communications Company at 1; Comments of Sprint Corporation at 15; Comments of The ICORE Companies at 2; Comments of Telecom Consulting Associates at 2; Comments of the Minnesota Independent Coalition at 12; Comments of Warinner, Gesinger, & Associates, LLC at 2; Comments of the National Telecommunications Cooperative Association at 2-3; Comments of Verizon at 5-7; Comments of CenturyTel at 4.

[28] *See* Vonage Petition at 13.

[29] Comments of the Montana Telecommunications Association at 3; Comments of the Minnesota Department of Commerce at 15; Comments of the People of the State of California and the California Public Utilities Commission at 5; Comments of the Washington Enhanced 911 Program at 5; Comments of the Communications Workers of America at 8; Comments of Surewest Communications at 8; Comments of Frontier and Citizens Telephone Companies at 5; Comments of the Independent Telephone and Telecommunications Alliance at 9; Comments of

network, there is no protocol conversion at all, thereby supporting a conclusion that such calls constitute a telecommunications service. Additionally, as several commenting parties point out, even where Vonage calls are interconnected to the public switched telecommunications network, the issue of whether net protocol conversion occurs is not dispositive to the determination of whether a service is classified as an information service.[30]

Vonage's argument that its service involves a net protocol conversion, and therefore, qualifies as an information service does not pass muster under prior Commission precedent.[31] As noted by several commenting parties, the Commission held in prior decisions classifying broadband personal communications services (PCS) and cellular services that involved protocol conversion that mere protocol conversion, by itself, does not transform a "telecommunications service" into an "information service."[32] Therefore, the Commission should apply its past

The ICORE Companies at 4; Comments of Verizon at 1-2, Comments of CenturyTel at 14; Comments of Sprint Corporation at 4.

[30] Comments of the Montana Telecommunications Association at 3-4; Comments of the National Association of State Utility Consumer Advocates at 6; Comments of the People of the State of California and the California Public Utilities Commission at 11-15; Comments of the Minnesota Department of Commerce at 16-17; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 5; Comments of the Independent Telephone and Telecommunications Alliance at 7; Comments of The ICORE Companies at 5-6; Comments of Telecom Consulting Associates at 3; Comments of the Minnesota Independent Coalition at 12-13; Comments of Warinner, Gesinger, & Associates, LLC at 2-3; Comments of the National Telecommunications Cooperative Association at 5-6; Comments of the National Exchange Carrier Association at 3-4; Comments of DJE Teleconsulting, LLC at 2; Comments of Surewest Communications at 6-7; Comments of CenturyTel at 6, 12.

[31] Vonage Petition at 17.

[32] *See* Comments of Surewest Communications at 7 (citing to *Interconnection First Report and Order*, 11 FCC Rcd 15499 (1996) at ¶ 993 and *Universal Service Report and Order*, 12 FCC Rcd 8776, 9175 (1997)); Comments of CenturyTel at 12 (citing to Communications Protocols Under 64.702 of the Commission's Rules and Regulations, Memorandum Opinion and Order, and Statement of Principles, 95 FCC 2d 584 (1983); *Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, at ¶ 106 (1996)).

precedent in evaluating Vonage's VOIP service which would require it to conclude that Vonage's protocol conversion does not alter the fact that it is providing a "telecommunications service."

Regardless of whether the Commission classifies Vonage's VOIP service as a Title II "telecommunications service" under the Communications Act, the Commission must follow Congress' intent in enacting CALEA and ensure that VOIP services fall under the CALEA definition of "telecommunications carrier" for CALEA purposes.[33] The Commission has recognized that the definition of "telecommunications carrier" under CALEA is different in scope that under Title II of the Communications Act.[34] Therefore, the Commission has discretion, if necessary, to hold that Vonage's VOIP service qualifies it as a "telecommunications carrier" for CALEA purposes. Any other outcome would undermine CALEA as carriers migrate their voice services to IP networks.

[33] Congress intentionally made the definition of "telecommunications carrier" under CALEA broader than that under Title II of the Communications Act for the very purpose of "*preserv[ing]* the government's ability, pursuant a court order, intercept communications that use advanced technologies such as digital or wireless transmission." *CALEA Legislative History* at 3496 (emphasis added). The Commission recognized this distinction in the definitions of "telecommunications carrier" for CALEA versus Title II purposes in its *CALEA Second Report and Order*. *See CALEA Second Report and Order* at 7112 ¶ 13. The Commission stated "[w]e also conclude that CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the 1996 Act, and that the CALEA definitions therefore remain in force for purposes of CALEA . . . [a]lthough we expect in virtually all cases that the definitions of the two Acts will produce the same results, we conclude as a matter of law that the *entities and services subject to CALEA must be based on the CALEA definition . . . independently of their classification for the separate purposes of the Communications Act*. *Id.* (emphasis added).

[34] *Id*.

CONCLUSION

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. In addition, the United States Department of Justice and the Federal Bureau of Investigation request that the Commission immediately commence a rulemaking proceeding to address the regulatory status of VOIP, including issues related to compliance with CALEA.

Dated: November 24, 2003

Respectfully submitted,
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I hereby certify that on November 24, 2003, I caused a copy of the foregoing Joint Reply Comments of the United States Department of Justice and the Federal Bureau of Investigation to be sent by electronic mail or United States Mail, first-class postage prepaid (as indicated) to each of the following:

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