

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order in WC Docket No. 03-211 (adopted Nov. 9, 2004).

This decision provides much-needed clarity regarding the jurisdictional status of Vonage's DigitalVoice service and other VoIP services. By fencing off these services from unnecessary regulation, this Order will help unleash a torrent of innovation. Indeed, by facilitating the IP revolution, rather than erecting roadblocks, our action will drive greater broadband adoption and deployment, and thereby promote economic development and consumer welfare.

There is no doubt that VoIP services of the type provided by Vonage are inherently interstate in nature. As the Order describes in detail, several factors combine to make it impossible to isolate any intrastate-only component of such services. These factors include the architecture of packet-switched networks and the enhanced features that are offered as an integral part of VoIP services. Together, these attributes necessarily result in the interstate routing of at least some packets. These services are also marked — in striking contrast to circuit-switched communications — by a complete disconnect between the subscriber's physical location and the ability to use the service. A subscriber's physical location is not only unknown in many instances, but also completely irrelevant. Allowing state commissions to impose traditional public-utility regulations on these interstate communications services would frustrate important federal policy objectives, including the congressional directive to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."¹

Thus, while I do not lightly arrive at any decision to preempt state regulatory authority, I believe it is imperative for the Commission to do so here. Allowing the Minnesota utility regulations — or comparable state regulations — to stand would authorize a single state to establish default national rules for all VoIP providers, given the impossibility of isolating any intrastate-only component. Equally troubling is the prospect of subjecting providers of these innovative new services — which are being rolled out on a regional, national, and even global scale — to a patchwork of *inconsistent* state regulations. In short, failure to preempt state utility regulations would likely sound the death knell for many IP-enabled services and would deprive consumers of the cost savings and exciting features they can deliver.

As necessary as preemption may be, I want to underscore my view that our assertion of exclusive federal jurisdiction still permits states to play an important role in facilitating the rollout of IP-enabled services. To begin with, as the Order makes clear, states will continue to enforce generally applicable consumer protection laws, such as provisions barring fraud and deceptive trade practices. Moreover, I have often

¹ 47 U.S.C. § 230(b)(2).

emphasized that, even where the FCC alone possesses the ultimate decisionmaking authority, this Commission and state regulators can and should collaborate in the development of sound policy — much as we have done through our Federal-State Joint Boards and Joint Conferences, the approval of Section 271 applications, and in other contexts. Indeed, I am encouraged that an increasing number of state commissioners agree that “preemption . . . does not preclude collaboration with States on key issues including public safety, consumer protection and reform of intercarrier compensation and universal service.”² These state commissioners further note that “clearly establishing the domain in which the regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation.”³

I also want to acknowledge the concerns expressed by commenters who argued that the Commission should resolve outstanding questions about access to E911, the preservation of universal service, and other important policy matters before addressing this jurisdictional issue. Ideally, the Commission would have decided the jurisdictional issue in tandem with the various rulemaking issues. But the decision of several states to impose utility regulations on VoIP services, and the ensuing litigation arising from such forays, makes it imperative for the Commission to establish our exclusive jurisdiction as the first order of business. This Commission runs significant risks if we remain on the sidelines and leave it to the courts to grapple with such issues of national import without the benefit of the expert agency’s views.⁴ Looking ahead, I agree that the Commission should proceed with the rulemaking on IP-enabled services as expeditiously as possible. We should adopt rules to the extent necessary to ensure the fulfillment of our core policy goals, including access to E911, the ability of law enforcement to conduct lawful surveillance, access for persons with disabilities, and the preservation of universal service. And we should provide a thorough and careful analysis of whether IP-enabled services are information services or telecommunications services, given the potentially far-reaching implications of that classification.

Finally, by the same token, I sympathize with parties who contend that the Commission should conclusively resolve the jurisdictional status of *all* VoIP services, rather than limiting our analysis to a subset of VoIP. I have endeavored to make our jurisdictional analysis as inclusive as possible, given the state of the record and the scope of the Declaratory Ruling Petition. This Order should make clear the Commission’s view that all VoIP services that integrate voice communications capabilities with enhanced

² Letter of Gregory Sopkin, Chairman, Colorado Public Utilities Commission; Thomas Welch, Chairman, Maine Public Utilities Commission; Jack Goldberg, Vice-Chairman, Connecticut Department of Public Utility Control; James Connelly, Commissioner, Massachusetts Department of Telecommunications & Energy; Charles Davidson, Commissioner, Florida Public Service Commission; Susan Kennedy, Commissioner, California Public Utilities Commission; and Connie Murray, Commissioner, Missouri Public Service Commission, at 6 (November 2, 2004).

³ *Id.*

⁴ *Cf. Brand X Internet Service v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petition for cert. filed* (Aug. 27, 2004) (No. 04-281).

features and entail the interstate routing of packets — whether provided by application service providers, cable operators, LECs, or others — will not be subject to state utility regulation.