October 23, 2008

Via E-Mail  EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re:  In the Matter of IP-Enabled Services, WC Dkt. No. 04-36, Universal Service
Contribution Methodology, WC Docket No. 06-122; Federal-State Joint Board on
Universal Service, CC Docket No. 96-45; Developing a Unified Intercarrier
Compensation Regime, CC Docket No. 01-92

Dear Ms Dortch:

In light of reports that the Commission intends to address the arguments raised in AT&T’s
letter, dated July 17, 2008 and filed in the above-referenced docket, in an upcoming order in the
intercarrier compensation reform docket, this letter responds to that AT&T letter.¹ As explained
below, there is no basis for AT&T’s argument that the FCC to extend the reasoning in the Vonage
Order² to preempt state regulation of all geographically “fixed” VoIP services.

In the Vonage Order, the FCC preempted state economic and entry regulation of Vonage’s
nomadic VoIP service based on the “impossibility doctrine.” Under that doctrine, the FCC may
preempt state regulation of services that have an intrastate component if (1) it is impossible or
impractical to separate the interstate and intrastate components of the service (the “inseverability”

¹ See Letter of Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, to Chairman Kevin
Martin, FCC, Secretary, FCC, WC Dkt. Nos. 04-36 & 06-122, CC Dkt. No. 96-45 (filed July 17, 2008)
(“AT&T Letter”).

² Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the
(“Vonage Order”).
prong) and (2) the state regulation at issue would thwart or negate the implementation of a defined federal policy (the “purpose” prong). See Vonage Order ¶ 19. The Commission also indicated that it would preempt state economic and entry regulation of other VoIP services, including geographically fixed VoIP services, that have certain of the characteristics of DigitalVoice service. In its brief filed in the subsequent appeal of the Vonage Order, the FCC clarified that such a future inquiry would depend on “the particular characteristics of a fixed VoIP service.”

As explained below, there is no basis for concluding that any fixed VoIP service meets the “inseverability” prong of the impossibility test, and, in any event, no fixed VoIP service offered by a dominant provider of telephone services like AT&T meets the “purpose” prong of the test. Nor has AT&T even specified the particular state regulations for which it seeks preemption or the VoIP services that are subject to such regulation, both of which are required here under the relevant precedent. The Commission should therefore reject AT&T’s request.

1. Fixed VoIP Service Does Not Satisfy The “Inseverability” Prong

In the Vonage Order, the FCC determined that it was impossible or impractical to separate the interstate and intrastate components of the Vonage DigitalVoice service because (1) a Vonage subscriber’s ability to originate calls from any broadband connection makes it impossible to determine the origination point of a particular call (Vonage Order ¶ 23), and (2) a Vonage subscriber’s ability to initiate multiple interstate communications during a VoIP session renders it impossible to determine the end point of any particular communications session. See Vonage Order ¶ 25. Since subscribers to fixed VoIP services generally originate all calls from the same location, the Commission could not rely on a finding that the origination point of a call cannot be ascertained as the basis for preemption. Accordingly, the second rationale is the only possible basis for FCC preemption of state economic and entry regulation of fixed VoIP service under the Vonage Order.

In suggesting that it would preempt state economic and entry regulation of fixed VoIP service based on the second rationale, the FCC relied on fixed VoIP service providers’ characterization of fixed VoIP service as including numerous interstate features and communications. See Vonage Order n.91, n.93 n.113. In fact, there is no meaningful difference, at least for purposes of the jurisdictional analysis, between the communications initiated by fixed VoIP subscribers and those initiated by circuit-switched telephone service subscribers. Nor is there a meaningful difference for these purposes between the network architectures utilized to provide fixed VoIP and circuit-switched telephone service. The FCC has not, and in most cases may not, preempt state regulation of intrastate circuit-switched telephone traffic. The same must therefore be true of fixed VoIP service.

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3 Brief for FCC at 63, Minn. Pub. Utils. Comm’n v. FCC, 483 F.3d 570 (8th Cir. 2007) (Nos. 05-1069, 05-1122, 05-3114, & 05-3118) (“FCC Brief”).

4 See Section 2(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 152(b) (providing that, apart from enumerated exceptions, “nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier”); La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 360 (1986) (“In broad terms, the Act grants to
a. Fixed VoIP subscribers’ origination of interstate communications during communications sessions does not justify treating fixed VoIP and circuit-switched voice service differently for jurisdictional purposes.

In the Vonage Order, the FCC relied on parties’ assertions that, unlike circuit-switched voice services, VoIP subscribers initiate multiple interstate communications during a VoIP session (e.g., voicemail forwarding, conference call management, and so on) that cannot be “separately tracked or recorded.” The FCC implied that this is not the case with circuit-switched telephone service, for which intrastate calls are treated as discrete intrastate communications subject to state regulation. But this is simply untrue as a matter of fact, and it is an insufficient basis under FCC precedent to treat telephone calls between two points within the same state as interstate.

First, a comparison of the communications originated by subscribers of fixed VoIP and traditional circuit-switched service yields no material differences that would justify differential jurisdictional treatment. For example, in paragraph 25 of the Vonage Order, the FCC stated that it is impossible to identify the termination point of VoIP communications where a subscriber (1) checks voice mail (presumably using a server in another state); (2) reconfigures service options (again, presumably using a server in another state); (3) forwards a voice mail to another location (possibly in another state); (4) uses call-forwarding functions to receive a call in a new location (again, possibly in another state); or (5) calls a nomadic VoIP service subscriber whose location cannot be determined. See Vonage Order ¶ 25. The FCC concluded that the integration of these functionalities into VoIP service rendered the entire service inherently interstate.

The problem with this line of reasoning is that subscribers to circuit-switched service use virtually all of these features and functionalities: (1) subscribers to tw telecom’s circuit-switched service have long been able to check voice mail and, as discussed further below, they increasingly do so using servers in other states; (2) subscribers to tw telecom’s circuit-switched service can reconfigure their circuit switched service options; (3) subscribers to tw telecom’s circuit-switched service can forward voice mail messages to another location, including a location in a different state, using regional servers (e.g., a tw telecom subscriber in state A using a PBX system serving offices in different states can forward a voice mail to a colleague in state B and would likely do so using a voice mail server that is not located in state A); (4) subscribers to tw telecom’s circuit-switched service have long been able to use call-forwarding functions to receive calls at any location (including in another state); and (5) subscribers to circuit-switched service frequently call nomadic VoIP service subscribers and mobile wireless service subscribers whose locations the circuit-switched service provider cannot identify. It is difficult to see how a circuit-switched subscriber’s ability to initiate these interstate communications is any less integrated with her ability to originate intrastate telephone calls than is the case with fixed VoIP service. Yet calls between two points within the same state made by circuit-

the FCC the authority to regulate ‘interstate and foreign commerce in wire and radio communication,’ … while expressly denying that agency ‘jurisdiction with respect to . . . intrastate communication service.’” (internal citations omitted).
switched service customers are nevertheless treated as discrete intrastate services subject to state regulation.

The ex parte filings upon which the FCC relied to illustrate VoIP subscribers’ use of the network to initiate multiple interstate communications during a call session offer no more support for the FCC’s tentative conclusion to treat fixed VoIP service as inseverably interstate. BellSouth appears to have provided the most detailed VoIP communications session scenarios in an October 2004 ex parte, relied upon by the FCC in the Vonage Order. In one scenario, BellSouth describes a VoIP subscriber’s interaction with callers in other states and network services in other states during a conference call. **Id.** at 8. This example offers no basis for distinguishing the jurisdictional analysis for fixed VoIP calls versus circuit-switched calls since any circuit-switched conference call with participants located in multiple states would be deemed interstate. If a circuit-switched conference call consists of participants in the same state, such a call would likely include multiple separate communications with an operator and switch located in another state (tw telecom provisions circuit-switched conference bridges using centralized switches and operator facilities that serve regions consisting of multiple states). Similarly, tw telecom’s circuit-switched conference call service offers customers the ability to identify who is on a conference call at any time and provides other enhanced features which the customer can utilize during the conference call and that require communication with centralized network facilities that serve multiple states and that are therefore likely located in a different state from the one in which the customer is located. Although these many separate interstate communications unquestionably occur during the same conference call “session,” they do not render interstate a conference call among callers within the same state.

In a second scenario, BellSouth describes a salesman who logs onto his VoIP account. When the salesman picks up the phone, all members of the salesman’s workgroup (including those located in different states) are notified that he is on the phone. The salesman calls a client and leaves the client a voice mail. After leaving the voice mail, the salesman hangs up. He then initiates a communication with a server (presumably in another state) to modify his profile to ensure that all calls go to voicemail (possibly using a server in another state) except calls from his client. The client then calls the salesman back and, while on the phone, the salesman exchanges instant messages with a colleague in another state.

Although this second scenario includes many different types of communications, it does not support the conclusion that fixed VoIP and circuit-switched voice service are qualitatively different for

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5 Ex Parte Presentation of BellSouth at 8-10, attached to Letter of Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Dkt Nos. 03-211, 04-36 (filed Oct. 26, 2004).

6 See, e.g., Investigation by the Minn. Pub. Utils. Comm’n Into the Provision of Tel. Conference Call Servs., Order Dismissing Complaint Against Call Points, Dkt. No. P-999/C-88-310, 1989 WL 509822 (Minn. PUC) (rejecting the contention “that intrastate conference calls, that is, conference calls in which all participants are within the state of Minnesota, become interstate calls when interstate facilities are used to complete them.”).
purposes of the jurisdictional analysis. Subscribers to circuit-switched service can experience a virtually identical communications session to the one just described. For example, consider a salesman using a circuit-switched PBX system that serves offices in different states. When the salesman calls his client, a signal is sent to extensions served by the PBX in other states indicating that the salesman’s phone is “off the hook” (e.g., lights next to the extension numbers on a handset turn on), thereby providing notice to members of a workgroup located in different states. After leaving a voice mail message for the client (likely on a server located in another state), the Class 5 circuit switch serving the office allows the salesman to selectively forward incoming calls, other than those from his client, to a voicemail database that may well be located in another state. Notwithstanding these multiple communications during the same “session,” existing regulations still treat the PBX trunk service provided to the salesman’s location as subject to state regulation.

Second, well-established FCC precedent mandates that an end user’s use of an interstate service, including an interstate information service, in connection with an intrastate voice service does not render the voice service interstate. For example, it has been the FCC’s practice to treat intrastate phone service as subject to state regulation even when such service is integrated with an interstate enhanced/information service. Similarly, in BellSouth MemoryCall, the FCC preempted state regulation of BellSouth’s MemoryCall voicemail service because BellSouth’s in-state customers could access the service out of state. Because BellSouth did not have the capability to determine if the calls to voicemail were interstate or intrastate, the FCC preempted state regulation of the voicemail service pursuant to the impossibility doctrine. Yet, the FCC did not disturb state regulation of local

7 The BellSouth scenario included the use of instant messaging. While circuit switched services cannot actually provide instant messaging capability integrated with the voice service, as explained below, the integration of instant messaging or any other interstate information service with an intrastate voice service does not, by itself, permit the FCC to preempt state regulation of the underlying voice service.

8 See, e.g., Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of Telecommunications Utilities, 2006 Cal. PUC LEXIS 367 (2006) (discussing proposal for regulation of PBX trunks).

9 See Policy and Rules Concerning the Interstate, Interexchange Marketplace et al., Report and Order, 16 FCC Rcd 7418, ¶ 45 (2001) (“To protect against cross-subsidy of enhanced services by intrastate ratepayers, which is an important issue if BOCs can bundle interstate enhanced services with local exchange service, a state need only use its normal regulatory mechanisms to ensure that intrastate rates are not too high in light of that assignment.”) (emphasis added).

10 See Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992) (“BellSouth MemoryCall”).

11 See BellSouth MemoryCall ¶ 7 (“In the case before us, the Georgia Order bars any provision by BellSouth of its voicemail service to new customers in Georgia. We find that the Georgia Order applies in part to interstate service because BellSouth’s voice mail service is jurisdictionally mixed. We also find that it is not possible to separate the interstate and intrastate provision of the service without impermissibly barring the interstate provision of the service.”).
telephone service that was bundled together with the MemoryCall voicemail service. Finally, in an analogous situation, the FCC preempted certain state regulations that applied to caller ID service, finding that “caller ID service, with its attendant privacy indicators is a ‘jurisdictionally mixed service.’” In so doing, however, the FCC did not preempt state regulation of basic intrastate phone service that was used in conjunction with caller ID service.

In any event, after the release of the *Vonage Order*, the FCC seems to have abandoned the notion that the interstate communications initiated by a VoIP subscriber during a communications session render interstate VoIP calls between two points in the same state. In the *VoIP USF Order*, the FCC held that, if a VoIP provider “develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls.” The FCC stated further that, “we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of the Vonage Order and would be subject to state regulation.” *VoIP USF Order* ¶ 56 (emphasis added). The phrase “customer calls” as used in the *VoIP USF Order* refers to the VoIP voice communication, not any additional interstate communications to websites or servers that may occur during the call session. The FCC itself has therefore concluded that it is the end points of such calls that determine the jurisdiction of fixed VoIP service, not other features and functionalities used during a communications session.

b. **Fixed VoIP providers’ network architecture does not justify treating fixed VoIP and circuit-switched voice services differently for jurisdictional purposes**

In reaching its tentative conclusion that the interstate and intrastate components of fixed VoIP service cannot be separated, the FCC also relied on assertions that VoIP networks often utilize servers and signaling network facilities located in states other than the one in which a subscriber is likely located. This fact, the argument goes, distinguishes fixed VoIP service from circuit switched voice service and justifies classifying even fixed VoIP calls between two locations in the same state as interstate. There is no basis in fact or law for this conclusion.

*First*, as to the facts, there is no material difference between the manner in which fixed VoIP and circuit-switched networks utilize out-of-state facilities to provision calls between two locations in the same state. For example, providers of circuit-switched service, particularly CLECs, often serve more than one state with a single switch. TWTC serves end users in North Carolina with a Class 5 switch located in South Carolina; it serves end users in New Jersey with a Class 5 switch located in New York; it serves end users in Mississippi with a Class 5 switch located in Tennessee; and it serves

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end users in Idaho with a Class 5 switch located in Washington. As a result, many TWTC circuit-switched service customers’ calls traverse switches in other states.

Moreover, for at least the last 10 years, TWTC and most other providers of circuit-switched telephone service have been migrating to an integrated network architecture in which they use the same facilities to provide both circuit-switched service and VoIP service. This allows carriers to take advantage of the same efficiencies offered by IP network architectures, most importantly the use of centralized servers to provide signaling and enhanced features to customers located in regions comprised of multiple states, in the provision of circuit-switched service. As a result, more and more features that have been provided in the past by a local Class 5 switch are now provided by a distant SONUS “switch” (really a server or computer) to circuit-switched service subscribers. For example, TWTC provides Class Features, including call forwarding, three-way calling, Caller ID, selective call forwarding, and selective call blocking in this manner. It follows that the alleged distinctions between utilization of out-of-state facilities by providers of fixed VoIP and providers of circuit-switched services are rapidly disappearing, if such distinctions ever existed at all.

Finally, although the FCC seems to have credited arguments that fixed VoIP providers’ use of interstate signaling networks to route calls might justify classifying all fixed VoIP traffic as interstate, here again the implicit distinction between fixed VoIP networks and circuit-switched networks does not hold up. As explained, TWTC circuit-switched customers’ intrastate voice calls are often routed through out-of-state switches. These out-of-state switches provide signaling functionality as well as a physical path for the intrastate call. In addition, the SS7 network that TWTC uses for call set up and to provide certain vertical features to its circuit-switched customers relies on six regional Signal Transfer Points (“STP”) pairs that, together, serve the 75 markets in 30 states in which TWTC offers circuit-switched telephone service. Every circuit-switched communication that requires the use of an STP (i.e., call set-up functions such as determining called number assignment in the NPAC, checking to determine whether the called line is available, obtaining routing information and so on) causes TWTC to utilize a regional STP that is likely located in a different state than the one in which a circuit-switched call originates. Similarly, TWTC must “dip” a centralized location routing number database, again often located in a different state, for all calls -- including most local calls -- for which TWTC is the N-1 carrier. As this description makes clear, providers of circuit-switched service such as TWTC frequently utilize out-of-state signaling and related network facilities to provide local telephone service. While IP networks perhaps rely on such facilities slightly more often, this is hardly a coherent basis for distinguishing the two networks for jurisdictional purposes.

Second, as to the law, the FCC examines the geographic end-points of the call to determine call jurisdiction without regard to intermediate switching and routing points. For example, intrastate

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14 See Vonage Order n.113 (citing Cox ex parte letter for the proposition that out-of-state facilities provide VoIP “call setup”).

15 See Teleconnect Co. v. the Bell Telephone Co. of Pennsylvania, Memorandum Opinion and Order, 10 FCC Rcd 1626, ¶ 12 (1995) (“[B]oth Court and Commission decisions have considered the end-to-end nature of communications more significant than the facilities used to complete such communications…. [A]n interstate communication does not end at an intermediate switch…. [T]he
circuit-switched 800 calls are often routed through a switch outside of the state where the origination and termination points of the voice call are located. Yet, the FCC specifically declined to preempt state regulation of such calls, holding that they are purely intrastate calls subject to state jurisdiction. The FCC offered no basis in the *Vonage Order* for departing from this approach for fixed VoIP service.

2. **AT&T Cannot Satisfy the “Purpose” Prong**

Even if the FCC believes that the “inseverability” prong of the impossibility analysis can be met with respect to fixed VoIP services, the FCC still may only preempt state entry and economic regulation where doing so would advance a defined FCC policy objective. The FCC’s policy, reiterated in the *Vonage Order*, is that economic regulation should apply to service providers with market power. Accordingly, it would be inconsistent with the “Purpose” prong of the inseverability test for the FCC to preempt state economic regulation of telephone services offered by AT&T and other incumbent LECs that possess market power and whose telephone service offerings are subject to dominant carrier regulation by the FCC.

Courts have repeatedly held that any preemption of state regulation must be “narrowly tailored” to the FCC’s stated goals. As the D.C. Circuit has found, “the Commission may take appropriate measures [to preempt state regulations] in pursuit of [its] goal but only to the extent necessary to achieve it.” In preempting state regulations, “the FCC has the burden … of showing with some specificity” how its goals are negated by the state regulation at issue. *NARUC III*, 880 F.2d at 430. For example, the D.C. Circuit rejected the FCC’s preemption of all state regulation of inside wiring because the federal purpose of ensuring a “free and competitive inside wiring market” would have been fulfilled by the more limited requirement that states unbundle inside wiring from basic

interstate communication itself extends from the inception of the call to its completion, regardless of any intermediate facilities.”.

See The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services, Memorandum Opinion and Order, 11 FCC Rcd 1186, ¶ 30 (1995) ("[W]e reject the implication raised in the pleadings that the routing of debit card calls through a remote 800 switch renders them jurisdictionally interstate in nature. We have previously held that calls involving 800 switching should be treated for jurisdictional purposes as a single, end-to-end communications. Thus, we find that a debit card call that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state.”).

*National Assn. of Regulatory Util. Commrs. v FCC*, 880 F.2d 422, 430 (D.C. Cir) (1989) (“*NARUC III*); see also *California v FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990) (“*California I*”) (“The FCC may not justify a preemption order merely by showing that some of the preempted state regulation would, if not preempted, frustrate FCC’s regulatory goals. Rather, the FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals.”).
transmission services. \textit{Id.} at 431. Similarly, the Ninth Circuit found that the FCC’s preemption of “all possible forms of state-imposed structural separation requirements...” was impermissible under the impossibility doctrine because the court was not “persuade[d]...that the Computer III preemption orders are limited to [state regulation] that would necessarily thwart or impede valid FCC goals.” \textit{California I}, 905 F.2d at 1243. The court upheld the FCC’s order on remand only because the “preemption order...was narrower than the order it issued in Computer III,” and the FCC supported its position that federal goals would be negated by “adequate record evidence.”\footnote{People of the State of California \textit{v.} FCC, 39 F.3d 919, 932 (9th Cir. 1994), \textit{cert. denied}, 514 U.S. 1050 (1995) (“California II”).}

In the \textit{Vonage Order}, the FCC preempted state “economic” (including “tariffing”) regulation of Vonage’s service because doing so was consistent with the FCC’s policy of removing such regulations from carriers that do not possess market power. The FCC asserted that, if Vonage’s service were regulated as a telecommunications service, it would “be considered a nondominant, competitive telecommunications provider for which the Commission has eliminated entry and tariff filing requirements...” \textit{Vonage Order} ¶ 20. The FCC also found that Vonage’s service, “lack[s] the monopoly characteristics that led to” economic regulation “of common carrier services historically.” \textit{Id.} ¶ 21. For these reasons, the FCC found that Minnesota’s economic and tariffing regulations “produce[ ] a direct conflict with our federal laws and policies.” \textit{Id.} ¶ 22.

This conclusion is irrelevant to service providers with market power. The FCC applies economic (including tariffing) regulation to incumbent LECs with respect to those retail and wholesale telephone services over which incumbent LECs retain market power. For example, the FCC applies dominant carrier economic regulation to incumbent LEC subscriber line charges (“SLCs”) for business and residential customers.\footnote{Cf. \textit{Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. §160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Memorandum Opinion and Order}, 22 FCC Rcd 16304, ¶ 72 (2007) (despite granting forbearance from other dominant carrier regulations, the Commission continued to impose a cap on ACS’ SLCs).} It does so based on the concern that, in the absence of such regulation, incumbent LECs would be able to charge supracompetitive end-user rates.\footnote{\textit{See Access Charge Reform et al., Sixth Report and Order et al.}, 15 FCC Rcd 12962, ¶ 33 (2000) (“The CALLS Proposal maintains an overall cap on the SLC assessed on primary residential and single-line business lines at $6.50, and could set the cap even lower if price cap LECs cannot justify higher increases. Thus..., CALLS ensures that basic telephone service does not become too expensive.”).} The FCC also continues to apply rate regulation, including tariffing requirements, to incumbent LEC switched access services purchased as wholesale inputs by long distance carriers to provide telephone service to business and
residential customers.\textsuperscript{21} The FCC has retained these requirements because it has repeatedly found that the incumbent LECs control bottleneck local access facilities necessary to provide retail and wholesale telephone service.\textsuperscript{22}

Given the FCC’s long-standing policy of applying “economic,” including tariffing, regulations to incumbent LEC provision of the retail and wholesale telephone services over which the incumbents possess market power, forbearance of state economic, including tariffing, regulation of incumbent LEC retail and wholesale fixed VoIP voice service would be inconsistent with federal policy. Stated differently, retention of such state regulation would not “negate” or “frustrate” federal purposes or goals. Where this is the case, preemption is impermissible.

For similar reasons, no federal purpose or goal would be “negated” or “frustrated” by state regulation of interconnection agreements covering the exchange of VoIP traffic. The purpose of the interconnection regime established by the 1996 Act is to ensure that ILECs do not use their market power in the local exchange market to shut out competitors. Incumbent LECs can reach every customer location with their ubiquitous networks, and an entrant seeking to interconnect poses a threat to the incumbent’s established customer base. As a result, incumbent LECs have little or no incentive to interconnect with competitors on reasonable terms and conditions, or, indeed, to interconnect at all.\textsuperscript{23} These incentives are the same regardless of whether the traffic traversing the interconnection facility is VoIP or circuit switched voice service. Accordingly, to the extent that the FCC continues to regulate interconnection for the exchange of circuit-switched traffic to prevent ILECs from exercising their market power, the FCC should not, and may not, preempt states from regulating interconnection with respect to VoIP traffic. Such state regulation would not “negate” or “frustrate” any federal goal. To the contrary, such state regulation would be entirely consistent with the federal policy underlying the FCC’s current interconnection regime.

\begin{itemize}
\item \textsuperscript{21} Indeed, AT&T has argued that these regulations should apply to circuit-switched traffic as well as VoIP traffic. See Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the “ESP Exemption,” WC Dkt. No. 08-152 (filed July 23, 2007).
\item \textsuperscript{22} See e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al., Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, ¶ 64 (2006).
\item \textsuperscript{23} Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777, ¶ 21 (1998), aff’d in part, rev’d in part, Gulf Power v. FCC, 208 F.3d 1263 (11th Cir. 2000), reversed & remanded, NCTA v. Gulf Power Co., 534 U.S. 327 (2002) (“In the Local Competition Order, the Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the incumbent. Rather, these new competitors seek to reduce the incumbent subscribership and weaken the incumbent’s dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement.”).
\end{itemize}
3. The Commission May Only Preempt State Regulation Where The Services Subject To The Regulation And The Regulation Are Specified

In order to meet the requirement that the FCC’s exercise of preemption be narrowly tailored, the agency should only preempt where it has specifically identified the state regulation at issue and the VoIP services subject to such regulation. AT&T has not identified any specific state laws that it believes should be preempted, and AT&T has not described with particularity any fixed VoIP services that should be relieved of state regulation. For this reason as well, AT&T’s preemption request should be denied.

In its review of the FCC’s order preempting state regulations requiring structural separation of ILECs’ enhanced services, the Ninth Circuit stated as follows: “the fact that state separation requirements could conceivably take forms that would frustrate valid federal goals is insufficient under the narrow ‘impossibility’ exception to justify the Commission’s preemption of all state regulations requiring some form of structural separation.” California I, 905 F.2d at 1244. On this basis, the court overturned the FCC’s preemption order. On remand, the FCC was careful to narrow the scope of preemption so that its “decision to preempt [was] not based on ‘hypothetical factors’” but rather strictly limited preemption to situations in specific state regulatory regimes that “impose[d] safeguards that would thwart federal objectives.”24 As a result, the FCC order was upheld on appeal.25

The FCC has recognized the need to narrowly tailor preemption to situations in which state regulations in fact frustrate or negate federal policy as applied to specific fixed VoIP products. In its brief to the 8th Circuit defending the Vonage Order, the FCC argued that it was not preempting fixed VoIP services because “the particular characteristics of a fixed VoIP service may bear on the FCC’s preemption analysis. ‘The presence of such fact intensive inquiries mandates deferral of review until an actual preemption of state specific regulation occurs.’”26 The FCC should heed its own advice and determine whether preemption of state VoIP regulations is appropriate only when it can review concrete examples of both state regulation and fixed VoIP services. AT&T has offered neither here.

4. Conclusion

For the reasons described herein, the FCC should reject AT&T’s request that for preemption of state entry and economic regulation of fixed VoIP service.


25 See California II, supra note 18.

26 FCC Brief at 63 (citing Alascom v. FCC, 727 F.2d 1212, 1220 (D.C. Cir. 1984)).
Pursuant to Section 1.1206(b) of the Commission’s rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced dockets.

Respectfully Submitted,

/s/
Thomas Jones
Jonathan Lechter
Willkie Farr & Gallagher LLP
1875 K Street N.W.
Washington, D.C. 20006

ATTORNEYS FOR tw telecom inc.

cc: Amy Bender
Nicholas Alexander
Greg Orlando
Scott Bergmann
Scott Deutchman