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BY OVERNIGHT DELIVERY

November 13, 2003

Honorable Jaclyn A. Brilling
Acting Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

**RE: Case 03-C-1285: Complaint of Frontier Telephone of Rochester, Inc.
Against Vonage Holdings Corp.; Frontier's Reply Comments**

Dear Secretary Brilling:

Enclosed for filing please find ten (10) copies of the Reply Comments of Frontier Telephone of Rochester, Inc. in the above-referenced proceeding.

Very truly yours,

Gregg C. Sayre
Associate General Counsel

GCS:hmj
Enc.
cc: Active Party List for Case 03-C-1285

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INDEXED
PUBLIC SERVICE
COMMISSION
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Complaint of Frontier Telephone of Rochester, Inc. Against
Vonage Holding Corp. Concerning Provision of Local
Exchange and Inter-Exchange Telephone Service in New
York State in Violation of the Public Service Law

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REPLY COMMENTS OF
FRONTIER TELEPHONE OF ROCHESTER, INC.

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DATE: November 13, 2003

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Complaint of Frontier Telephone of Rochester, Inc. Against
Vonage Holding Corp. Concerning Provision of Local
Exchange and Inter-Exchange Telephone Service in New
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**REPLY COMMENTS OF
FRONTIER TELEPHONE OF ROCHESTER, INC.**

Pursuant to the Commission's October 9, 2003 Notice Requesting Comments, Frontier Telephone of Rochester, Inc. ("Frontier") hereby replies to the Comments on Frontier's Complaint filed October 31, 2003. In summary:

(1) Vonage's service is an immediate threat to the lives, safety and security of the New York consumers that the Commission is charged with protecting. Unlike other providers of IP services, Vonage is aggressively marketing its services to unsophisticated residential subscribers and is encouraging them to port their numbers to Vonage and thereby give up their ILEC (Incumbent Local Exchange Carrier) service.

(2) The Commission cannot wait for the FCC to act. The FCC is planning to take a year to resolve these issues. The Commission has jurisdiction to resolve the Federal issue of whether the Commission's regulation has been preempted by FCC orders.

(3) The legal issue of whether Vonage is an "information service provider" under Federal law is very simple. Vonage is an information service provider only if it provides a net protocol conversion. If the Commission recognizes the router that Vonage supplies to most of its

customers, Vonage is providing voice-to-voice POTS (Plan Old Telephone Service), which is exactly what it is advertising. Only if the Commission ignores this router is Vonage performing a net protocol conversion.

I. Vonage's Service Is An Immediate Threat To The Lives, Safety And Security Of Residential New York Customers.

As correctly stated by the Communications Workers of America,¹ Vonage's 911 service is so inferior that it would endanger public safety. Frontier's Complaint partly describes the inadequacies of Vonage's service. Even more inadequacies of Vonage's 911 service are set forth in chilling detail in Vonage's Terms of Service, available on the Internet.² These deficiencies are so serious that Vonage requires its customers to notify all household residents, guests and other persons present at the location about the deficiencies of Vonage's 911 service.³ The probability that these warnings will actually be given is near zero. Vonage thus recognizes that many people beyond its customers are put at risk by its substandard 911 service, but offers no practicable way to protect them. Vonage's argument that it is "under no affirmative legal obligation to provide its customers with access to the 911 services offered by telecommunications carriers"⁴ demonstrates a cavalier attitude to the safety of the public, and its attempt through its Terms of Service to shift all legal risks to its subscribers⁵ underscores the need for a regulatory agency to step in to protect the public – not only Vonage customers but also any person at the location of a Vonage customer.

¹ CWA Comments, pp. 4-6.

² http://www.vonage.com/features_terms_service.php

³ Terms of Service, §2.1.

⁴ Vonage Comments, p. 6.

⁵ The Terms of Service even require the customer to bear any fines or penalties related to inadequate 911 service. Terms of Service, §2.3.5.

After the filing of Frontier's Complaint, Frontier discovered that some of these problems can be solved, but that Vonage has not taken steps to solve them. Frontier is currently working with another carrier in the Rochester area that has disclosed an intention to provide a Vonage-like service. That carrier has indicated to Frontier that it has solved most of the E-911 problem in a very simple manner. Every switch-based CLEC (Competitive Local Exchange Carrier) and every cellular carrier in the Rochester area has 911 trunks to the 911 selective routers, and all of these carriers participate in the E-911 system used by the PSAPs (Public Safety Answering Points) in the Rochester area. The CLEC that the prospective VoIP carrier plans to use for number portability and for a gateway to the PSTN (Public Switched Telephone Network) is one of those carriers. This CLEC has 911 trunks to the local 911 selective routers and participates fully in the ALI database and E-911 service for its own end users. This CLEC can take a 911 call from the VoIP carrier and route it over its own 911 trunks, and can populate the ALI database with the VoIP carrier's customer information. This solves the problem of routing the 911 call to the PSAP with full emergency priority. It solves the problem of giving the PSAP a callback number in the event the calling telephone is hung up prematurely, and it solves the E-911 location problem as long as the IP telephone is used at its primary location. The only problem it does not solve is the location information when the customer moves the IP equipment to another location with a broadband Internet connection and makes a 911 call from there. The Commission, the FCC and the telecommunications industry should address this latter problem together on a priority basis, but this is a far smaller problem than the critical problems created by Vonage's service as it currently exists and as its Comments attempt to justify.

The Commission cannot count on Vonage, or other carriers of its type, to solve their 911 issues on a voluntary basis. In order to protect the safety of the public, including innocent

household members and visitors at the location of a Vonage subscriber, the Commission must regulate Vonage as the CLEC that it is.

The New York State Telecommunications Association noted an additional danger to the public from Vonage's service, which is its lack of CALEA compliance.⁶ Vonage as an unregulated end user would not be subject to the requirements of CALEA, the Communications Assistance for Law Enforcement Act, codified at 47 U.S.C. §1001 et seq. The provision of information services is exempted from the definition of "telecommunications carrier" in 47 U.S.C. §1001(8)(C). The FCC has implemented some of the CALEA requirements at 47 C.F.R. §64.2100 et seq. of its rules. These rules also apply only to telecommunications carriers. The Commission should consider the implications of declaring that Vonage is not a carrier but instead is an information service provider. As Vonage notes,⁷ some of its calls do not touch the PSTN when one of its users calls another of its users. These calls can only be tapped or traced by Vonage. If Vonage is exempt as a non-carrier from CALEA and other carrier requirements applicable to court-ordered wiretaps and traces, then criminals and terrorists will have a strong reason to communicate with each other using Vonage telephones, with vastly reduced risk of law enforcement surveillance. As argued below, where a carrier like Vonage advertises and provides voice-to-voice POTS, it is fully consistent with existing rules to find that the carrier is not an information service provider but instead must be lightly regulated as a CLEC – and must therefore comply with CALEA.

Vonage's Terms of Service create additional unacceptable risks to the lives, safety and security of the public. Under these Terms of Service:

⁶ NYSTA Comments, p. 10.

⁷ Vonage Petition for Declaratory Ruling filed with the FCC on September 22, 2003, p. 7.

- Customers have only 7 days to raise a dispute and the dispute must be made in writing.⁸
- Vonage is free to discontinue dial tone service at any time for any reason.⁹
- Vonage charges a \$39.99 fee for disconnection by the customer.¹⁰
- All disputes are subject to mandatory arbitration under the Commercial Arbitration Rules of the American Arbitration Association.¹¹ These rules require the claimant to pay an initial fee deposit of \$125 toward the charges of the arbitrator.¹²
- If a court case is brought, the consumer has already agreed to personal and exclusive jurisdiction of the courts of New Jersey.¹³

To put it another way, a residential customer replacing his or her ILEC POTS line with Vonage service has dial tone only as long as Vonage in its sole discretion chooses to provide it, and only until Vonage in its sole discretion chooses to take it away. The customer has no recourse to the Commission in the event of a dispute, no recourse to the courts of New York, and no way to obtain any review whatsoever of Vonage's actions except by filing an expensive arbitration proceeding.

In summary, if the Commission fails to apply the light hand of CLEC regulation to Vonage:

⁸ Vonage Terms of Service, §4.2.

⁹ Vonage Terms of Service, §4.4. The Commission should view this as an intolerable life and safety risk.

¹⁰ Vonage Terms of Service, §4.6. Thus the customer must pay a penalty to return back from Vonage to ILEC service.

¹¹ Vonage Terms of Service, §6.1.

¹² AAA Commercial Arbitration Rules, Supplementary Procedures for Consumer Related Disputes, §C-8 (available online at <http://www.adr.org/>).

¹³ Vonage Terms of Service, §6.2.

(1) People are likely to die or to lose their health or property because they fail to reach an emergency service agency when they dial 911, or because the emergency service agency has no location or callback number on the emergency call.

(2) Criminals and terrorists are likely to use Vonage telephones because Vonage, as an information service provider, would be exempt from CALEA.

(3) People are likely to lose their dial tone, with all the risk to life, health and safety that such a loss implies, when Vonage terminates residential services under circumstances that would be violations of the Commission's regulations.

II. The Commission Cannot Wait For The FCC To Act.

Vonage filed a Petition for Declaratory Ruling with the FCC on September 22, 2003, requesting the FCC to preempt state regulation of Vonage on the ground that it is an information service provider. Vonage claims that the FCC's rules exempt it from New York regulation,¹⁴ but in fact the FCC has not acted on the fact pattern that Vonage's service presents.¹⁵ If the rules were as clear as Vonage asserts, its petition would not have been necessary. The FCC in WC Docket No. 03-211 put this petition out for comment. Reply Comments are due November 24, 2003. However, the FCC cannot be counted upon to act on Vonage's petition in the near future. On November 6, 2003 the FCC issued a News Release attaching a copy of a letter from Chairman Michael K. Powell to Senator Ron Wyden. The letter states that shortly after a VoIP forum scheduled for December 1, "the FCC will initiate a *Notice of Public Rulemaking* ("*NPRM*") on VoIP services" and that "[o]ver the course of the next year, after full public

¹⁴ Vonage Comments, pp. 9-10.

¹⁵ Vonage admits that the FCC has indicated that "phone-to-phone IP telephony" may not be "information services." Vonage Comments, p. 12. If Vonage's services are not "information services" then they are subject to common carrier regulation at both the Federal and State level.

comment and thoughtful consideration of the record, the FCC plans to follow up the *NPRM* with a *Report and Order* on the VoIP issues raised in the proceeding.”

It appears highly probable that the FCC will not act quickly on the legal question of whether and to what extent Vonage is exempt from state regulation as a matter of Federal preemption. It appears highly probable that the FCC will consider Vonage’s petition “over the course of the next year.”

There is no need for the Commission to resolve all VoIP issues at this time and in this proceeding. The issue presently before the Commission is Vonage’s exemption or non-exemption from the Public Service Law. Unlike other providers of VoIP service, Vonage is aggressively marketing its service to residential subscribers, and is encouraging them to give up their ILEC service by porting their existing numbers to Vonage. It is Vonage’s dial tone services, not Internet-based long distance applications that consumers load onto their home computers, that are before the Commission. It is Vonage that through its marketing and operational practices is creating an imminent danger to the public of the State of New York. If the Commission waits for a year or more for the FCC to act, it is highly likely that at least one life will be lost or that at least one serious crime or terrorist act will be committed as a result of Vonage’s failure to comply with the simple 911, CALEA and consumer protection rules applicable to every other CLEC that provides dial tone to New York consumers.

The Commission has jurisdiction to determine whether its state regulation has been preempted by FCC decisions. The Commission must exercise this jurisdiction and must determine, considering both legal and policy arguments, whether Vonage is an information service provider.

III. Vonage Is Not An Information Service Provider Because It Does Not Perform A Net Protocol Conversion.

Vonage's entire legal argument of preemption rests on its claim that it is providing "information services" as a result of its alleged net protocol conversion.¹⁶ However, its service fails the test that it proposes to use. At page 13 of its Comments, Vonage proposes the use of a four-part test to distinguish telecommunications services from information services, the latter of which are preemptively deregulated. These four factors for testing whether a service is subject to regulation, and how Vonage stacks up against them, are as follows:

(1) "The provider holds itself out as providing voice telephony or facsimile transmission service." Vonage's website states as follows:

Use Vonage like you use any telephone

With Vonage, you pick up the phone, hear the dial tone and dial the telephone number of your choice. There are no extra numbers to dial and no special routines to follow. It's that simple. You don't have to be an engineer to use our service.

You can be up and running within minutes of receiving your Vonage package. We send you everything you need to get Vonage DigitalVoice phone service, right down to the extra cable wire. Best of all, there's no technician, no wiring in the walls, and no technical experience needed! Setup usually takes less than 5 minutes.¹⁷

This is no more and no less than an admission that Vonage is providing Plain Old Telephone Service, or POTS. Vonage is holding itself out as providing voice telephony. This factor is satisfied.

(2) "The provider does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public

¹⁶ Vonage Comments, pp. 10-13.

¹⁷ http://www.vonage.com/learn_howitworks.php (accessed 10/23/03)

switched telephone network.” As noted in Vonage’s website quoted above, Vonage provides everything except an ordinary voice telephone. The only CPE that the customer must provide is the same CPE used with POTS. It is true that customers might choose to use different CPE, which would internally provide a voice/IP conversion, rendering Vonage’s equipment unnecessary. However, Vonage admits that “most” of its customers use the “Multimedia Terminal Adapter” equipment provided by Vonage to make voice calls.¹⁸ Thus, at least for most of its customers, Vonage is providing POTS, and this factor is satisfied.

(3) “The provider allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements.” Vonage makes no claim that it does otherwise. This factor is satisfied.

(4) “The provider transmits customer information without net change in form or content.” This is the heart of the legal issue. If the Commission recognizes the Multimedia Terminal Adapter provided by Vonage to most of its customers, then Vonage is providing voice-to-voice POTS with no net protocol conversion. If the Commission chooses to ignore the adapter, then Vonage’s network is changing protocol between voice and IP in Vonage’s equipment in New York City. With the adapter added to the mix, Vonage’s network uses IP only internally, and, just as Vonage states on its web site, its customers use Vonage like they use any telephone. The Commission must include in its analysis the equipment that Vonage provides to most customers. This factor is thus satisfied. On all four factors, Vonage is a regulated provider of telecommunications services.

¹⁸ See Vonage’s FCC petition at page 5.

Vonage makes a further claim that state regulation of Vonage would be regulation of the Internet.¹⁹ From a legal standpoint, this argument is not any different from the “information services” argument discussed above. From a policy standpoint, the “regulation of the Internet” argument is a red herring. Vonage does not provide Internet access. Vonage’s use of the Internet occurs only because it requires its customers to provide the equivalent of a local loop. Vonage’s customers reach Vonage through a customer-provided broadband Internet connection, obtained from a third party of the customer’s choice. The fact that Vonage requires its customers to provide their own loop facilities does not turn regulation of Vonage into regulation of the Internet. Vonage’s service is no less POTS even though the customer pays a third party for the loop.

Vonage accuses Frontier of “numerous false allegations.”²⁰ One such allegedly false allegation is Frontier’s position that Vonage’s router (the Multimedia Terminal Adapter) converts the call from a POTS signal to Internet Protocol. Vonage’s argument on this point is that the “call” does not begin until the call reaches Vonage’s New York City server on the other end of the customer-provided equivalent of the local loop.²¹ This argument is strained to the breaking point. If it were correct, a POTS “call” does not begin until it reaches the telephone company central office switch. In reality, a call begins when a customer picks up an ordinary telephone and hears dial tone. This is true whether the customer is using ILEC POTS or Vonage POTS. In both cases, the customer picks up an ordinary telephone, hears dial tone, dials a number using an ordinary touch-tone pad, hears a ringing or busy signal, and if the call is answered begins talking.

¹⁹ Vonage Comments, pp. 15-18.

²⁰ Vonage Comments, pp. 7-8.

²¹ Vonage Comments, p. 8.

Vonage also asserts that it owns no facilities in Rochester, and that its New York State gateway is in New York City.²² Frontier does not challenge this assertion but it is a distinction without a difference. Frontier is surprised that Vonage can use PaeTec Communications to port numbers from Frontier to Vonage within Rochester without owning facilities to take the traffic that is coming in to Vonage customers via PaeTec's switch. The Local Exchange Routing Guide (or, for ported numbers, the LNP database) causes all local and long distance carriers to route incoming traffic to Vonage's Rochester numbers via PaeTec. As a matter of necessity, the calls must be transported to Vonage's New York City gateway or some other gateway. Because Vonage has no facilities in Rochester and PaeTec to the best of Frontier's knowledge has no long-haul facilities between Rochester and New York City, Vonage must be using the services of an interexchange carrier to send and receive calls to and from Rochester.²³ This has no impact on the questions of whether Vonage owns facilities within New York State to provide telephonic communications, or whether Vonage provides a net protocol conversion.

In addition, Vonage provides intrastate long distance services to its customers. In this respect Vonage is acting like any other switchless reseller of long distance service. Whether Vonage's gateway is located in New York City or Rochester or both makes no difference to the

²² Vonage Comments, p. 8. Vonage's assertion that Frontier failed to make a reasonable investigation of the facts (Vonage Comments, p. 7) should be viewed in light of the facts that Vonage has failed to disclose its network structure, failed to engage in interconnection negotiations, and thus leaves the rest of the industry in the dark about its capabilities.

²³ Vonage and Global Crossing announced on October 13, 2003 that Global Crossing is providing domestic and international voice termination services to Vonage. http://biz.yahoo.com/prnews/031013/lam002_1.html. These Global Crossing services are the same services purchased by regulated long distance carriers that do not own their own long-haul transmission facilities. Vonage is no more and no less than a combination of a CLEC (competitive local exchange carrier) and a long distance reseller.

fact that Vonage is both offering and providing both POTS and intrastate long distance voice service.²⁴

Finally, Vonage argues that it is not a “telephone corporation” because it does not own, operate or manage any facilities used to provide telephonic communications.²⁵ The argument Vonage makes is no different from its argument that it is an information service or enhanced service provider. Vonage argues that the Multimedia Terminal Adapter that it provides to most of its customers is really a computer owned by the customer.²⁶ This argument is belied by Vonage’s web site, which asserts that Vonage furnishes everything but the ordinary telephone set that the customer needs to make voice calls. The argument once again boils down to the simple issue of whether the Commission will recognize, or whether the Commission will ignore, the device that Vonage furnishes to most of its customers. This device performs one half of a protocol conversion while Vonage’s New York City device provides the other and equally opposite half. Taken together, there is no net protocol conversion and Vonage’s service is POTS. But even taken separately, Vonage’s New York City equipment is providing dial tone, ring tones, busy signals and the transmission of voice telephone calls. This is surely a device used to provide telephonic communications, and therefore a “telephone line” as defined by Public Service Law §2(18). As the owner and operator of this device, Vonage is a “telephone corporation” as defined by Public Service Law §2(17).

²⁴ In a striking similarity to Vonage, for a number of years MFS (now owned by MCI) has provided dial tone to its Rochester CLEC customers from a switch in Buffalo. This does not make MFS any more or less of a regulated CLEC. MFS is in fact a regulated CLEC.

²⁵ Vonage Comments, pp. 18-21.

²⁶ Vonage Comments, p. 19.

IV. Conclusions.

This proceeding is about Vonage, not IP telephony in general, and certainly not about applications that customers load onto their personal computers. It appears that the FCC is not about to act on this subject. Vonage is promoting its services to residential consumers throughout New York State. In many locations including Rochester it is porting numbers from the ILEC, leaving the customers with no dial tone other than Vonage's. Unlike at least one other prospective provider of VoIP service, Vonage provides no real 911 service other than the equivalent of a "speed dial" call to a POTS number at a PSAP. This is a problem that can be solved, but Vonage has not taken steps to solve it. Similarly, Vonage does not comply with CALEA, making its service a haven for criminals who desire to avoid court-ordered wiretaps and traces. Finally Vonage requires its customers to agree to Terms of Service that are a lawyer's dream and a consumer's nightmare and that would not begin to pass muster under the Commission's regulations.

If the Commission fails to act, sometime within the next year it is likely that a disaster will occur to one or more New York residents, perhaps not even Vonage subscribers, because they cannot reach 911, or because a criminal's calls have not been intercepted, or because a subscriber has had service terminated under circumstances that the Commission would not countenance for any regulated dial tone provider.

Vonage's argument that it is providing an "information service" may be true for a few "hobbyist" customers who have their own voice-to-IP equipment. For the majority of Vonage's customers, Vonage is advertising its services as POTS, is providing its services as POTS, but is offering none of the protections that POTS customers expect and deserve. The Commission must determine that Vonage is subject to the very light-handed regulation applicable to CLECs

and switchless resellers of intrastate long distance services. The Commission should not leave POTS consumers stranded with no regulatory protections and few if any real remedies.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregg C. Sayre". The signature is fluid and cursive, with a large initial "G" and "S".

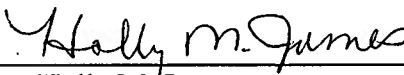
Gregg C. Sayre
Associate General Counsel
Frontier Telephone of Rochester, Inc.
180 South Clinton Avenue
Rochester, New York 14646-0700

DATE: November 13, 2003

CERTIFICATE OF SERVICE

Frontier Telephone of Rochester, Inc.
Case 03-C-1285

I hereby certify that, on this 13th day of November 2003, copies of the foregoing Complaint of Frontier Telephone of Rochester, Inc. in the above-referenced proceeding were placed in the U.S. Mail to all parties on the Active Party List in this proceeding.



Holly M. James

**CASE 03-C-1285
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(As of 11/12/03)**

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