

comments



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October 31, 2003

Honorable Jaclyn A. Brillling
Acting Secretary
State of New York
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

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C03-C-1285
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**Re: Complaint of Frontier Telephone of Rochester, Inc. Against
Vonage Holdings Corp. Concerning Provision of Local Exchange and
Inter-Exchange Telephone Service in New York State in Violation of the
Public Service Law
Case 03-C-1285**

Dear Acting Secretary Brillling:

Enclosed please find an original and 10 copies of comments from the New York State
Telecommunications Association, Inc. in the above-referenced proceeding.

If you have any questions, please contact our office.

Respectfully submitted,

Robert R. Puckett
President

Enclosures

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

In the Matter of

**Complaint of Frontier Telephone of)
Rochester, Inc. Against Vonage Holdings Corp.)
Concerning Provision of Local Exchange and) Case 03-C-1285
Inter-Exchange Telephone Service in New York State)
in Violation of the Public Service Law)**

**COMMENTS OF
THE NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC.**

Robert R. Puckett, President
Louis Manuta, Esq., Director -- Regulatory Policy
New York State Telecommunications
Association, Inc.
100 State Street
Suite 650
Albany, New York 12207

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PUBLIC SERVICE COMMISSION**

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**COMMENTS OF
THE NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC.**

On September 10, 2003, Frontier Telephone of Rochester, Inc. ("Frontier") filed a complaint with the New York State Public Service Commission ("Commission") regarding the "unlawful provision of local exchange and interexchange telephone services by Vonage Holdings Corp. ("Vonage") in Rochester and other locations in New York State in violation of the Public Service Law ("PSL") and other statutes, regulations, and orders."¹ In response, the Commission issued a *Notice Requesting Comments* on October 9, 2003, acknowledging that the complaint raised concerns that could affect other entities besides Frontier.²

¹ *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provision of Local Exchange and Inter-Exchange Telephone Service in New York State in Violation of the Public Service Law*, submitted September 10, 2003, at p. 1. ("*Frontier Complaint*")

² *Notice Requesting Comments*, Case 03-C-1285, Issued October 9, 2003.

The New York State Telecommunications Association, Inc. ("NYSTA") agrees with the Commission that the concerns and issues raised by Frontier regarding Vonage's activities do have general applicability, especially to all incumbent local exchange carriers in New York State. Accordingly, NYSTA hereby submits these comments to support Frontier in its complaint and will explain how Vonage's services are effectively available statewide and its actions as a non-certified provider of Intrastate telecommunications services have an impact on the telecommunications industry and potential customers throughout New York State.

STATEMENT OF INTEREST

NYSTA is a non-profit association incorporated in 1921 whose membership includes all of the incumbent local exchange carriers operating in New York State, including Frontier, as well as several competitive local exchange carriers and interexchange carriers. Vonage customers can place and receive calls using the facilities of New York's local exchange carriers via broadband Internet connections, which are offered by the vast majority of NYSTA's members in their operating territories. As a result, the incumbent local exchange carrier members of NYSTA interact with Vonage in a similar fashion to Frontier and, accordingly, our member LECs are directly affected by Vonage's activities.

FRONTIER'S COMPLAINT

Frontier's complaint shows that Vonage is violating the Public Service Law ("PSL"), as well as other statutes, regulations, and policies which apply to competitive local exchange carriers and interexchange carriers by failing to comply with any regulatory requirements.

Frontier also argued that Vonage is providing an unsafe and inadequate emergency dialing service in violation of PSL §97.

Frontier supported its position by stating that Vonage is a “telephone corporation” “owning, operating or managing” a “telephone line” under PSL §§2(17) and (18).³ Frontier noted that the only distinction between Vonage’s local exchange telephone service and any other provider’s local exchange telephone service is the technology Vonage uses. However, the PSL does not distinguish between local exchange telephone service technologies except for mobile radio and cellular telephone services, which are exempted from regulation.⁴ Vonage does not use either mobile radio or cellular telephone technology, but rather provides local exchange and long distance service utilizing Voice over Internet Protocol (“VoIP”) technology. It also argued that from the customer perspective, Vonage’s service is no different than any other plain old telephone service (“POTS”) call -- the subscriber picks up an ordinary telephone handset, dials a POTS number, hears busy signals or ringing tones, and conducts conversations. Incoming calls are also handled the same as POTS.

Frontier went on to cite several PSL violations, including the requirement to pay its share of the agency’s costs and expenses, to file tariffs for local exchange and intrastate long distance services, and to obtain Commission approval to issue securities.

³ *Id.*, at p. 2. Frontier’s arguments supporting its position that Vonage is a telephone corporation are discussed in its complaint on pages 2 to 6.

⁴ NY Pub. Serv. Law §5(3) and (6).

Frontier also maintained that Vonage is not following the Commission's consumer complaint procedures. For example, Vonage's Terms of Service require mandatory arbitration of consumer disputes under the American Arbitration Association rules for commercial arbitration. These rules potentially require the customer to bear expenses of arbitration that could exceed the amount in dispute. The Terms of Service further require the subscriber to submit to the jurisdiction of the courts of New Jersey. According to Frontier, Vonage is also not following the Telephone Fair Practices Act (Part 609 of the Commission's Rules), the annual report requirement, and the requirement to offer per-line or all-call Caller ID Blocking. It is also not following the Telecom Act of 1996's interconnection agreement dictates or the PSC's traffic exchange requirements for CLECs operating in the local calling areas of incumbent providers.

Frontier went on to state that Vonage does not collect or remit the applicable state and local sales taxes, gross revenue taxes, and the E-911 surcharge. It does, however, collect and remit the three percent Federal Excise Tax on telecommunications services, which Frontier argued is an admission by Vonage that it is a telecommunications carrier.

Finally, Frontier discussed Vonage's 911 service, which it described as "distinctly inferior compared to the 911 service provided by other local exchange carriers."⁵ Vonage: (1) requests that its customers affirmatively subscribe to its 911 service; (2) does not use the dedicated 911 network; (3) routes 911 calls to POTS numbers at a "local emergency personnel location" which may be only a local fire or police station, not necessarily the designated Public

⁵ *Frontier Complaint*, at p. 8.

Safety Answering Point (“PSAP”); (4) does not participate in E-911 service and provides no Automatic Location Identification (“ALI”) for its customers; and (5) provides no backup routing in situations where the number it selects is busy, out-of-service, or otherwise unavailable. As a result, Frontier stated that “[t]he shortcomings discussed above render Vonage’s [911] service unsafe to its subscribers and to other potential users in emergency situations.”⁶

As a remedy for these infractions, Frontier asked the Commission to order Vonage:

- (1) to immediately cease providing local exchange and intrastate long distance services within the state until it complies with all of the requirements as a CLEC and as an interexchange carrier.
- (2) to route all 911 calls over the dedicated 911 network without requiring a special 911 subscription and to participate fully in E-911 service where available.

NYSTA’S POSITION

NYSTA believes that the situations amply demonstrated by Frontier do affect every other local exchange carrier as well as every potential telephone user in the state that may choose Vonage as a local exchange carrier, as reflected by the Commission’s decision to convert Frontier’s complaint into a generic proceeding. Vonage is not only providing service in Rochester and the other Frontier properties in the state, but, because broadband services are available throughout the state, all New Yorkers across the state can avail themselves of Vonage’s service. The Commission’s own Broadband Report, which was issued earlier this year, clearly illustrates the availability of broadband connectivity in every corner of the state -- even by the

⁶ *Id.*, at p. 9

Independent LECs.⁷ Accordingly, NYSTA is pleased that the Commission has chosen to broaden this proceeding so that all entities affected by Vonage's actions will have an opportunity to participate as equal parties.

Jurisdiction and Preemption

In NYSTA's view, this Commission has jurisdiction to consider the proper regulatory treatment of Internet Telephony providers such as Vonage. As illustrated by Frontier, the PSL has granted the Commission the ability to regulate the intrastate operations of telephone corporations in New York State and Vonage meets the definition of a telephone corporation because it owns, operates, or manages a telephone line within the state.⁸ Accordingly, the Commission has the ability to enforce the provisions of the PSL and its rules against all telephone corporations, even those employing VoIP (or any other non-wireless technology) in their networks. It has already done so, in fact, with regards to USA DataNet.⁹

While the FCC has three open proceedings to address an array of Internet Telephony issues, it has not moved to preempt state consideration of Internet Telephony regulation.¹⁰ In

⁷ *See: Study of Rural Customer Access to Advanced Telecommunication Service In Compliance with Chapter 132 of the Laws of 2002*, New York State Department of Public Service, February 1, 2003.

⁸ N.Y. Pub. Serv. Law §§2(17) and (18).

⁹ *Order Requiring Payment of Intrastate Carrier Access Charges*, 01-C-1119, Issued May 31, 2002.

¹⁰ *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, WC Docket No. 02-361, DA 02-3184, issued November 18, 2002; *Pleading Cycle Established for Comments on Pulver.Com Petition for Declaratory Ruling*, WC Docket No. 03-45, DA 03-439, issued February 14, 2003; and *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, DA 03-2952, issued September 26, 2003.

fact, a handful of states have already issued rulings regarding Internet Telephony and have ruled that Vonage must obtain a Certification of Public Convenience and Necessity in order to provide service in the state and that it must comply with applicable 911 rules, including routing requirements and the collection (and remittance) of surcharges.¹¹ Moreover, other states have launched generic inquiries into Internet Telephony regulation, similar to the instant proceeding.¹² Most are still in the fact-finding phase.

Because there is such interest and activity on the state level, combined with the long-standing grant of intrastate telephony jurisdiction to the states by the Communications Act of 1934,¹³ it is NYSTA's position that it is unlikely that the FCC will preempt state action over carriers such as Vonage, but will rather resolve issues regarding the interstate portion of the service.

Vonage Provides Intrastate Telecommunications Service

It is NYSTA's position that Vonage provides telephone service no different than that offered by all other carriers certified by the PSC. Back in 1998, in its *Universal Service Report*

¹¹ *See: e.g.*, Letter from John M. Leutza, Director of the Telecommunications Division, California Public Utilities Commission, to Jeffrey Citron, CEO, Vonage Holdings Corporation, informing the company that it is offering an intrastate telecommunications service for profit without formal certification, dated September 22, 2003; Letter from Wisconsin Public Service Commission to 8x8, Inc. informing the company that its voice and data communications service is an intrastate telecommunications service operating without certification, dated September 11, 2003; and *Order Finding Jurisdiction and Requiring Compliance by the Minnesota Public Utilities Commission*, Docket No. P-6214/C-03-108, issued September 11, 2003. An injunction issued on October 16, 2003 by a federal District Court judge in Minnesota (Civil No. 03-5287 MJD/JGL) to block the determination by the Minnesota Public Utilities Commission that Vonage requires a CPCN to operate, bears no weight outside that state and is distinguished on substantive grounds in these comments (pp. 8-10).

¹² Other states addressing these issues include Alabama, Colorado, Ohio, and Pennsylvania.

¹³ 47 USC §152(b).

to Congress, the FCC discussed four criteria to determine whether phone-to-phone Internet Telephony is a telecommunications service:¹⁴

In using the term "phone-to-phone" IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it 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 switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.¹⁵

Vonage's service satisfies all four criteria.

First, Vonage's advertisements and web page illustrate its provisioning of voice telephony service. Second, ordinary CPE is used to make calls. While an ATA-186 adapter must be used to connect the CPE to the broadband modem, the end user still uses the same CPE as it traditionally has. The addition of related equipment, be it a caller ID box or an answering machine, does not change the fact that an ordinary receiver and handset are used. Third, Vonage advertises that its customers can call telephone numbers assigned via the North American Numbering Plan. Vonage customers are also assigned telephone numbers. Fourth, the fact that Vonage's system converts analog data to digital and back again is only a red herring. In the *Report to Congress*, the FCC stated: "The protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the

¹⁴ *Report to Congress*, In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 98-67, Released April 10, 1998.

¹⁵ *Id.*, at p. 45.

Commission's current approach, because it results in no net protocol conversion to the end user."¹⁶ Accordingly, any change in form that may occur is negated when it is converted back into the same form as originated -- thus there is no net change. Further, analog telephones have converted sound waves to electrical impulses and back again for over 125 years and this has never been considered "a net change in form or content."

Requested Commission Action

Accordingly, NYSTA believes that the Commission has the ability *and duty* to address the issues surrounding Vonage's service and Frontier's complaint. It also should, under the public interest standard, resolve the following concerns:

(1) The Commission should not determine that some local exchange and interexchange providers be subject to a different set of regulations or no regulation based solely on the technology employed. Otherwise, an unlevel playing field would be maintained whereby certain providers would not be subject to the same regulatory and financial obligations as others even though they provide an "identical" service for the end user.

(2) All entities deemed "telephone corporations" under the PSL must meet the requirements of the Commission's end user service standards, codified in Parts 602 and 603 of the Commission's Rules. While the reporting mandates are tiered based upon the number of

¹⁶ *Id.*, at p. 28.

access lines served, there is not (and should not be) an exemption for carriers employing specific transport technologies.

(3) The Commission's Part 609 regulations which, among other things, are designed to protect customers from service suspension and termination, will not apply to Vonage or its customers unless the Commission affirmatively regulates Vonage as a local exchange carrier.

(4) All wireline telecommunications providers are required to comply with the assistance capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA").¹⁷ These public safety-related CALEA mandates, which concern the ability of law enforcement officials to perform electronic surveillance, apply to all other local exchange carriers and must continue to be uniformly applied -- even to Vonage. Because calls between Vonage customers can only be trapped or traced by Vonage, exempting Vonage from CALEA requirements for such calls would hinder law enforcement activities against criminals and terrorists.

¹⁷ Pub. L. No. 103-414, 108 Stat. 4279 (1994).

(5) Similarly, the Commission's on-going investigation into network security and reliability¹⁸ needs to consider the impact of VoIP providers, as reflected in the *White Paper* issued by the Commission in November 2002.¹⁹

(6) Regarding the imposition of access charges for use of LEC facilities, both the originating and terminating scenarios of Internet calls must be addressed by this Commission. NYSTA believes that the various charges applicable under the current regulatory environment for use of LEC provided facilities is appropriate.

(7) All Internet Telephony providers must offer 911 service equivalent to other local exchange carriers or not be permitted to operate in the state. Customers using Internet Telephony for their local service may have serious safety and health implications from the lack of emergency calling on the same level as all other local exchange carriers. The absence of direct trunks to the PSAP or 911 access during a power failure make the Vonage 911 service not just inferior, but potentially dangerous.

¹⁸ *Notice Requesting Comment*, Case 03-C-0922, Issued August 25, 2003.

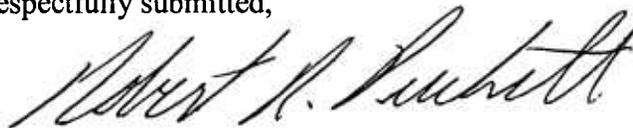
¹⁹ *See: Network Reliability After 9/11: A Staff White Paper on Local Telephone Exchange Network Reliability*, New York State Department of Public Service Office of Communications, November 2, 2002. In this White Paper, Department Staff reflects on the need for network reliability by all providers, *regardless of technology*: "New players using new communications platforms (e.g., cable, wireless, the Internet) are now incorporated into the traditional network. The integration of multiple carriers, sometimes jointly using the same physical plant, creates new challenges for local exchange network reliability." (*White Paper*, at p. 4).

(8) Finally, the Commission must direct Vonage to collect and remit all applicable taxes and surcharges. Otherwise, what affect will the reduction in tax revenues from regulated telephone companies which lose customers to Internet Telephony providers such as Vonage have on state coffers should Vonage not be certificated and regulated as a local exchange and interexchange carrier?

CONCLUSION

NYSTA appreciates the opportunity to express its views regarding the impact that the burgeoning Internet Telephony market is having -- and will continue to have -- on telephone users across New York. Providers of identical services from the end user's perspective need to be regulated in a similar fashion with regards to service standards, customer protections, intercarrier compensation, emergency dialing, and regulatory agency financial support. Failure to do so will lead to the creation of an uneconomic competitive telecommunications marketplace and the potential for serious consequences regarding the safety and health of New Yorkers.

Respectfully submitted,



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