

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Petition of Vaya Telecom, Inc. for) CC Docket No. 01-92
Declaratory Ruling Regarding)
LEC-to-LEC VoIP Traffic Exchange)

**COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
AND
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	VAYA PETITION	3
A.	Summary of Petition	3
B.	Contrary to Vaya’s assertions, it is not “well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate.”	3
C.	Carriers, regardless of the technology they use, should pay a fair share of the cost of using the network.....	7
D.	Vaya’s reliance upon various prior FCC decisions and on sections of the Telecommunications Act of 1996 is misplaced.....	9
III.	CONCLUSION.....	11

SUMMARY

The National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (collectively, “Consumer Advocates”) urge the Federal Communications Commission (“FCC”) to deny the petition filed by Vaya Telecom, Inc. for a declaratory ruling regarding intercarrier compensation for Voice over Internet Protocol (“VoIP”) traffic. Vaya asserts that such traffic is exclusively interstate, and not subject to state jurisdiction.

Consumer Advocates also reiterate their long-standing recommendation that the FCC determine, unambiguously, that VoIP services are telecommunications services. Regardless of such a determination, however, under existing precedent and legislative guidance, states have the authority to regulate intrastate interconnected fixed VoIP, and therefore have the authority to regulate the way in which these VoIP providers compensate other carriers for the use of the public switched telephone network for intrastate calls.

Vaya’s reliance on prior FCC orders, Court decisions, and the Telecommunications Act of 1996 in support of its petition is misplaced. The FCC should reject Vaya’s reasoning as to the characteristics of the Internet traffic that Vaya receives from its VoIP-service-provider customers and then exchanges with other local exchange carriers.

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I. INTRODUCTION

The National Association of State Utility Consumer Advocates (“NASUCA”) as an organization¹ and the New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency representing New Jersey consumers and as a member of NASUCA² (collectively, “Consumer Advocates”) submit comments in opposition to the petition submitted by Vaya Telecom, Inc.

^{1/} NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

^{2/} Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A. §§ 52:27EE-46 et seq.*

(“Vaya”) to the Federal Communications Commission (“FCC” or “Commission”) for declaratory ruling regarding the exchange of Voice over Internet Protocol (“VoIP”) traffic between local exchange carriers (“LECs”).³

In these comments, Consumer Advocates reiterate the recommendations that they have made in various other submissions to the FCC regarding intercarrier compensation (“ICC”). First, the FCC should declare VoIP to be a telecommunications service. Second, all carriers, regardless of the technology they use, should pay for the use of originating and terminating calls on the public switched telecommunications network (“PSTN”). Third, states have the authority to regulate intercarrier compensation rates for intrastate traffic. Finally, states continue to have authority to regulate interconnected fixed VoIP as intrastate services. Vaya’s Petition is without merit and should be rejected.

³ / CC Docket No. 01-92, Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges, August 26, 2011 (“Petition”).

II. VAYA PETITION

A. Summary of Petition

Vaya⁴ seeks a declaration that “a LEC’s attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice.”⁵ Vaya states that it sends only traffic to the public switched telephone network (“PSTN”) that has originated on devices that are enabled with Internet Protocol (“IP”).⁶ Specifically, Vaya seeks a declaration by the FCC that Vaya “is not required to pay a LEC’s intrastate tariffed access charges when Vaya receives a call that begins on the Internet and delivers that call to another LEC for termination.”⁷ As these comments demonstrate, Vaya’s reasoning is flawed, and the FCC should reject Vaya’s petition.

B. Contrary to Vaya’s assertions, it is not “well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate.”

Contrary to Vaya’s assertion, it is not “well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate.”⁸ The FCC has been actively considering how to treat VoIP services for more than seven years⁹ and has yet to come up with a definitive decision on how they should be classified (and what the effects of a particular classification should be).

⁴ / As described on its website: “Vaya Telecom offers flexible and effective solutions for telecommunications service providers. Vaya exclusively offers termination service for IP-originated traffic and can terminate to any location in the contiguous 48 states.” <http://www.vayatelecom.com/about.php>, site visited October 3, 2011.

⁵ / Petition, at 1.

⁶ / *Id.*, at 2.

⁷ / *Id.*, at 3.

⁸ / *Id.*

⁹ / The *Pulver*, *Vonage* and *IP-in-the-Middle* cases, *infra* fn. 9-11, were decided in 2004, and the FCC initiated its pending *IP-Enabled Services* rulemaking, *infra* fn. 12, in that same year.

The forms of VoIP can be loosely categorized as “interconnected” – able to complete calls to end users anywhere on the public switched telecommunications network, regardless of the technology they use for telephone service – or “non-interconnected” – able to reach only persons connected via some form of broadband Internet access service on their computer. There is also “fixed” VoIP – usable at a single location – and “nomadic” VoIP – accessible from any computer connected to the Internet.

The only form of VoIP that the FCC has affirmatively classified as an “information service” (hence not subject to state regulation) is non-interconnected, nomadic VoIP, such as the service offered by Pulver.com.¹⁰ Subsequently, in the *Vonage* case, the FCC preempted states from regulating an interconnected, nomadic VoIP service (in which the VoIP service was sold independent of the broadband facility to the user’s premises) as an intrastate service, on the grounds that it is difficult to know whether the call is intra- or interstate – as determined by its two end-points – when the customer’s location is hard to identify.¹¹ Finally, the FCC has classified calls transmitted using the Internet protocol only “in the middle” as telecommunications services.¹² The FCC has yet to make a definitive classification or pin down

¹⁰/ *In re Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, 19 FCC Rcd 3307 (2004). In pulver.com’s “Free World Dialup” service (“PWD”), customers (“members”) could communicate only with other members and not with points on the PSTN. “Specifically, members must have an existing broadband Internet access service as Pulver does not offer any transmission service or transmission capability. In addition, members must acquire and appropriately configure Session Initiation Protocol (SIP) phones or download software that enables their personal computers to function as ‘soft phones.’” *Id.* at 3309 (para. 5).

¹¹/ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 FCC Rcd 22404 (2004). In 2003, Vonage was offering interconnected VoIP service to customers in Minnesota; since Vonage did not own or provide any broadband Internet access to the customer, however, the location of the customer’s originating service was not necessarily “fixed.”

¹²/ *In re Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd 7457 (2004) (“*IP-in-the-Middle*”). AT&T wanted the FCC to classify its “IP-in-the-Middle” service as an information service, but the FCC determined that it was a

all aspects of the regulatory treatment of “interconnected, fixed VoIP” services, such as the one that is apparently offered by Vaya.

However, since opening its VoIP classification proceeding in 2004, the FCC has made it clear that VoIP providers, and especially those that provide VoIP over their own physical facilities, provide a service that shares many functional similarities with traditional wireline telecommunications service. As such, the FCC currently imposes numerous obligations of providers of interconnected VoIP services that parallel obligations imposed on providers that use older technologies to provide telecommunications services. Among these obligations are:

- Contribution to the federal universal service fund;¹³
- E-911 requirements (interfacing with public safety access points to identify customer location);¹⁴
- Protection of customer privacy, pursuant to section 222 of the Act;¹⁵
- Porting telephone numbers and contributing to expenses associated with administration of numbering database;¹⁶
- Accessibility mandates under Section 225 (requiring telecommunications service providers and equipment manufacturers to make their services and equipment

telecommunications service. As described by the FCC, “the service at issue in AT&T’s petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls -- by an end user who dials 1 + the called number from a regular telephone. When the call reaches AT&T’s network, AT&T converts it from its existing format into an IP format and transports it over AT&T’s Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines.”

^{13/} *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538-43 (2006), *aff’d in relevant part, Vonage Holdings Corp., v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

^{14/} *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10257-58 (2005).

^{15/} *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, 22 FCC Rcd 6927 (2007).

^{16/} *In re Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531 (2007).

accessible to individuals with disabilities, unless not readily achievable);¹⁷

- Notice to customers prior to discontinuance of service;¹⁸ and
- Reporting information on VoIP business (FCC Form 477).¹⁹

With respect to its decision to impose these types of obligations on interconnected VoIP providers, the FCC has observed:

Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public policy goals and protect consumers, and the Commission has stated previously that it 'will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era.' Included among these are the obligations we impose today on providers of interconnected VoIP service, which serve as important consumer protection measures.²⁰

Most recently, the FCC has issued a Notice of Proposed Rulemaking proposing rules to require interconnected VoIP and broadband Internet service providers to report significant outages to the FCC.²¹

^{17/} *In re IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 22 FCC Rcd 11275 (2007)

^{18/} *In the Matter of IP-Enabled Services*, 24 FCC Rcd 6039 (2009).

^{19/} *Local Telephone Competition Report*, July 2009, *op. cit.* fn 20, at 1 ("Effective with the filing of data as of December 31, 2008, Form 477 is a Web-based electronic filing system, and the reporting of information about voice service subscribers is mandatory for providers of interconnected Voice over Internet Protocol (VoIP) service as well as for local exchange carriers and facilities-based providers of mobile telephony service.")

^{20/} *In the Matter of IP-Enabled Services*, 24 FCC Rcd 6039, 6040-41, para. 3 (2009).

^{21/} *In the Matter of The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82, *Notice of Proposed Rulemaking*, rel. May 13, 2011 ("Notice"). The Notice provides: "47 C.F.R. § 9.3 defines an interconnected Voice over Internet Protocol (VoIP) service as a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." *Id.*, at footnote 2.

C. Carriers, regardless of the technology they use, should pay a fair share of the cost of using the network.

Consumer Advocates have previously addressed matters relating to the proper compensation for VoIP traffic.²² The FCC should treat VoIP traffic as it does other traffic (and therefore subject to the same intercarrier compensation (“ICC”) rules as is other intrastate, interstate and local traffic), and should reject proposals for VoIP-specific rates. The continued lack of clarity as to the treatment of VoIP traffic for purposes of intercarrier compensation has led to billing disputes and litigation, and the Commission acknowledges that, despite opening various proceedings and seeking comments several times on this issue, it has failed to act.²³ Consumer Advocates urge the Commission to resolve unambiguously the treatment of VoIP traffic. As Consumer Advocates have stated for many years now, technological innovation should not be a means by which carriers avoid paying for their fair share of the cost of the network.²⁴

The Commission has determined that interconnected VoIP traffic is “telecommunications” traffic whether or not VoIP service is classified as a telecommunications

²² / See, e.g., *In the Matter of Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, rel. February 9, 2011 (“2011 NPRM”), Initial Comments and Reply Comments of NASUCA and Rate Counsel on Section XV of the NPRM, filed April 1 and April 18, 2011, respectively; Initial and Reply Comments of NASUCA and Rate Counsel regarding the “ABC Plan,” August 24, 2011 and September 6, 2011, respectively.

²³ / *2011 NPRM*, at para. 610.

²⁴ / See, e.g., *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the New Jersey Division of Rate Counsel (December 6, 2006), at 5-6.

service or an information service,²⁵ and, therefore, the Commission can logically conclude that VoIP traffic should be subject to the same ICC obligations as all other traffic. Similarly, VoIP carriers should be subject to whatever long-range changes the FCC orders for ICC. The migration to an all-IP network is well underway, and neither needs to be nor should be artificially assisted by disparate (favorable) ICC treatment.

Section 251(b)(5), upon which Vaya relies in part in its Petition,²⁶ specifies interconnection requirements applicable to local exchange carriers in competitive local markets. On its face, it has no applicability to interstate or intrastate exchange access service. Congress specifically distinguished exchange access services from reciprocal compensation transport and termination arrangement required by § 251(b)(5), when it specified that competitive LECs can utilize the facilities and equipment of incumbent's for the transmission and routing of telephone exchange service and exchange access (47 U.S.C. §251(c)(2)(A)). The Commission's authority under Section 201 is expressly limited by § 152(b) of the 96 Act which reserves States authority over intrastate rates and services. Section 152(b) provides, in pertinent part: "[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classification, practices, services, facilities, or regulations for or in connection with intrastate communications by wire or radio of any carrier."

NASUCA addressed the Commission's authority under §§ 251(b)(5) and Section 251(g) to set unified rate in its reply comments filed on May 23, 2011 in this proceeding and set forth reasons that the Commission lacks such authority. In particular, NASUCA explained that §

²⁵ / 2011 NPRM, at para. 615, citing *Universal Service Contribution Methodology*, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking ("2006 Report and Order"), 21 FCC Rcd 7518, 7538-40, paras. 39-41 (2006).

²⁶ / Petition, at 7-10.

251(b)(5) of the 96 Act identifies the reciprocal compensation obligations on ILECs. However, the implementation of reciprocal compensation is outlined in the § 252(d) pricing standards, which are clearly described as being the responsibility of state commissions.

The *Iowa Utilities Board* decision describes a process where the application of the FCC's methodology results in outcomes that fit the specific circumstances present in the states:

The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in §252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.²⁷

D. Vaya's reliance upon various prior FCC decisions and on sections of the Telecommunications Act of 1996 is misplaced.

Vaya's reliance upon the *Core Mandamus Order*²⁸ is misplaced. Although in *Core Communications* the D.C. Circuit upheld the Commission's determination that dial-up Internet access was an interstate service and therefore, the Commission had authority to set a rate for dial-up internet service as an interstate service,²⁹ the Court did not reach the question of whether the Commission could set a rate rather than establish a methodology for intrastate and interstate intercarrier compensation generally.³⁰ Similarly, Vaya's reliance on the FCC's *Cable Modem*

²⁷ / *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).

²⁸ / Petition, at 3,5, citing *In the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98, 99-68, FCC 08-262, 24 FCC Rcd. 6475(Nov. 5, 2008) ("Core Mandamus Order").

²⁹ / *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010).

³⁰ / *Core Communications*, 592 F.2d at 144-145.

Declaratory Ruling is irrelevant because the ruling did not concern VoIP service and VoIP traffic.³¹

Vaya considers its traffic to be jurisdictionally interstate,³² and argues that the traffic exchanged between it and other LECs has “essentially the same characteristics” as ISP-bound traffic “but travels in the opposition direction of ISP-bound traffic.”³³ Consumer Advocates disagree with Vaya’s reliance on the Commission’s *ISP Declaratory Ruling*,³⁴ because Vaya’s traffic is VoIP (*i.e.*, voice) traffic, not “ISP-bound” traffic. Many different services are provided on telecommunications networks. As the technology evolves, IP transmission is being increasingly used to provide traditional telephone service – from the customer’s perspective, the service has not changed, just the technical means of transmission. For instance, a customer may be talking on a phone where part of the call is carried on the traditional network, but the call is also carried on a network that uses IP.

In summary, Vaya’s argument that the traffic that it “receives from its VoIP-service-provider customers and exchanged with other LECs is simply ISP-bound traffic flowing in the other direction”³⁵ and that therefore is necessarily subject to reciprocal compensation, is not persuasive and should be rejected by the FCC.

³¹ / Petition, at 6, citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff’d National Cable & Telecomms. Ass’n v. Brand X Internet Servs.* 545 U.S. 967 (2005).

³² / Petition, at 1.

³³ / *Id.*, at 4.

³⁴ / *Id.*, citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier for ISP-Bound Traffic*, 14 FCC Rcd 3689, para. 13 (1999) (“*ISP Declaratory Ruling*”).

³⁵ / Petition, at 9.

III. CONCLUSION

Consumer Advocates recommend that the FCC deny Vaya's Petition for the reasons set forth in these comments.

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