IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

05–1069, 05–1122, 05–3114, & 05–3118

MINNESOTA PUBLIC UTILITIES COMMISSION, ET AL.

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

Respondents

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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SUMMARY OF THE CASE AND REQUEST FOR ARGUMENT

The petitioners in this case challenge an order of the Federal Communications Commission that preempts a decision by the Minnesota Public Utilities Commission (MPUC) to regulate Vonage Holdings Corporation, a provider of Voice-over-Internet-Protocol (VoIP) service, as a telephone company under state law. The FCC explained that, because Vonage's service did not have a distinct intrastate component to which state regulations could apply, the MPUC's attempt to regulate Vonage under state law impermissibly impinged on, and frustrated, the FCC's policies promoting deregulation of interstate communications.

The Court should hear oral argument in this case. The questions presented are legally and technically complex, and the Court's resolution of the issues in this case could significantly affect the FCC's ability to promote important federal policies. The FCC believes that 30 minutes of argument time for each side will be sufficient to provide the Court with a full presentation of the issues. If the Court decides to allocate more than 30 minutes to the petitioners, however, the FCC requests that it receive an equal amount of time to present its argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

Others

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BRIEF FOR RESPONDENTS

JURISDICTION

The Federal Communications Commission (FCC) released the order under review on November 12, 2004. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22,404 (2004) (*Preemption Order*) (MPUC Add. 1–41).[1] Petitions for review of the *Preemption Order* were filed on January 3, 6,

[1] The following abbreviations are used in this brief: (1) "MPUC Add." refers to the addendum to the brief of the Minnesota Public Utilities Commission *et*

7, and 10, 2005. The jurisdiction of this Court rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), which authorize the courts of appeals to adjudicate petitions to review final orders of the FCC.

QUESTIONS PRESENTED

In the order under review, the FCC preempted a decision by the Minnesota Public Utilities Commission (MPUC) to regulate a Voice-over-Internet-Protocol (VoIP) service provided by Vonage Holdings Corporation (Vonage) as a telephone service under state law. The FCC concluded that preemption was necessary because Minnesota's regulation of Vonage's VoIP service conflicted with the FCC's deregulatory policies and because Vonage's service did not contain a separate intrastate component to which Minnesota's regulations could apply.

The FCC's decision presents the following questions:

1. Was the FCC's decision to preempt the MPUC Order a lawful exercise of its authority to regulate interstate communications?

   Most apposite cases and statutes:

   - 47 U.S.C. § 152(a), (b)
   - *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)
   - *Qwest Corp. v. Scott*, 380 F.3d 367 (8th Cir. 2004)

2. In challenging the FCC's prediction that it likely would preempt state regulation of VoIP services that have similar basic characteristics to

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al.; (2) "J.A." refers to the joint appendix filed by petitioners; and (3) "R.A." refers to the joint appendix filed by respondents.

Vonage's service, has the Public Service Commission of the State of New York (NYPSC) challenged a final agency order that is ripe for judicial review?

Most apposite cases:

- *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004)
- *Alascom v. FCC*, 727 F.2d 1212 (D.C. Cir. 1984)

3. Did the FCC act reasonably in suggesting that it might preempt state regulation of VoIP services that have similar basic characteristics to Vonage's service?

COUNTERSTATEMENT

Vonage Holdings Corporation offers a service known as DigitalVoice, which uses Voice-over-Internet-Protocol (or VoIP) technology to provide communications capabilities that resemble traditional telephone service. Only those who have access to a broadband (*i.e.*, "high speed") connection to the Internet can use DigitalVoice. That broadband connection can be located anywhere; a DigitalVoice subscriber receives the same service in Minneapolis as he or she would in London. Using DigitalVoice, subscribers can communicate with each other using the Internet or talk to other persons who are connected to the traditional public switched telephone network (PSTN).

Because VoIP services such as DigitalVoice use Internet technology to process and transmit information, they are similar in certain respects to services such as email and web surfing, which have traditionally been classified as

"information services" subject to minimal regulation under the Communications Act of 1934. *See* 47 U.S.C. § 153(20). But because some VoIP services can function as a traditional telephony service, they arguably could fall within the definition of "telecommunications service" under the Communications Act (47 U.S.C. § 153(46)) and thus be regulated (like traditional telephony) as common-carrier services under Title II of the Act, 47 U.S.C. §§ 201 *et seq.* *See generally National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005). The proper statutory classification of VoIP services raises complex technical and policy issues, and the resolution of the classification question could have significant and far-reaching consequences for the industry and the development of the Internet. The FCC has initiated a comprehensive rulemaking proceeding to explore the regulatory questions raised by VoIP technology, but it has not yet reached a final determination on how VoIP services should be classified under the Communications Act. *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004) (*IP NPRM*).

This case arises out of a September 11, 2003, decision of the Minnesota Public Utilities Commission (MPUC) to regulate Vonage's DigitalVoice offering as a "telephone service" under Minnesota law.[2] In that decision, the MPUC directed Vonage to comply with Minnesota statutes and regulations

[2] *Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P–6214/C–03–108, Order Finding Jurisdiction and Requiring Compliance (Sept. 11, 2003) (MPUC Order) (J.A. 133–142).

applicable to telephone companies, including "certification requirements and the provisioning of 911 service." MPUC Order 8 (J.A. 141).

In the order under review, the FCC preempted the MPUC Order. The FCC did not resolve whether DigitalVoice should be classified as an information service or a telecommunications service under the Communications Act. Rather, the FCC explained that, under either classification, the MPUC Order imposed requirements on Vonage that negated important federal policy goals. The FCC acknowledged that the Communications Act generally reserves regulation of intrastate communications to the states, but it found that, because Vonage offered DigitalVoice through the Internet, a separate intrastate component of DigitalVoice could not readily be identified for purposes of permitting dual federal-state regulation of the service. The FCC accordingly concluded that, under settled principles of conflict preemption, the MPUC Order had to yield to prevent frustration of overriding federal policy objectives.

A. Voice communications over the Internet

1. Before the advent of the Internet, real-time voice communications in the United States occurred largely on "circuit switched" networks such as the PSTN. *IP NPRM*, 19 FCC Rcd at 4864 ¶ 1. A circuit-switched network operates by creating a dedicated communication path (*i.e.*, a circuit) between different points on the network for each call that is placed over the network. *Id.* at 4869 ¶ 8. For example, in a traditional telephone call, the caller and the called party are connected by a two-way transmission link that is dedicated to that particular call. When either party hangs up, the circuit terminates, and the

network capacity used to create that circuit becomes available to support another call. *See* Newton's Telecom Dictionary 180 (16th ed. 2000) (definition of "circuit switching").

The Internet transmits information in a fundamentally different way. The Internet uses "packet switching" technology, which transmits information by breaking it down into many small pieces, which are then individually transmitted over the network and reassembled at their destination. *IP NPRM*, 19 FCC Rcd at 4869–70 ¶ 8. Internet packets do not travel over dedicated circuits. Rather, packets share network capacity on the Internet, in much the same way that different types of cars and trucks share capacity on a single road. *Id.*; *see also* Newton's Telecom Dictionary 627 (definition of "packet switching").

The term "Internet Protocol" (or IP for short) refers to one of the protocols used to manage the complex process of "packetizing," routing, and reassembling information on the Internet. *IP NPRM*, 19 FCC Rcd at 4869 ¶ 8 & nn.23, 25; *see also* Newton's Telecom Dictionary 447, 838 (definitions of "Internet Protocol" and "TCP/IP"). Among other things, these protocols ensure that each packet of information is marked with an IP "address" so that the packet can be transmitted to the correct destination on the Internet. An IP address does not denote the geographic location of the destination computer or device. Rather, an IP address designates what is in effect a "virtual" location on the Internet. *See, e.g., Brand X Internet Servs.*, 125 S. Ct. at 2703 n.1; *Resonate Inc. v. Alteon Websystems, Inc.*, 338 F.3d 1360, 1362 n.1 (Fed. Cir. 2003);

American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 170–171 (S.D.N.Y. 1997).

2. Virtually any type of information, including data, audio, video, and voice, can be packetized and distributed through the Internet. *IP NPRM*, 19 FCC Rcd at 4870–71 ¶ 9. Until recently, however, the Internet was not a widely used medium for engaging in voice communication because technological constraints often prevented voice packets from being transmitted and reassembled quickly enough to provide the quality of service typically associated with traditional telephone calls. *Id.* at 4866–67 ¶ 4, 4871 ¶ 10; *see also* Newton's Telecom Dictionary 627–628 (definition of "packet switching"). That is beginning to change, as more individuals have begun to access the Internet using high-speed, broadband connections such as DSL or cable-modem service. Broadband connections offer the capability for significantly faster transmission speeds, which, in turn, allows for faster delivery of voice (and non-voice) packets and an improved service quality. *IP NPRM*, 19 FCC Rcd at 4873–74 ¶ 11; *see also Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4818 n.126 (2002) (*Cable Modem Order*) (subsequent history omitted); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6608 ¶ 142 (2001).

The term "VoIP" generally refers to any technology that provides the capability for engaging in real-time voice communications over an IP network

such as the Internet. *Preemption Order* n.9 (MPUC Add. 3). VoIP technology can be implemented in a number of different ways. For instance, the FCC has noted that certain instant messaging and Internet "chat" applications (both of which are traditionally text-based services) have begun to incorporate voice capabilities. *IP NPRM*, 19 FCC Rcd at 4877–78 ¶ 19. Commercial websites may also incorporate VoIP technology to offer consumers the ability to speak with a customer-service representative while online. *Id*. Video-game providers have used VoIP to allow competitors to communicate with each other while playing. *Id*. VoIP also has been used to create online "communities" that allow Internet users to converse and exchange information with each other. *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3307–10 ¶¶ 2–5 (2004).

B. DigitalVoice service

Vonage's DigitalVoice service uses VoIP technology to provide an Internet-based communications product that emulates traditional telephony service. *Preemption Order* ¶ 4 (MPUC Add. 3). DigitalVoice can be accessed only through a broadband Internet connection. *Id.* ¶ 5 (MPUC Add. 3). In addition, because conventional telephones by themselves are not compatible with IP networks, DigitalVoice subscribers also must obtain specialized equipment or software in order to use the service. *Id.* ¶ 6 (MPUC Add. 4). This equipment or software, however, may be used with any broadband Internet connection. "[I]t is not relevant where that broadband connection is located or

even whether it is the same broadband connection every time the subscriber accesses the service"; DigitalVoice is available from any broadband connection "anywhere in the world." *Id.* ¶ 5 (MPUC Add. 3).

DigitalVoice subscribers are assigned telephone numbers that are based on the North American Numbering Plan (*i.e.*, a 3-digit area code and a 7-digit telephone number). *Preemption Order* ¶ 9 (MPUC Add. 5). DigitalVoice subscribers can use these numbers to contact each other (and possibly subscribers to other VoIP services) over the Internet, without having to use the PSTN. *Id.* ¶ 8 (MPUC Add. 4–5).[3] In addition, Vonage can convert IP packets into signals that can be understood by the traditional telephone network, and vice versa. *Preemption Order* ¶ 8 (MPUC Add. 4–5). This capability enables DigitalVoice subscribers to communicate with virtually any person who is connected to the PSTN. *Id.*

Vonage also offers customers non-voice capabilities that resemble or improve upon services typically associated with traditional telephone service. These capabilities include, for instance, "voicemail, three-way calling, online account and voicemail management, and geographically independent

[3] For VoIP-to-VoIP communications over the Internet, traditional telephone numbers are not required. *Preemption Order* n.27 (MPUC Add. 5). For instance, Vonage has entered into at least one "peering" arrangement that allows DigitalVoice subscribers to use the Internet to communicate with other VoIP users who do not have telephone numbers. *See* Letter from William B. Wilhelm, Jr. & Ronald W. Del Sesto, Jr., Swidler, Berlin, Shereff, Friedman, LLP, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03–211 (Oct. 1, 2004), at 3 (R.A. 3).

'telephone' numbers." *Preemption Order* ¶ 7 (MPUC Add. 4). With respect to the last feature, the FCC explained that, unlike traditional landline telephone numbers, DigitalVoice telephone numbers are not assigned on the basis of subscribers' geographic locations. *Id.* ¶ 9 (MPUC Add. 5). A DigitalVoice subscriber instead can request any area code and phone number that Vonage makes available, regardless of where the subscriber resides.

C. The MPUC's decision to regulate DigitalVoice

1. On September 11, 2003, the MPUC issued an order asserting jurisdiction over Vonage's DigitalVoice service. In doing so, the MPUC emphasized that "Vonage offers unlimited local and long distance calling as well as Caller ID, Call Waiting and Voicemail" and that Vonage "holds itself out" as an "all-inclusive home phone service." MPUC Order 8 (J.A. 141). Although the MPUC recognized that a Vonage customer "must have an [Internet service provider] and a computer modem" to use DigitalVoice, it determined that the "consumer is being provided with service that is functionally the same as any other telephone service." *Id.* Based on that determination, the MPUC concluded that DigitalVoice is a "telephone service" and "clearly subject to regulation" under Minnesota law. *Id.* The MPUC accordingly directed Vonage to comply with "all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota," including "certification requirements and the provisioning of 911 service." *Id.* at 8–9 (J.A. 141–142). Although not expressly specified in the MPUC Order, it is undisputed that telephone companies in Minnesota must offer service through

tariffs or price lists filed with the MPUC. *See* Minn. Dep't of Commerce Compl. 9 ¶¶ 47–49 (J.A. 52) (citing Minn. Stat. § 237.07).

Only one month earlier, the MPUC had noted that it would not be "technically feasible" for Vonage to stop marketing DigitalVoice to Minnesota customers "due to the portability of the service."[4] Nonetheless, the MPUC did not consider those portability concerns in the MPUC Order.

2. Vonage successfully challenged the MPUC Order in the United States District Court for the District of Minnesota. *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004). The district court determined that DigitalVoice is an information service under the Communications Act because "it offers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.' " *Id.* at 999 (quoting 47 U.S.C. § 153(20)). Concluding that "Congress intended to keep the Internet and information services unregulated" (*id.* at 1001; *see also id.* at 997), the court held that "Minnesota regulations that have the effect of regulating information services are in conflict with federal law and must be pre-empted," *id.* at 1002. Accordingly, the district court issued a permanent injunction barring the MPUC from enforcing the MPUC Order. *Id.* at 1004.

[4] *Complaint by the Department of Commerce Against Vonage Holdings Corp.*, Docket No. P–6214/C–03–108, Order Denying Temporary Relief (Aug. 1, 2003), at 4 (J.A. 131).

On December 22, 2004, this Court affirmed the district court's permanent injunction. *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004). The Court did not address the statutory classification of DigitalVoice under the Communications Act. Rather, the Court concluded that the *Preemption Order*, which the FCC had released the previous month, "dispositively supports the District Court's injunction." *Id.* at 569. The Court explained that the *Preemption Order* "is binding on this Court and may not be challenged" outside the context of a judicial-review proceeding brought under the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. § 2342(1). *Id.*

D. The FCC proceeding under review

1. At the same time Vonage initiated its district court action against the MPUC, it filed a petition with the FCC seeking a declaratory ruling that the MPUC Order was preempted by federal law. On September 26, 2003, the FCC issued a public notice seeking comment on Vonage's petition. *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, 18 FCC Rcd 19,325 (2003).

A few months later, in early 2004, the FCC initiated a comprehensive rulemaking proceeding "to examine issues relating to services and applications making use of [IP], including but not limited to [VoIP] services." *IP NPRM*, 19 FCC Rcd at 4684 ¶ 1. The *IP NPRM* invited comment on "the proper legal classification and appropriate regulatory treatment of each specific class of IP-enabled services," including "[w]hich classes of IP-enabled services, if any, are 'telecommunications services' under the Act" and "[w]hich, if any, are

'information services.' " *Id.* at 4892–93 ¶¶ 42–43. The *IP NPRM* also invited comment on "how, if at all, [the FCC] should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate." *Id.* at 4886 ¶ 35. The *IP NPRM* further asked about "the jurisdictional nature of IP-enabled services," and, in particular, how jurisdiction could be determined for Internet services where "the points of origination and termination are not always known." *Id.* at 4890 ¶ 38, 4891 ¶ 40. Relatedly, the *IP NPRM* sought comment about the role of the states in regulating IP-enabled services and whether certain categories of IP-enabled services "can be regulated at both the state and federal level without interfering with valid [FCC] policy." *Id.* at 4892 ¶ 41. The *IP NPRM* made clear, however, that the FCC might rule on Vonage's preemption petition before completion of the IP rulemaking proceeding. *Id.* at 4884 n.112.

2. On November 12, 2004, the FCC issued the preemption order under review in this case. The FCC did not address how DigitalVoice should be classified under the Communications Act, but instead deferred that question to its IP rulemaking proceeding. *Preemption Order* n.46 (MPUC Add. 8). The FCC determined, however, that, because regulation of DigitalVoice was inconsistent with certain deregulatory federal policies governing interstate communications and the service did not contain an identifiable intrastate communications component, it was necessary to preempt the MPUC's regulatory requirements.

The FCC explained that, if DigitalVoice is classified as a telecommunications service, "Vonage would be considered a nondominant, competitive telecommunications provider for which the [FCC] has eliminated entry and tariff filing requirements." *Preemption Order* ¶ 20 (MPUC Add. 12). On the other hand, if DigitalVoice is classified as an information service, "it would be subject to the [FCC's] long-standing national policy of nonregulation," particularly with respect to "economic, public-utility" requirements that have traditionally been imposed on telephone companies. *Id.* ¶ 21 & n.78 (MPUC Add. 13–14). In contrast to these deregulatory policies, the FCC noted, the MPUC Order would require Vonage to apply for and obtain the MPUC's prior approval before offering DigitalVoice service in Minnesota and would further require Vonage to offer DigitalVoice through tariffs or price lists filed with the MPUC. *Id.* ¶ 20 (MPUC Add. 13). The FCC concluded that these entry and tariffing requirements would "directly conflict[] with [federal] pro-competitive deregulatory rules and policies," regardless of how DigitalVoice is classified under the Communications Act. *Id.* (MPUC Add. 12).

Recognizing that the Communications Act establishes a "dual regulatory regime" that generally "reserves to the states jurisdiction 'with respect to intrastate communication service,' " *Preemption Order* ¶ 16 (MPUC Add. 9) (quoting 47 U.S.C. § 152(b)), the FCC also examined whether DigitalVoice contained a separate intrastate component such that the MPUC could regulate that component without "reach[ing] the interstate components" of the service,

id. ¶ 23 (MPUC Add. 15). The FCC determined that a separate intrastate component to DigitalVoice could not be identified because of the difficulty of accurately determining the geographic end points of Internet-delivered communications. *Id.* ¶¶ 23–25 (MPUC Add. 15–18). As the FCC noted, the "Internet's inherently global and open architecture obviates the need for any correlation between Vonage's DigitalVoice service and its end users' geographic locations." *Id.* ¶ 24 (MPUC Add. 16). In addition, the FCC explained that "the inherent capability of IP-based services to enable subscribers to utilize multiple service features * * * during the same communication session and to perform different types of communications simultaneously" makes it "difficult, if not impossible," to separate the interstate and intrastate components of DigitalVoice. *Id.* ¶¶ 24, 25 (MPUC Add. 16).

The FCC also concluded that the telephone numbers and billing addresses of Vonage's subscribers could not reliably be used to distinguish the interstate and intrastate components of DigitalVoice. The FCC explained that DigitalVoice telephone numbers are not a reliable indicator of geographic location because, unlike traditional landline telephone numbers, DigitalVoice numbers are not assigned on the basis of geography. In addition, the FCC determined that using telephone-number or billing-address information to ascertain a subscriber's location would ignore the fact that subscribers can use DigitalVoice (with the same telephone number) from any location where a broadband connection to the Internet is available. *Preemption Order* ¶¶ 26–28 (MPUC Add. 18–19).

Based on these findings, the FCC determined that the MPUC Order could not "apply only to intrastate calling functionalities [of DigitalVoice] without also reaching the interstate aspects" of the service. *Preemption Order* ¶ 31 (MPUC Add. 20). The FCC therefore concluded that it was necessary to preempt the MPUC Order to prevent frustration of federal policies disfavoring entry and tariffing requirements for interstate communications.

The FCC stated that preemption of the MPUC Order also was "consistent with" the Internet and broadband policies that Congress had set forth in 47 U.S.C. § 230(b) and section 706 of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104–104, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note). *See Preemption Order* ¶¶ 33–37 (MPUC Add. 22–24). Section 230(b) establishes a national policy of "promot[ing] the continued development of the Internet" and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §§ 230(b)(1), (2). Section 706 articulates a national policy of "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The FCC determined that its decision to preempt in this case would promote these statutory objectives by ensuring that DigitalVoice and similar VoIP services would be governed by a "single national policy," rather than by the disparate and possibly conflicting regulatory policies of various state commissions. *Preemption Order* ¶ 33 (MPUC Add. 22); *see also id.* ¶¶ 35–37 (MPUC Add. 23–24).

The FCC explained that its preemption decision necessarily extended to the MPUC's 911 requirements. *Preemption Order* ¶¶ 42–45 (MPUC Add. 27–29). The FCC explained that, because Minnesota "inextricably links pre-approval of a 911 plan to becoming certificated to offer service in the state, the application of its 911 requirements operates as an entry regulation," and, thus, to that extent, those requirements were preempted along with all other entry requirements imposed on DigitalVoice by Minnesota's regulations. *Id.* ¶ 42 (MPUC Add. 27). At the same time, the FCC made clear that its action "does not mean that Vonage should cease * * * efforts * * * to develop a workable public safety solution for its DigitalVoice service and to offer its customers equivalent access to emergency services." *Id.* (MPUC Add. 28).

In addition, the FCC predicted that state regulation of other VoIP services that "share similar basic characteristics" with DigitalVoice would likely be preempted. *Preemption Order* ¶¶ 2, 32 (MPUC Add. 2, 21). Although the FCC did not have before it any specific attempt by a state regulatory commission to exercise jurisdiction over a VoIP service other than DigitalVoice, the FCC reasoned that the ability of IP technology generally to enable "the provision of tightly integrated communications capabilities" can "greatly complicate[] the isolation of intrastate communication." *Id.* ¶ 32 (MPUC Add. 21).

E. The *VoIP 911 Order*

In the *Preemption Order*, the FCC stated its intent to address "as soon as possible" the general relationship between VoIP service and 911 obligations. *Preemption Order* ¶ 44 (MPUC Add. 29). The FCC followed up that statement

with the release of the *VoIP 911 Order* on June 3, 2005. *IP-Enabled Services*, 20 FCC Rcd 10,245 (2005) (*VoIP 911 Order*). The *VoIP 911 Order* directs providers of "interconnected" VoIP services (*i.e.*, VoIP services, like DigitalVoice, that enable users to call, and receive calls from, PSTN users) to provide their subscribers with 911 capabilities as part of their VoIP service offerings. 20 FCC Rcd at 10,266–67 ¶ 37. In a 911 system, location information is necessary to ensure that 911 calls are sent to the appropriate public-safety authorities and to provide those authorities with the location of 911 callers who are requesting assistance. *Id.* at 10,250–51 ¶¶ 12–13. The FCC recognized, however, that, because many VoIP services are accessible from any broadband connection, service providers "often have no reliable way to discern" their customers' locations for purposes of providing reliable 911 service. *Id.* at 10,259 ¶ 25; *see also id.* at 10,271 ¶ 46 (observing that "it currently is not always technologically feasible for providers of interconnected VoIP services to automatically determine the location of their end users without end users' active cooperation"). To address this problem, the FCC directed providers of interconnected VoIP services that are not capable of automatically determining subscribers' locations to incorporate a system that would require their subscribers to register "the physical location at which the service will first be utilized" and allow them to update their "Registered Location" information "at will and in a timely manner." *Id.* at 10,271 ¶ 46; *see also id.* at 10,291, App. B. The FCC noted that this self-reporting mechanism was only "an immediate step toward a more advanced solution," and it initiated a further rulemaking

proceeding to explore the feasibility of developing new "method[s] for determining a user's location without assistance from the user." *Id.* at 10,246 ¶ 2, 10,276 ¶ 56.

SUMMARY OF ARGUMENT

I. The FCC's preemption of Minnesota's regulation of Vonage's Voice-over-Internet-Protocol service should be upheld. It is well established that the FCC may preempt state regulation to protect its ability to promote valid federal policies governing interstate communications. As the Commission explained, the MPUC's decision to regulate Vonage's VoIP service as a telephone service conflicts with federal deregulatory policies. And because geographic location is irrelevant to the Internet and VoIP service, the MPUC cannot as a practical matter confine its regulation to communications occurring wholly within the state. Under the circumstances, the Commission's decision to preempt the MPUC Order was entirely reasonable.

A. The FCC has generally removed entry and tariffing requirements for competitive telecommunications providers because, in its view, those requirements impede competition and stifle the development of new services. For similar reasons, the FCC has concluded that information-service providers generally should not be subject to economic regulation as public utilities, but should instead be allowed to compete and innovate in a free and open market. Here, however, Minnesota applied the opposite regulatory approach, requiring Vonage to obtain prior approval from state regulators before providing service and to offer DigitalVoice through filed tariffs. Because, regardless of its

regulatory classification, Vonage would not face at the federal level the types of certification and tariffing requirements that Minnesota imposes on telephone companies, the FCC did not have to classify DigitalVoice under the Communications Act in order to conclude that Minnesota's regulatory policies were incompatible with the FCC's deregulatory framework.

B. While states may assert jurisdiction over wholly intrastate communications, the record in this proceeding demonstrates that DigitalVoice users can access the service from any broadband Internet connection, and that there is currently no mechanism by which the Internet can inform Vonage of its users' geographic locations. Moreover, because DigitalVoice is a portable service, DigitalVoice telephone numbers and billing addresses do not accurately reveal geographic locations of Vonage's customers; indeed, Vonage can provide DigitalVoice service to its users regardless of where they are located. Finally, IP technology provides the capability for managing many different types of communications, and Vonage has no means for separately tracking the various "destinations" of these different types of communications for the purpose of determining which state, if any, has jurisdiction over them.

Contrary to the MPUC's contention, the FCC's *VoIP 911 Order* does not retroactively render the FCC's conclusions in this case unreasonable. The *VoIP 911 Order*—which reaffirms the difficulty of obtaining accurate location information on the Internet—does not draw any conclusions about VoIP providers' ability to use customer-provided location information for non-911 calls, nor does it address Vonage's ability to track the non-subscriber end of

VoIP communications. In any event, the MPUC is barred from raising the *VoIP 911 Order* at this time, because it has not asked the FCC (and the FCC has therefore had no opportunity) to address that order's implications for the preemption decision in this case. Finally, the FCC's decision to preempt the MPUC Order is not invalid merely because future technologies conceivably might permit accurate tracking of the geographic end points of IP communications. Instead, the issue is whether the FCC drew reasonable conclusions in light of the record that was before it in this case.

C. The FCC also correctly observed that preempting state regulation of DigitalVoice would promote Congress's statutorily expressed goals of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), and "encourag[ing] the deployment * * * of advanced telecommunications capability to all Americans," 47 U.S.C. § 157 note. Although the MPUC attacks the FCC's reference to these policies, it provides no basis for questioning the FCC's underlying conclusion that allowing multiple state commissions to regulate VoIP services would undermine, rather than advance, Congress's objectives.

II. The NYPSC's attempt to obtain a ruling from this Court that states may regulate so-called "fixed" VoIP services should be dismissed under principles of ripeness and finality. The FCC's statement that it would likely preempt state regulation of services with characteristics similar to those of Vonage's service, including those offered by facilities-based providers, was simply a prediction of

an action that it might take in the future. The statement, without more, does not constitute final agency action that is presently subject to judicial review. The FCC's decision nowhere addresses fixed VoIP services, nor did the FCC have before it any particular state regulation seeking to regulate such services, and there is no basis for concluding that fixed VoIP services are necessarily subject to state regulation in all cases. In any event, the FCC acted reasonably in predicting that state regulation of similar types of VoIP services might also have to be preempted in order to prevent frustration of the FCC's interstate policy goals.

STANDARD OF REVIEW

In issuing the *Preemption Order*, the FCC assessed the technological characteristics of DigitalVoice service and the ability of the MPUC to regulate DigitalVoice without impinging on the FCC's jurisdiction to regulate interstate communications. Under the Administrative Procedure Act, the FCC's analysis can be set aside only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The principle of deferential review applies to FCC decisions preempting conflicting state regulations. In deciding whether preemption is warranted, the "FCC is empowered 'to make reasonable assumptions about economic impact based on the evidence currently available.' " *California v. FCC*, 75 F.3d 1350,

1359 (9th Cir.) (*California IV*), *cert. denied*, 517 U.S. 1216 (1996) (quoting *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1056 (4th Cir.) (*NCUC II*), *cert. denied*, 434 U.S. 874 (1977)). The FCC's "informed discretion" in resolving "primarily issues of fact and analysis" that involve "a high level of technical expertise" is entitled to substantial judicial deference. *Central S.D. Co-op Grazing v. Secretary of the U.S. Dep't of Agric.*, 266 F.3d 889, 894–895 (8th Cir. 2001) (internal quotation marks omitted); *see also Brand X Internet Servs.*, 125 S. Ct. at 2709 (deferring to the FCC's reasonable understanding of the technical characteristics of cable-modem service). The FCC's decision also deserves "weight" because of the agency's "thorough understanding of its own [regulatory framework] and its objectives" and "the likely impact of state requirements" on its ability to promote valid federal regulatory policies concerning VoIP and other Internet-delivered services. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) (internal quotation marks omitted). The FCC's decision to preempt must be affirmed if its judgment represents a "reasonable exercise of its discretion, based on consideration of relevant factors, and [is] supported by the record." *California IV*, 75 F.3d at 1360 (internal quotation marks omitted).

Judicial review of the FCC's interpretation of the Communications Act is governed by the framework set forth in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842–843. If, however,

"the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *accord Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 539 (2002) (under *Chevron*, the court asks "whether the [FCC] made choices reasonably within the pale of statutory possibility"). "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X Internet Servs.*, 125 S. Ct. at 2699.[5]

ARGUMENT

I. THE FCC LAWFULLY PREEMPTED THE MPUC ORDER

In preempting the MPUC Order, the FCC made three central determinations: (1) Vonage engages in interstate communications that are subject to the FCC's exclusive jurisdiction; (2) regardless of the regulatory classification of DigitalVoice under the Communications Act, Minnesota's certification and tariffing requirements conflict with the FCC's deregulatory framework for interstate services; and (3) Minnesota's regulation of Vonage's service frustrates the FCC's deregulatory policies governing interstate

[5] Contrary to the MPUC's assertion (at 16–17), the "presumption against pre-emption" does not apply in analyzing the lawfulness of an agency's decision to preempt state law. *See New York v. FERC*, 535 U.S. 1, 18 (2002). Rather, a reviewing court's role in such cases is to "to determine whether Congress has given [the agency] the power to act as it has" without applying "any presumption one way or the other." *Id.* (internal quotation marks omitted); *see also, infra*, pp. 25–26.

communications because DigitalVoice does not have a separate intrastate component to which the MPUC Order can be confined. Each of the FCC's determinations is reasonable and, taken together, they provide ample support for the FCC's decision to preempt the MPUC Order.

A. The FCC Has Authority to Preempt State Regulation of Intrastate Communications That Conflict With the FCC's Authority to Regulate Interstate Communications

The Communications Act grants the FCC exclusive jurisdiction to regulate interstate (and international) communication in the United States. 47 U.S.C. §§ 151, 152(a); *see also Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004). The Communications Act also grants the FCC broad authority to take "all regulatory actions 'necessary to ensure the achievement of [its] statutory responsibilities.' " *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)). In exercising its authority under the Communications Act, the FCC may "pre-empt any state or local law that conflicts with [federal policy] or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). So long as the FCC has acted "within the scope of authority delegated to it by Congress," its decision to preempt state law has the same legal force as a congressional decision to preempt state law by federal statute. *See Qwest Corp.*, 380 F.3d at 371 (citing *Capital Cities Cable*, 467 U.S. at 699, and *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153–154 (1984)); *see also Symens v. SmithKline Beecham Corp.*, 152 F.3d 1050, 1053 (8th Cir. 1998) ("When agency preemption is at issue, the inquiry focuses on

whether the agency intended to preempt state law and whether it had the statutory authority to do so.").

While the FCC has plenary authority over interstate communications, the Communications Act generally does not authorize the FCC to regulate intrastate communications, but instead "leaves that authority with the States." *Qwest Corp.*, 380 F.3d at 370 & n.1. In particular, section 2(b) of the Communications Act provides that (with certain exceptions) the FCC may not regulate the "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b). Section 2(b) thus establishes a "system of dual state and federal regulation over telephone service" that "would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (*Louisiana PSC*). "[T]the realities of technology and economics," however, often "belie such a clean parceling of responsibility." *Id.*; *see also Qwest Corp.*, 380 F.3d at 370.

In *Louisiana PSC*, the Court considered the interplay between the FCC's responsibility to regulate interstate services and the states' authority to regulate intrastate services. In that case, the FCC had "require[d] state commissions to follow FCC depreciation practices for intrastate ratemaking purposes" to ensure that telephone companies carrying both interstate and intrastate traffic would

receive an "accurate and timely recapturing of capital." 476 U.S. at 368, 374. The Court concluded, however, that the FCC did not have the authority to compel states to use FCC depreciation practices for intrastate ratemaking. The Court explained that, although the FCC has a "statutory obligation" to "determine depreciation for plant used to provide interstate services," the FCC could fulfill that obligation without preempting state depreciation practices because it was possible "to depreciate one piece of property two ways." *Id.* at 375. Indeed, the Court emphasized that Congress had established a specific statutory mechanism for the purposes of "determin[ing] what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service." *Id.* at 375 (citing 47 U.S.C. §§ 221(c) and 410(c)). Because that process "literally separates costs * * * between interstate and intrastate service, it facilitates the creation or recognition of distinct spheres of regulation" to which "different rates and methods of depreciation" can apply. *Id.* The Court in *Louisiana PSC* recognized, however, that it would not always be possible "to separate the interstate and the intrastate components" of regulation so easily. 476 U.S. at 375 n.4. When this "impossibility" is present, the Court noted, the FCC retains the authority to preempt "inconsistent state regulation" in order to prevent such regulation from "negat[ing]" valid FCC policies. *Id.*[6]

[6] In support of this principle, the Court cited the Fourth Circuit's decisions in *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.) (*NCUC I*), *cert. denied*, 429 U.S. 1027 (1976), and *NCUC II*, 552 F.2d 1036, which had upheld the FCC's decision to preempt state regulation of "terminal equipment" used in traditional telephone service. The Fourth Circuit explained that, although section 2(b) limits the FCC's "regulatory power over local services" that are

Since *Louisiana PSC*, the courts of appeals have consistently recognized the FCC's prerogative, under the impossibility exception, to preempt state laws that reach outside the state's "distinct sphere[] of regulation" over intrastate communication (*Louisiana PSC*, 476 U.S. at 375) and into the FCC's regulatory domain. As this Court noted in *Qwest Corp. v. Scott*, the FCC may "preempt state regulation of telecommunications" in order to "further a valid federal regulatory objective," "where it is not possible to separate the interstate and intrastate aspects of a communications service" for purposes of enabling dual federal-state regulation. 380 F.3d at 372 (citing *NCUC II* and *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114–115 (D.C. Cir. 1989)); *see also Public Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (*Maryland PSC*) (recognizing the FCC's authority "to protect a valid federal regulatory objective" where federal and state policies conflict and "cannot be unbundled" from each other) (internal quotation marks omitted); *California v. FCC*, 39 F.3d 919, 932–933 (9th Cir. 1994) (*California III*) (upholding preemption where "the state's more stringent requirements" would "defeat[] the FCC's more permissive policy"), *cert. denied*, 514 U.S. 1050 (1995). In those circumstances, the FCC may occupy the "entire subject matter" at issue to

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"separable from and do not substantially affect the conduct or development of interstate communications," section 2(b) does not "sanction[] any state regulation, formally restrictive only of intrastate communications, that in effect encroaches substantially upon" the FCC's plenary authority to regulate interstate services. *NCUC I*, 537 F.2d at 793; *see also NCUC II*, 552 F.2d at 1046 (reaffirming *NCUC I*).

ensure that "inconsistent state regulation" does not thwart its ability to promote valid federal policies for interstate communications. *Illinois Bell Tel. Co.*, 883 F.2d at 115.[7]

B. DigitalVoice Provides an Interstate Service That is Subject to the FCC's Regulatory Authority

The FCC's jurisdiction under the Communications Act extends to "all interstate and foreign communication" in the United States and "all persons engaged * * * in such communication." 47 U.S.C. § 152(a). Traditionally, the FCC has applied an "end to end" analysis to determine whether a particular service provider or communication falls within its regulatory authority. *Preemption Order* ¶ 17 (MPUC Add. 10); *see also Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000). Under that approach, the FCC examines the "continuous path of communication" from its inception to its completion.[8] A service is deemed "purely intrastate" if the end points of the communication are necessarily located in the same state, and "purely interstate" if the end points are in different states. *Preemption Order* ¶ 17 (MPUC Add. 10). Services capable of both intrastate and interstate communications are deemed "mixed-use" or "jurisdictionally mixed." *Id.*

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[7] Contrary to the MPUC's contention (at 29), *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), does not discuss, much less disturb, the FCC's authority to preempt conflicting state law under the impossibility exception established in *Louisiana PSC*.

[8] *Preemption Order* ¶ 17 (MPUC Add. 10); *see also GTE Telephone Operating Cos.*, 13 FCC Rcd 22,466, 22,475 ¶ 17 (1998) (*GTE Tariffing Order*) (quoting *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619, 1620 ¶ 9 (1992)).

The FCC concluded that DigitalVoice service is not a purely intrastate service subject to the exclusive jurisdiction of state regulatory commissions. *Preemption Order* ¶ 18 (MPUC Add. 10). As the FCC explained, Vonage "has over 275,000 subscribers located throughout the United States, each with the ability to communicate with anyone in the world from anywhere in the world." *Id.* (MPUC Add. 10–11). Accordingly, the FCC concluded that, at a minimum, DigitalVoice is a jurisdictionally mixed service subject to the FCC's regulatory authority over interstate services. *Id.* ¶ 18 & n.63 (MPUC Add. 11).[9] The petitioners in this case do not challenge this aspect of the FCC's decision.

C. The FCC Reasonably Concluded That the MPUC Order Conflicted with Federal Regulatory Policies

1. The FCC also considered whether the MPUC Order imposed requirements on Vonage that conflicted with "valid federal policy objective[s]." *Qwest Corp.*, 380 F.3d at 372; *see also Maryland PSC*, 909 F.2d at 1515. Because the FCC has not yet determined whether DigitalVoice is an information service or a telecommunications service, the FCC's conflict analysis examined both possibilities. The FCC determined that the regulatory classification of DigitalVoice did not affect the result: The MPUC Order

[9] Although DigitalVoice enables intrastate communication, the FCC did not conclude that DigitalVoice provides an intrastate *service*. *See* MPUC Br. 44. A communications service that carries mixed traffic, *i.e.*, some interstate and some intrastate, can be deemed a single interstate service subject to the FCC's exclusive authority. *See, e.g.*, *GTE Tariffing Order*, 13 FCC Rcd at 22,479 ¶ 23; *Cable Modem Order*, 17 FCC Rcd at 4832 ¶ 59.

frustrated federal policies regardless of how DigitalVoice is to be classified under the Communications Act.

The FCC first outlined the conflict between Minnesota law and federal policies if Vonage's service were classified as a telecommunications service. The FCC explained that it long ago decided to "completely eliminat[e] interstate market entry requirements" for domestic telecommunications carriers. *Preemption Order* ¶ 20 (MPUC Add. 13). In the FCC's judgment, "retaining entry requirements could stifle new and innovative services," whereas "unconditional entry[] would promote competition." *Id.* Minnesota, however, takes a different approach toward new entry. Under Minnesota law, "[n]o person shall provide telephone service in Minnesota without first obtaining * * * a certificate of authority" from the MPUC. Minn. Stat. § 237.16, Subd. 1(b) (quoted at J.A. 136); *see also* Minn. R. § 7812.0200 (specifying the MPUC's general certification requirements). Thus, in Minnesota, carriers are barred from providing telecommunications services unless they first demonstrate to the MPUC's satisfaction that they have the "technical, managerial, and financial resources" to provide service in that state. Minn. Stat. § 237.16, Subd. 1(b). As the FCC observed, to obtain state commission certification, a carrier must provided "detailed information," such as "public disclosure of detailed financial information, operational, and business plans, and proposed service offerings," and the certification process could result in delay or the denial of authority to enter the Minnesota market altogether. *Preemption Order* ¶ 20 (MPUC Add. 13).

The FCC also found that Minnesota's tariffing requirements conflicted with the FCC's detariffing policies. The FCC has determined that the use of tariffs by nondominant carriers (*i.e.*, carriers without market power, *see* 47 C.F.R. § 61.3(y)) can "harm consumers by impeding the development of vigorous competition." *Preemption Order* ¶ 20 (MPUC Add. 13) (emphasis omitted). The FCC therefore has generally prohibited nondominant carriers from filing tariffs for domestic, interstate, interexchange (*i.e.*, long distance) services. *Id.* (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20,730 (1996) (*Interexchange Detariffing Order*) (agency history omitted), *aff'd*, *MCI Worldcom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000)). Again, Minnesota has adopted an approach that is inconsistent with federal policy. Under Minn. Stat. § 237.07, "[e]very telephone company shall * * * keep on file * * * a specific rate, toll, or charge [or] a price list * * *, together with all rules and classifications used by it in the conduct of the telephone business." *See* J.A. 152. Thus, although the FCC's rules would prohibit Vonage from offering DigitalVoice through tariffs, Minnesota law would compel a tariffed offering.

The FCC determined that the same conflict between federal and state policies would be present if DigitalVoice were classified as an information service, since the FCC has long pursued a "national policy of nonregulation" of information services. *Preemption Order* ¶ 21 (MPUC Add. 13). That policy is grounded in the FCC's view that imposing traditional, common-carrier-type "economic regulation" on information services would "disserve the public

interest" because information services typically have "lacked the monopoly characteristics" of traditional telephone companies. *Id.* ¶ 21 (MPUC Add. 14). Consistent with that view, the FCC has promoted a market-oriented policy that allows information-service providers to "burgeon and flourish in an environment of free-give-and-take" without the "possible burden of rules, regulations, and licensing requirements" typically associated with traditional telephone regulation. *Id.* (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 425–433 ¶¶ 109–127 (1980) (subsequent history and internal quotation marks omitted)). The MPUC's decision to regulate Vonage as a telephone company indisputably conflicts with the FCC's policies governing information services.

2. The MPUC argues that the FCC may not preempt Minnesota's regulation of DigitalVoice until it resolves the "threshold jurisdictional issue" (at 4, 22) of how the service should be classified under the Communications Act. According to the MPUC, absent resolution of the classification question, the FCC's conflict analysis is "hypothetical" (at 10, 12, 19, 21, 22, 34), "tentative" (at 19), and "void of meaning" (at 21). But it was entirely proper for the FCC to determine that it did not have to classify DigitalVoice in this proceeding. As the Supreme Court has observed, "decisionmakers sometimes dodge hard questions when easier ones are dispositive." *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002). In *Gulf Power*, the Supreme Court described as "sensible" the FCC's decision not to determine

"whether [Internet services] are cable services" under the Communications Act, given the FCC's decision that such a determination was not necessary for it to assert jurisdiction over pole-attachment rates for Internet traffic under 47 U.S.C. § 224. *Id.* at 337. The FCC's decision to defer resolution of the classification of DigitalVoice was equally sensible. The regulatory classification of VoIP services (and IP-enabled services generally) implicates several "complex and critically important matters" that are being addressed in the context of comprehensive, industry-wide rulemaking proceedings. *Preemption Order* n.46 (MPUC Add. 8). Because the FCC determined that the classification of DigitalVoice would not affect the outcome of its preemption analysis, the FCC acted well within its administrative discretion to decide the "narrow jurisdictional question" presented in this case and to defer other regulatory questions presented by VoIP services generally to its IP rulemaking proceeding. *Id.*; *see also United States Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) (stating that the FCC need not address all potential concerns "in one fell swoop") (quoting *National Ass'n of Broad. v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984)).

3. The MPUC also argues (at 25) that the FCC may not preempt state law based on a conflict with federal policies of promoting competition and deregulation in the interstate market. The courts, however, have consistently recognized that competition and deregulation are valid federal interests that the FCC may protect through its preemption authority. *See, e.g., Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 214–218 (D.C. Cir. 1982)

(concluding that the FCC may preempt state regulation to promote a federal policy of fostering competition in the market for customer premises equipment), *cert. denied*, 461 U.S. 938 (1983); *California III*, 39 F.3d at 933 (holding that the FCC may preempt state rules that "defeat the FCC's more permissive policy" of allowing telephone companies to offer basic and enhanced services (precursors to telecommunications and information services) on an integrated basis); *California IV*, 75 F.3d at 1360 (upholding FCC preemption where state regulation "necessarily thwarts and impedes the accomplishment of [the FCC's] objectives" to promote the "development of interstate [calling party number (*e.g.*, Caller ID)] services") (approvingly quoting the underlying FCC order). The MPUC relies (at 25–26) on *Maryland PSC*, 909 F.2d at 1516, and *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (*NARUC*), but those cases also recognize that promoting "the benefits of a free market and free choice" in the interstate market, *see NARUC*, 880 F.2d at 430, is a valid federal objective that can justify preemption of conflicting state laws where "regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects." *Maryland PSC*, 909 F.2d at 1515 (quoting *NARUC*, 880 F.2d at 429).

Nor is there any basis for the MPUC's contention (at 35) that, even if DigitalVoice is classified as a telecommunications service, the FCC's open entry and detariffing policies may not "automatically appl[y]." The FCC squarely concluded that, if DigitalVoice were classified as a telecommunications service, Vonage would be regulated as a "nondominant,

competitive telecommunications provider" to which the FCC's policies against entry barriers and tariff filings would apply. *Preemption Order* ¶ 20 (MPUC Add. 12). It is not relevant that VoIP services "did not even exist (and could not have been contemplated) at the time" those FCC policies were established. *See* MPUC Br. 35. Minnesota has been regulating "telephone companies" for nearly a century, *see State ex rel. Tri-State Tel. & Tel. Co. v. Holm*, 164 N.W. 989, 989 (Minn. 1917), yet the MPUC had no difficulty applying that pre-existing regulatory framework to DigitalVoice, *see* MPUC Order 8 (J.A. 141). Similarly, the FCC's policies against entry barriers and tariff filings are not confined only to those telecommunications services that were in existence when those policies were first announced. *See, e.g.*, 47 C.F.R. § 63.01(a) (eliminating entry barriers for "domestic, interstate service"); 47 C.F.R. § 61.19 (prohibiting, with certain exceptions, tariff filings by "carriers that are nondominant in the provision of international and interstate, domestic interexchange services").[10]

Turning to the specifics, the MPUC argues (at 37–38) that, because its certification process is "flexible" and "allows waivers," it does not "introduce[]

[10] The MPUC argues (at 35-36) that the FCC orders deregulating interstate services did not preempt states from regulating intrastate communications. Two of the cited decisions, however, do not address preemption. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, 14 FCC Rcd 11,364 (1999) (*Section 214 Order*), and *General Tel. Co. of Ca. v. FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). The FCC's detariffing order, moreover, does not address a situation in which, as here, a state's tariffing requirements impinged on the FCC's interstate detariffing requirements. *See Interexchange Detariffing Order*, 11 FCC Rcd at 20,752 ¶ 40.

substantial delay in time-to-market and ability to respond to changing market demands." *See Preemption Order* ¶ 20 (MPUC Add. 13). The FCC's policy, however, has been to "remov[e] regulatory hurdles to market entry" because they can "stifle new and innovative services."[11] The FCC has also concluded that the use of tariffs in competitive markets should be prohibited to "promote competition and the public interest."[12] The MPUC's approach of evaluating requests for waiver of entry and tariffing requirements on a case-by-case basis directly conflicts with the FCC's decision to eliminate entry or tariffing requirements for nondominant carriers across the board.

4. The MPUC cites (at 28–31) a number of statutory savings provisions that it contends preserve state authority over intrastate communications.[13] None of those provisions, however, apply in this case, much less limit the FCC's authority to preempt under the impossibility exception. 47 U.S.C. § 251(d)(3)

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[11] *Preemption Order* ¶ 20 & n.71 (MPUC Add. 13) (quoting *Section 214 Order*, 14 FCC Rcd at 11,373 ¶¶ 13, 14); *see also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, 41 ¶ 118 (1980) (subsequent history omitted) (concluding that the "overall purposes [of the Communications Act] are best fulfilled by reduced entry and exit barriers.").

[12] *Preemption Order* ¶ 20 (MPUC Add. 13); *see also MCI WorldCom*, 209 F.3d at 766 (upholding the FCC's determination that "permitting carriers to file tariffs on a voluntary basis would undermine the competition-enhancing effect of detariffing").

[13] In addition to the savings provisions discussed in the text, the MPUC relies on 47 U.S.C. §§ 214(e)(3), 254(f), and 410. *See* MPUC Br. 29. These provisions—none of which are claimed to have been violated by the *Preemption Order*—do not speak to the FCC's authority to preempt state law under the impossibility exception to section 2(b).

applies only with respect to FCC actions "prescribing and enforcing regulations to implement the requirements" of section 251, which is not the type of action the FCC undertook in this case. 47 U.S.C. § 253(b) likewise provides that "[n]othing in this section," which authorizes the FCC to preempt state or local requirements in certain circumstances, "shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to preserve and advance universal service [and] protect the public safety and welfare." That savings clause does not apply because the FCC did not exercise its authority to preempt under section 253. *See Preemption Order* n.69 (MPUC Add. 12). 47 U.S.C. § 261(c) and section 601(c)(1) of the 1996 Act, 47 U.S.C. § 152 note, are similarly limited. Section 261(c) provides that "[n]othing in this part," *i.e.*, Part II of the Communications Act, 47 U.S.C. §§ 251–261, precludes state regulation that is "not inconsistent" with Part II or the FCC's implementing regulations. Section 601(c)(1)(c)(1) provides that the 1996 Act should not be "construed to modify, impair, or supercede Federal, State, or local law unless expressly so provided." Those provisions do not save the MPUC Order from preemption because the FCC did not invoke Part II of the Communications Act in the *Preemption Order* or "construe[]" the 1996 Act as an independent basis for preemption.[14]

[14] Contrary to the MPUC's assertion (at 65-73), the FCC did not interpret 47 U.S.C. § 230(b) or section 706 of the 1996 Act as an independent source of preemption authority. *See, infra*, pp. 59–61.

5. Finally, there is no basis for the MPUC's contention that the FCC's preemption decision was "too broad." *See* MPUC Br. 39–41. The FCC preempted the MPUC's "certification, tariffing, and other related requirements" to the extent they were "conditions to offering DigitalVoice" in Minnesota. *Preemption Order* ¶ 46 (MPUC Add. 29). On the other hand, the *Preemption Order* did not reach Minnesota's "general laws governing entities conducting business within the state," including laws governing "taxation, fraud, general commercial dealings, and marketing, advertising, and other business practices." *Id.* ¶ 1 (MPUC Add. 2) (punctuation modified).[15] Thus, the *Preemption Order* focused on the particular regulatory requirements that the MPUC sought to impose on Vonage and did not extend to Minnesota's general laws. To the extent the MPUC believes that "the FCC could have fashioned a narrower pre-emption order" and still protected federal interstate policies, the MPUC should have presented that "less intrusive form of pre-emption" to the FCC in its comments or in a petition for agency reconsideration. *See Public Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989) (*Texas PUC*). Having failed to do so, the MPUC is barred from challenging the breadth of the FCC's preemption order on judicial review. *See* 47 U.S.C. § 405(a) (providing that a

[15] In its separate brief, the National Association of State Utility Consumer Advocates (NASUCA) argues that industry-specific consumer protection laws should also be "preserved from preemption" *See* NASUCA Br. 9. The Court should not address the merits of that argument. Because the FCC did not have before it any industry-specific consumer protection laws, the principles of finality and ripeness discussed, *infra*, pp. 40–41, preclude NASUCA from raising its separate argument on judicial review.

party must file a petition for agency reconsideration before it may seek judicial review of an issue over which the FCC has had no "opportunity to pass"); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279–280 (D.C. Cir. 1997); *see also Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 750 (8th Cir. 1998) (noting statutory exhaustion requirement).

The MPUC (at 39, 41) relies on *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996), and *Alascom, Inc. v. FCC*, 727 F.2d 1212 (D.C. Cir. 1984), but those cases provide an additional basis for not reaching the merits of the MPUC's overbreadth argument. *Time Warner* and *Alascom* both hold that principles of finality and ripeness preclude reviewing courts from invalidating an agency's preemption policies outside the context of a concrete factual and legal setting. *See Alascom, Inc.*, 727 F.2d at 1219 ("The mere expression of an agency's intention to preempt some presently nonexistent state regulation which might be found in some future agency proceeding to be inconsistent with federal * * * policy is not reviewable final action"); *Time Warner Entertainment Co.*, 56 F.3d at 194 (an "abstract" statement that state laws "may or may not" be preempted is neither reviewable final agency action nor ripe for review). Particularly given that the MPUC has not cited a single example of a regulation that it believes was wrongly preempted as a result of agency "over-reaching" (MPUC Br. 40), the principles of finality and ripeness discussed in *Alascom* and *Time Warner* compel dismissal of the MPUC's overbreadth argument in this case.

Amicus Arizona Corporation Commission (ACC) argues, without citation to authority, that the FCC failed to provide adequate "notice" of the scope of the *Preemption Order*. ACC Br. 5-9. This Court ordinarily does not consider arguments raised only in an amicus brief, except where "substantial public interests are involved."[16] The ACC's challenge to the adequacy of the FCC's notice was not raised by the petitioners and does not implicate a substantial public interest. Moreover, it is without merit. As the ACC acknowledges (at 8 n.11), the *IP NPRM* "expressly preserve[s] the [FCC's] flexibility to address [Vonage's petition for preemption] by issuing a declaratory ruling or rulings before the culmination" of the IP rulemaking proceeding. *IP NPRM*, 19 FCC Rcd at 4884 n.112. ACC thus had notice that the FCC might act separately on Vonage's petition, and it should have known that the FCC's analysis of the MPUC Order could well apply to similar attempts by other state commissions to regulate DigitalVoice.

D. The FCC Reasonably Concluded That Preemption Was Necessary Because DigitalVoice Does Not Contain a Separate Intrastate Component Capable of Regulation by the MPUC

Contrary to the MPUC's contention (at 26, 37), the FCC's preemption analysis did not end with its conclusion that the MPUC Order conflicted with the FCC's policies disfavoring entry and tariffing regulation in the interstate

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[16] *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 984 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988); *see also Carter v. Lutheran Medical Ctr.*, 87 F.3d 1025, 1026 (8th Cir. 1996); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

market. Recognizing that the Communications Act generally "reserves to the states jurisdiction" over intrastate communications (*see Preemption Order* ¶ 16 (MPUC Add. 9)), the FCC considered whether DigitalVoice contained separate "interstate and intrastate components" such that "dual federal and state regulations [can] coexist." *Id.* ¶¶ 23 (MPUC Add. 15). As the FCC noted, without the ability to distinguish interstate and intrastate communications, Vonage could not freely enter the interstate market (as FCC policy would encourage) without first obtaining the MPUC's permission (and that of every other state commission that sought to regulate DigitalVoice) to provide intrastate services. *See id*. ¶ 30 (MPUC Add. 20). Similarly, Vonage cannot comply with both the MPUC's tariffing requirements and the FCC's mandatory detariffing policies unless it can readily identify (and tariff) a distinct intrastate component of DigitalVoice. Thus, the FCC correctly concluded that, absent a "practical way to sever DigitalVoice into interstate and intrastate communications that enables the [MPUC Order] to apply only to intrastate calling functionalities," *id.* ¶ 31 (MPUC Add. 20), preemption of the MPUC Order was necessary to eliminate the conflict that existed between the FCC's deregulatory framework and Minnesota's requirements.

In the *Preemption Order*, the FCC concluded that DigitalVoice did not contain a separate intrastate component to which Minnesota's certification and tariffing regulations could apply without frustrating the FCC's interstate policies. As explained below, that conclusion was reasonable and should be affirmed.

1. The FCC Reasonably Determined That DigitalVoice Does Not Have a Separate Intrastate Component

a. The FCC has traditionally applied an "end to end" analysis to distinguish interstate and intrastate communications. Under that analysis, a communication whose origination and termination end points are located in the same state would be classified as intrastate and subject to the regulatory authority of state commissions. *Preemption Order* ¶ 17 (MPUC Add. 10). All other communications are subject to the FCC's plenary authority. *Id.*

In the order on review, the FCC determined that Vonage's DigitalVoice service did not contain a separate intrastate component because, as an Internet-based service, DigitalVoice did not have readily identifiable end points. *See Preemption Order* ¶ 24 (MPUC Add. 16). The FCC explained that "Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber" because DigitalVoice is a fully portable service that allows its subscribers to "manage their communications needs from any broadband connection" and to be "reachable anywhere" they can obtain broadband access to the Internet. *Preemption Order* ¶¶ 23–24 (MPUC Add. 15–16). The FCC noted, moreover, that, because a subscriber can "utilize multiple service features that access different websites or IP addresses during the same communication session," the non-subscriber end of a DigitalVoice communication can be "similarly difficult or impossible to pinpoint." *Preemption Order* ¶ 25 (MPUC Add. 16). For instance, a Vonage customer may use the service to "check[] voicemail or reconfigure[e] service options," or "forward[] a voicemail via e-mail." *Id.* ¶ 25 (MPUC Add. 17); *see also id.* ¶ 7

(MPUC Add. 4). The FCC determined that Vonage has no reliable means "to separately track or record" the geographic end points of these "different types of communications," "making jurisdictional determinations about particular DigitalVoice communications based on an end-point approach difficult, if not impossible." *Id.* ¶¶ 24–25 (MPUC Add. 16–17).

The FCC also found that DigitalVoice telephone numbers and billing addresses were not reliable indicators of the physical location of Vonage's customers. *Preemption Order* ¶¶ 26–28 (MPUC Add. 18–19). The FCC explained that any Vonage customer may obtain a Minnesota-based telephone number regardless of where he or she resides and may use that telephone number to send and receive DigitalVoice calls from any location. *Id.* ¶¶ 26–27 (MPUC Add. 18–19).[17] Similarly, "a subscriber with a Minnesota billing address" can use DigitalVoice "from any location" outside Minnesota. *Id.* ¶ 28 (MPUC Add. 19). Thus, the FCC determined, a system that relied on telephone numbers or billing addresses to separate interstate and intrastate communications would erroneously classify some interstate communications as intrastate calls subject to the MPUC's regulatory authority. *Id.*.[18]

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[17] The FCC also explained that, although one of Vonage's previous service plans labeled DigitalVoice calls as "local" or "long distance," those labels were based on telephone numbers and, therefore, did not accurately reflect the geographic end points of DigitalVoice communications. *Preemption Order* ¶ 27 (MPUC Add. 19) (observing that calls between two "local" telephone numbers could occur between persons located "on opposite ends of the world.").

[18] For similar reasons, the FCC explained that developing a "percentage proxy" to approximate the amount of interstate and intrastate communications

b. Although the MPUC disputes (at 43–52) the FCC's finding that Vonage could not ascertain the geographic location of DigitalVoice subscribers, the FCC's conclusion has substantial support in the agency record. As Vonage asserted in its petition, because the "Internet has no system for determining the geographic location of users," it is "technically impossible for Vonage to accurately determine whether a particular transmission is intrastate or interstate in nature." Vonage Pet. 28–29 (J.A. 35–36). Several other commenters confirmed that view. For example, Motorola stated that the "Internet-based nature of VoIP service makes it difficult, if not impossible, to separate its interstate and intrastate components." Comments of Motorola, Inc., WC Dkt. No. 03–211 (filed Oct. 27, 2003), at 15 (R.A. 29). The High Tech Broadband Coalition likewise noted that "[t]here is no way for Vonage to determine the physical location of its customers" and that the "underlying technology makes it impossible to determine the jurisdiction of a particular call." Comments of the High Tech Broadband Coalition, WC Dkt. No. 03–211 (filed Oct. 27, 2003), at

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that take place using DigitalVoice would not address "the conflict between the federal and state regulatory regimes (in particular, the tariffing and certification requirements) at issue" in this case. *Preemption Order* n.98 (MPUC Add. 18) (internal quotation marks omitted). Unless Vonage can accurately identify the particular DigitalVoice communications that would be subject to the MPUC's jurisdiction, Vonage cannot freely enter the interstate market without first becoming certificated in Minnesota (and any other state that sought to regulate DigitalVoice), and it cannot comply with Minnesota's tariffing requirements without also violating the FCC's detariffing policies.

3, 10 (R.A. 36, 43). Several providers of VoIP services also confirmed that, like Vonage, they could not determine their end users' physical locations.[19]

The MPUC's response to these assertions is to dismiss them as "self serving," MPUC Br. 18, 50, but the record evidence in this proceeding accords with the FCC's expert understanding of the difficulty of obtaining accurate location information for communication that originates on the Internet. *See, e.g.*, *Preemption Order* n.89 (MPUC Add. 16). For instance, in the context of IP-based relay services used by the hearing and speech impaired, the FCC has observed that "there is no automatic way to determine whether any call [originating on the Internet] is intrastate or interstate."[20] Having previously

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[19] Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03–211 (Oct. 21, 2004), at 2 (R.A. 47) (noting that it was "impossible to determine the geographic" location of AT&T's VoIP customers); Letter from Kathleen Grillo, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03–211 (Nov. 1, 2004), at 1 (R.A. 50) (Verizon Nov. 1 Ex Parte Letter) (asserting that Verizon "currently does not have a reliable and commercially feasible way to determine a particular VoIP customer's geographic location when the call is being made"); Letter from John T. Nakahata, Harris, Wiltshire & Grannis, LLP, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03–211 *et al.* (Nov. 3, 2004), Att. at 1 (R.A. 54) ("it is impossible to determine which jurisdictional boundaries an IP communication crosses or precisely where the end user customer is located").

[20] *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 17 FCC Rcd 7779, 7784 ¶ 15 (2002); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 19 FCC Rcd 12,475, 12,481 ¶ 5 (2004) ("Since [Video Relay Service] generally involves the use of the Internet for one leg of the call * * *, it is currently not possible to automatically determine the geographic location of

recognized the difficulty of determining location information on the Internet, it was reasonable for the FCC to credit the record evidence that the FCC's prior understanding is, in fact, correct.[21]

The MPUC also surmises (at 47 & n.22, 50) that Vonage must know the physical location of its subscribers in order to accurately route DigitalVoice communications. DigitalVoice communications, however, are routed on the basis of IP addresses.[22] IP addresses are not physical addresses; they are "virtual," cyberspace addresses that signify "no particular geographical location." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 851 (1997); *see also PSINet, Inc. v. Chapman*, 362 F.3d 227, 235 (4th Cir. 2004) ("Internet protocols were designed to ignore rather than to document geographic location. While computers on the Internet do have 'addresses,' they are addresses on the network rather than geographic addresses in real space") (internal quotation marks omitted). Every Internet-based form of communication—such as email and web surfing—uses IP addresses to deliver information successfully. *See*

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that party to the call, and therefore to determine whether a particular VRS call is *intra*state or *inter*state.").

[21] Amicus New Jersey *et al.* suggests (at 7) that certain "geolocation" products can be used to identify the physical location of DigitalVoice subscribers. The FCC determined, however, that geolocation technology was not "readily obtainable at this time." Preemption Order n.95 (MPUC Add. 17). Moreover, the FCC need not require VoIP providers to incorporate such technology solely to create a separate intrastate communications service capable of regulation by the states. *See, infra*, pp. 55–56.

[22] *See* Letter from William B. Wilhelm, Jr. & Ronald W. Del Sesto, Jr., Swidler, Berlin, Shereff, Friedman, LLP, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03–211 (Oct. 19, 2004), at 2 (R.A. 8).

American Libraries Ass'n, 969 F. Supp. at 165–166 (noting that emails and websites operate through "logical" rather than "geographic" addresses). The courts have nonetheless recognized that the ability to deliver information over the Internet does not necessarily translate into a capability for determining the physical location of Internet users. *See*, *e.g.*, *Ashcroft v. ACLU*, 535 U.S. 564, 577 (2002) ("Web publishers currently lack the ability to limit access to their sites on a geographic basis"); *American Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) ("Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States") (internal punctuation and quotation marks omitted); *American Libraries Ass'n*, 969 F. Supp. at 169 ("Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.").[23]

c. The MPUC also asserts (at 50) that "the *portability* of a *service* has never" provided a basis for preemption under the impossibility exception. The FCC, however, has often recognized the necessity of preempting state regulation of mobile services in favor of a uniform framework. For instance, in the early 1980's, the FCC preempted state entry and rate regulation of nationwide paging service, which "can be used for both interstate and intrastate

[23] The MPUC's concern (at 52–57) about "bundling arbitrage" is therefore misplaced. Vonage has not "deliberate[ly] bundl[ed]" otherwise distinct interstate and intrastate services. *See* MPUC Br. 55. Instead, as the FCC concluded, DigitalVoice does not contain separate interstate and intrastate components.

communication," because it "function[s] as an integrated communications system and, therefore, must be viewed as a whole for regulatory purposes."[24] The FCC also has preempted state regulation of air-to-ground telephone services on interstate flights, explaining that preemption was necessary because "it is not feasible to identify the originating point of calls made" from an airplane in interstate transit.[25] The FCC has similarly preempted state entry and rate regulation of the "space segment" of mobile satellite services (MSS), concluding that requiring satellite operators "to adhere to fifty potentially conflicting technical standards, entry standards and space segment rate standards would render implementation of an MSS system virtually impossible."[26]

The MPUC fares no better in analogizing DigitalVoice to wireless-telephone services. *See* MPUC Br. 50–51. When the FCC first licensed

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[24] *See Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services*, 93 FCC Rcd 908, 921–922 ¶¶ 35–36 (1983); *Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services*, 97 FCC 2d 900, 907–908 ¶¶ 14–15 & n.29 (1984).

[25] *Amendment of the Commission's Rules Relative to Allocation of the 849–851/894–896 MHz Bands*, 5 FCC Rcd 3861, 3865–66 ¶ 36 (1990).

[26] *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, 2 FCC Rcd 485, 491 ¶ 40 (1987).

commercial cellular service, it permitted state regulation based on its view that such regulation would "provide considerable assistance in achieving" federal policy goals. *An Inquiry Into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems*, 86 FCC 2d 469, 505 ¶ 83 (1981). At that time, however, the FCC also made clear that, because "cellular systems can provide both intrastate and interstate communication," it retained the authority to exercise "[f]ederal primacy where necessary to preserve a federal scheme for the provision of interstate communications." *Id.* at 504 n.74. Moreover, in 1993, Congress enacted 47 U.S.C. § 332(c)(3), which preempted state regulation of "the entry of or the rates charged by" wireless providers. As the FCC recognized in this case, to the extent DigitalVoice's portability makes it analogous to wireless services, that analogy further supports the FCC's preemption of the MPUC's entry and tariffing regulations in this case. *Preemption Order* ¶ 22 (MPUC Add. 15).[27]

d. The MPUC challenges the FCC's decision not to rely on DigitalVoice telephone numbers to separate DigitalVoice into interstate and intrastate

[27] There is no basis for the MPUC's assertion that the states' authority under section 332(c)(3) to regulate "other terms and conditions" of wireless service supports its attempt to regulate DigitalVoice here. MPUC Br. 49 n.25, 51. As an initial matter, this case concerns Minnesota's entry and tariffing regulations, which would clearly be preempted if applied to wireless services. In any event, in implementing section 332, the FCC explained that state regulation of "other terms and conditions" under section 332(c)(3) would not be permitted where such regulation would frustrate valid federal policies. *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1506 ¶ 257 & n.517 (1994).

components. *See* MPUC Br. 49–50, 57–58. The MPUC does not dispute that DigitalVoice telephone numbers do not necessarily reflect the geographic location of Vonage's customers. Instead, the MPUC asserts that telephone numbers are the "best (albeit not perfect) proxy" because, in the "normal situation," Vonage's customers will obtain an in-state telephone number and will use DigitalVoice "to mostly make local calls from home." *See* MPUC Br. 49, 58. The MPUC cites no record evidence to support its assertions concerning the calling practices of VoIP users generally or DigitalVoice subscribers in particular.[28] But even if such evidence did exist, the FCC would still have the authority to preempt the MPUC Order in order to effectuate federal policies with respect to the component of DigitalVoice that is used for interstate communications. As the Fourth Circuit noted in an analogous situation, the FCC's authority to regulate interstate communications is not affected by "the calling habits of telephone subscribers." *NCUC II*, 552 F.2d at 1046; *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use").

[28] In its petition (which was filed with the FCC in 2003), Vonage asserted that 37 of the approximately 500 DigitalVoice customers with Minnesota billing addresses did not have a Minnesota-based telephone number, while 88 subscribers with billing addresses outside of Minnesota had Minnesota-based telephone numbers. Vonage Pet. 8 (J.A. 15).

To be sure, in other contexts, the FCC has declined to exercise its full preemption authority and, instead, has permitted the states to assert jurisdiction over certain jurisdictionally mixed services in order to "foster[] administrative simplicity" or otherwise to promote federal policy interests.[29] In this case, however, the FCC reasonably rejected that approach. The FCC explained that requiring Vonage to submit to regulation by various state commissions would "serve no legitimate policy purpose," but, rather, would undermine the FCC's policy of "encouraging and promoting the development of innovative, competitive advanced service offerings." *Preemption Order* ¶ 25 (MPUC Add. 18). "Forcing such changes to [DigitalVoice] would greatly diminish the advantages of the Internet's ubiquitous and open nature that inspire the offering of services such as DigitalVoice in the first instance." *Id.* ¶ 29 (MPUC Add. 19). Particularly where, as here, the service provider has "no service-driven reason" to separate the interstate and intrastate components of its service, the FCC explained that its preferred approach is to "treat[] the services at issue as jurisdictionally interstate" and to "preempt[] state regulation where necessary" to protect its ability to promote federal policy objectives. *Id.* ¶ 29 (MPUC Add.

[29] *See, e.g.*, *Qwest Corp.*, 380 F.3d at 371 (observing that the FCC has enabled states to regulate jurisdictionally mixed special-access lines where interstate traffic comprises less than 10% of the traffic on those lines); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (concluding that the FCC "has appropriately exercised its discretion to require an ISP to pay intrastate charges," but not interstate charges, where ISP services "may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements").

19–20). *See also, infra*, pp. 59–61. (discussing the FCC's conclusion that preemption of the MPUC Order is consistent with Congress's Internet and broadband policies).

2. The *VoIP 911 Order* Does Not Undermine the FCC's Conclusion in the *Preemption Order* That DigitalVoice Does Not Contain a Separate Intrastate Component

In the *Preemption Order*, the FCC recognized that the ability of VoIP users to have "[a]ccess to emergency services" is "a critically important public safety matter." *Preemption Order* ¶ 43 (MPUC Add. 28). The FCC therefore indicated that it would address 911 issues "as soon as possible" in the context of its general IP rulemaking proceeding. *Id.* ¶ 44 (MPUC Add. 29). Consistent with that statement, the FCC released the *VoIP 911 Order* in June 2005. The *VoIP 911 Order* adopts an "immediate [911] solution" to ensure that subscribers to interconnected VoIP services have access to 911 capabilities. *VoIP 911 Order*, 20 FCC Rcd at 10,266 ¶ 36. Under the *VoIP 911 Order*, interconnected VoIP providers that cannot automatically determine the physical location of their subscribers must "[o]btain for each customer, prior to initiation of service, the physical location at which the service will first be utilized" and also must enable subscribers to update their location information "at will." *Id.* at 10,291, App. B; *see also id.* at 10,271 ¶ 46.

The MPUC relies on the *VoIP 911 Order* to attack the FCC's inseparability finding in the *Preemption Order* (*see* MPUC Br. 43), but the two orders are wholly consistent in their conclusions about the difficulty of accurately determining the physical location of DigitalVoice subscribers. As the FCC

noted in the *VoIP 911 Order*, "the mobility enabled by a VoIP service that can be used from any broadband connection" means that "VoIP service providers often have no reliable way to discern from where their customers are accessing VoIP service." 20 FCC Rcd at 10,259 ¶ 25; *see also id.* at 10,271 ¶ 46, 10,276 ¶ 56. The FCC accordingly "emphasize[d]" in the *VoIP 911 Order* that it was "not requiring interconnected VoIP providers to automatically determine the location of their end users." *Id.* at 10,271 n.146. Instead, the FCC initiated a further rulemaking proceeding to explore the development of "a more advanced solution" that would enable providers of interconnected VoIP services such as DigitalVoice to ascertain the geographic location of their subscribers without those subscribers' "active cooperation." *Id.* at 10,276 ¶¶ 56–57.

The MPUC contends that the *VoIP 911 Order* shows that the "separation problem" affecting VoIP services "could be resolved." MPUC Br. 43. There is no factual basis for that assertion. Nothing in the *VoIP 911 Order* indicates that the "Registered Location" information that Vonage collects to provide 911 service can be readily used to determine the geographic end points of non-911 communications. Moreover, the FCC noted in the *Preemption Order* that, even if Vonage could ascertain the physical location of its customers, the other end of a DigitalVoice communication would still remain "difficult or impossible to pinpoint." *Preemption Order* ¶ 25 (MPUC Add. 16). The MPUC does not contest that finding, and the *VoIP 911 Order* does not address that issue. Thus, to the extent the MPUC believes that the *VoIP 911 Order* affects the factual underpinnings of the *Preemption Order*, it must first provide the FCC with an

opportunity to evaluate the relevance of the *VoIP 911 Order* to its prior preemption analysis. *See* 47 U.S.C. § 405(a); *cf. Capital Network Sys., Inc. v. FCC*, 3 F.3d 1526, 1530 (D.C. Cir. 1993) ("[T]he Commission can hardly be faulted for ignoring precedents that did not precede") (punctuation and internal quotation marks omitted).

In any event, the FCC correctly rejected the argument that it could preempt the MPUC only if it "demonstrate[d] absolute future impossibility" of separating DigitalVoice into interstate and intrastate components.[30] Contrary to the MPUC's suggestion (at 53), the Communications Act does not compel service providers to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communications service that they can regulate under section 2(b). *Cf. Illinois Bell Tel. Co.*, 883 F.2d at 116 (noting that the Act's "separation of state and federal regulatory spheres" does not require "construction of wholly independent intrastate and interstate networks"). Nor does any provision of the Act require the FCC to compel such separation before it can preempt state law under the impossibility doctrine. *See California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (upholding FCC preemption on the basis that it would be "impractical" to require investment in "expensive additional equipment" solely to create a separate intrastate communications service), *cert denied*, 434 U.S.

[30] *Preemption Order* ¶ 29 (MPUC Add. 20) (quoting *Rules and Policies Regarding Calling Number Identification Service—Caller ID*, 10 FCC Rcd 11,700, 11,727–28 ¶ 77 (1995), *aff'd*, *California IV*, 75 F.3d 1360).

1010 (1978).[31] Technological advances arising out of the FCC's 911 initiatives or through other means may one day enable VoIP providers to track the geographic end points of voice IP packets with the same facility as traditional telephone companies can determine the origination and termination of circuit-switched communications. But the *Preemption Order*'s findings must be reviewed in light of facts as they currently exist and "on the basis of the record developed before" the agency.[32] Here, the MPUC has failed to point to anything in the record that calls into question the FCC's conclusion that DigitalVoice does not contain a separate intrastate component to which Minnesota's entry and tariffing regulations can apply.

E. The FCC Lawfully Preempted the MPUC's 911 Requirements

As explained above, the FCC reasonably concluded that the MPUC could not regulate the entry of DigitalVoice into the Minnesota market because such entry regulation necessarily would curtail Vonage's ability to provide interstate

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[31] The "jurisdictional separation" process at issue in *Louisiana PSC* is designed "to allocate costs and regulatory authority over ratemaking" and does not address the antecedent question whether the FCC or state commissions have "plenary regulatory authority" over a particular service. *Qwest Corp.*, 380 F.3d at 373; *see also Illinois Bell Tel. Co.*, 883 F.2d at 114–116 (holding that the FCC's allocation of marketing costs through the jurisdictional-separations process was "not determinative" of the FCC's authority to preempt state regulation of marketing itself); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 408 (D.C. Cir. 2002).

[32] *Texas PUC*, 886 F.2d at 1334; *see also Maryland PSC*, 909 F.2d at 1516; *cf. Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) (affirming exclusion of "evidence concerning post-sale logging and road construction" where a challenge was brought against "the Forest Service's timber sales decisions, not post-sale activities implementing the sales").

communications. Because Minnesota "includes as one of its entry conditions the approval of a 911 service plan 'comparable to the provision of 911 service by the [incumbent] local exchange carrier,' " *Preemption Order* ¶ 42 (MPUC Add. 27) (citing Minn. R. § 7812.0550, Subpt. 1); *see also* MPUC Order 8 (J.A. 141), the FCC determined that Minnesota's 911 requirement impermissibly "bars Vonage from entry in Minnesota." *Preemption Order* ¶ 42 (MPUC Add. 27).

Citing the *VoIP 911 Order*, the MPUC contends (at 63) that Vonage could have "identif[ied] the location of calls with sufficient accuracy" to meet the MPUC's 911 requirements. The FCC's VoIP 911 requirements, however, did not exist when the MPUC asserted jurisdiction over Vonage or even when the FCC issued the *Preemption Order*. The MPUC's reliance on the *VoIP 911 Order* is therefore barred under 47 U.S.C. § 405(a). Moreover, the *VoIP 911 Order* does not support the MPUC's suggestion that multifarious state-imposed 911 requirements would have imposed no greater burden on VoIP providers than the FCC's uniform, national framework. As the FCC has noted, there are a variety of "differences in state laws and regulations governing the provision of 911 service." *VoIP 911 Order*, 20 FCC Rcd at 10,251 n.34. Particularly with respect to services (such as interconnected VoIP service) that can be used in different locations, the FCC has recognized the need for "setting national rules." *See id.* at 10,259 ¶ 25; *see also id.* at 10,249 ¶ 8 (noting that "new communications technologies" can pose "technical and operational challenges to the 911 system" that necessitate "the adoption of a uniform national

approach"). The FCC specifically identified "various inseverable, nationwide aspects" of 911 service offered by interconnected VoIP providers, including the need for "ubiquitous [911] operational compatibility, avoiding state-by-state technical and operational requirements that would burden equipment manufacturers and providers, and avoiding confusion by end users who attempt to contact emergency services * * * away from their primary location." *Id.* at 10,262–63 n.95 (punctuation modified and list numbers omitted). There is no basis for the MPUC's view that its go-it-alone approach to VoIP 911 issues would have been equally as workable.[33]

The MPUC responds (at 61–62) that it might have granted Vonage a waiver of "infeasible or unreasonably burdensome" 911 requirements. The FCC explained, however, that the requirement that Vonage undertake the uncertain process of seeking waivers of state certification requirements from the MPUC (and every other state commission that might seek to regulate it) does not mitigate the conflict between the MPUC Order and the FCC's interstate policies. *Preemption Order* n.31 (MPUC Add. 6).

Finally, the MPUC contends that the Wireless Communications and Public Safety Act of 1999 (911 Act), Pub. L. No. 106–81, 113 Stat. 1286, does "not show an intent by Congress to prohibit State 911 regulation of telephone service providers." MPUC Br. 64. The FCC did not base its decision to preempt on the

[33] *See, e.g.*, Letter from John T. Nakahata, Harris, Wiltshire & Grannis, LLP, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03–211 *et al.* (Oct. 29, 2004), Att. at 23–24 (R.A. 108–109).

provisions of the 911 Act, but rather on its authority under the Communications Act to regulate interstate communications. Nothing in the 911 Act limits the scope of that preemption authority.

F. The FCC Correctly Determined That Federal Internet and Broadband Policies Support its Decision to Preempt

1. Section 230(b) of the Communications Act provides that "[i]t is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services" and "(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b). In the *Preemption Order*, the FCC noted that its decision to preempt was "consistent with" that congressional policy. *Preemption Order* ¶ 33 (MPUC Add. 22). The FCC explained that the policy of promoting the Internet's "continued development" (47 U.S.C. § 230(b)(1)) applies without regard to the statutory classification of particular Internet-based services, *Preemption Order* ¶ 34 (MPUC Add. 22–23), and that allowing "more than 50 different jurisdictions to impose traditional common carrier economic regulations" on VoIP services would likely retard, rather than promote, that important federal policy. *Id.* ¶ 35 (MPUC Add. 23).

Contrary to the MPUC's contention (at 65–68), the FCC did not interpret section 230 to "require[] the FCC to preempt" or to "strip the State

commissions of their traditional police authority."[34] As explained, the FCC preempted the MPUC Order on the basis of its general authority to regulate interstate communications. But it also recognized that its decision to preempt comports with the Internet policies that Congress set forth in section 230.

The MPUC contends that the "section 230 policy statement *does not* include DigitalVoice" because Vonage does not provide "content." MPUC Br. 68 & n.29. The FCC reasonably rejected that view. Section 230(f)(1) defines the "Internet" as the "international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). Section 230(f)(2) defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service." 47 U.S.C. § 230(f)(2). Although the FCC concluded that it was unnecessary to determine precisely which aspect of the definition best applied to DigitalVoice (*see Preemption Order* n.115 (MPUC Add. 22)), the FCC correctly observed that neither definition is limited to services that offer content. *Id*. n.115 & ¶ 35.

2. Section 706 of the 1996 Act establishes a national policy of "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 157 note. As the FCC explained, services such as DigitalVoice that are accessible only through

[34] Accordingly, there is no basis for the MPUC's suggestion (at 69 n.30) that the FCC's interpretation of section 230(b) would lead to the repeal of federal regulation of telecommunications services that "touch" the Internet.

high-speed Internet access "driv[e] consumer demand for broadband connections, and consequently encourag[e] more broadband investment and deployment." *Preemption Order* ¶ 36 (MPUC Add. 24). The FCC predicted that state regulation of services such as DigitalVoice would "severely inhibit [their] development," thereby impeding section 706's goal of promoting investment in broadband infrastructure. *Id.* ¶ 37 (MPUC Add. 24).

The MPUC contends (at 72) that the FCC interpreted section 706 as "somehow mandat[ing] federal preemption." The FCC, however, merely expressed its expert judgment—which the MPUC does not contest—that state-based regulation of VoIP services would frustrate the goal of encouraging ubiquitous broadband services. Again, while the FCC did not invoke section 706 as an independent source of authority for its decision to preempt the MPUC Order, section 706's policy of encouraging broadband deployment is "consistent with [its] decision to preempt" in this case. *Preemption Order* ¶ 33 (MPUC Add. 22).

II. THE NYPSC'S ARGUMENT CONCERNING PREEMPTION OF "FIXED" VoIP SERVICES IS PREMATURE

In the *Preemption Order*, the FCC stated that it was "highly unlikely that [it] would fail to preempt state regulation" of other VoIP services, including those offered by cable and other "facilities-based providers," that "are not the same as Vonage's but share similar basic characteristics." *Preemption Order* ¶ 1 & n.3 (MPUC Add. 2). The NYPSC contends that one category of VoIP services that should not be preempted is "fixed" VoIP services because those

services have "geographically fixed endpoints." NYPSC Br. i. The *Preemption Order* does not specifically address fixed VoIP services, but rather speaks only of services "having basic characteristics similar to DigitalVoice." *Preemption Order* ¶ 32 (MPUC Add. 21). The NYPSC's attempt to obtain a ruling from this Court on how the FCC's prediction would apply to fixed VoIP services should be rejected as premature.

A. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 807–808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967)). Consistent with that principle, the D.C. Circuit has concluded that an agency's "general prediction" that it is likely to preempt state regulation at some point in the future "does not constitute final agency action" that is ripe for judicial review. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 594 (D.C. Cir.) (*USTA II*), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). In *USTA II*, the states challenged an FCC prediction that state-imposed network "unbundling" rules that differed from the FCC's rules are "unlikely to be found consistent" with the Communications Act. *Id.* (internal quotation marks omitted). The Court dismissed that challenge, noting that, because the FCC had "not taken any view on any attempted state unbundling order," its "general prediction" was

not properly before the Court. *Id.* (citing *Alascom*, 727 F.2d at 1218–20, and *Time Warner Entertainment Co.*, 56 F.3d at 193–196).

The FCC made a similar prediction in this case. The FCC stated that it was "highly unlikely" that it "would fail to preempt state regulation" of VoIP services that "share similar basic characteristics" with DigitalVoice. *Preemption Order* ¶ 1 (MPUC Add. 2). The agency's "announcement of its intent to preempt inconsistent state regulations should they arise does not constitute reviewable final action by the agency." *Alascom*, 727 F.2d at 1219. DigitalVoice is not a fixed VoIP service, and the FCC did not have before it any particular state regulation seeking to regulate fixed VoIP services. *See* NYPSC Br. 7 (noting that the FCC "did not discuss cable services which have fixed end points associated with the end user's location"). Moreover, VoIP services can be provided in a variety of different ways (*see Preemption Order* n.9 (MPUC Add. 3)), and 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 a specific state regulation occurs." *Alascom*, 727 F.2d at 1220.

B. In any event, the FCC acted reasonably in predicting that VoIP services that share the same basic characteristics as DigitalVoice (including VoIP services offered by facilities-based providers) are "practical[ly] inseverabl[e]" for purposes of confining state regulation to the intrastate component of the service. *Preemption Order* ¶ 32 (MPUC Add. 21). As the FCC noted, a VoIP service provider generally includes in its service features other than a simple

real-time voice communications capability. *Id.* The record indicates that, because IP technology enables "service providers to offer and subscribers to access and use features that are housed in distant locations," "packets carrying intrastate components and interstate components can be delivered simultaneously on the same VoIP session to a VoIP subscriber." Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04–36 & 03–211 (Oct. 26, 2004), Att. at 6 (R.A. 75). VoIP subscribers likewise may "perform simultaneously multiple communications tasks during a single VoIP session," and may transmit packets consisting of "intrastate and interstate communications" that are "intertwined and inseverable." *Id.* at 10–11 (R.A. 79–80).

Although the NYPSC argues (at 19–20) that traditional telephone companies might also offer subscribers additional service features in combination with voice telephony, those subscribers typically would not access those service features during a single call "session," because circuit-switched networks require the establishment of a dedicated communications path each time the subscriber uses the network. In contrast, use of the Internet enables "the provision of tightly integrated communications capabilities," which "greatly complicates the isolation of intrastate communications." *Preemption Order* ¶ 32 (MPUC Add. 21). For example, a cable VoIP provider may offer VoIP service along with cable-modem service, which is an Internet-access service that the FCC has classified as an interstate information service under the

Communications Act. *See Brand X Internet Servs.*, 125 S. Ct. 2688; *Cable Modem Order*, 17 FCC Rcd at 4832 ¶ 59. Even if the FCC determines that VoIP service is a distinct telecommunications service under the Act, separating cable-provided VoIP service accurately into interstate and intrastate components might require a cable operator to distinguish IP packets containing its customers' voice communications from all other packets that might be accessed through the cable-modem connection (such as non-voice packets containing data or video signals and voice packets associated with other VoIP services). A cable VoIP provider would then have to identify the geographic origin and destination for the particular group of packets associated with the voice services that would be subject to state regulation. As explained above, the FCC has not yet been squarely presented with the issue of whether these technological differences between the PSTN and the Internet are sufficient to justify preemption of state entry and tariffing regulation of fixed VoIP services. It was reasonable, however, for the FCC, based on the record that it had before it in this proceeding, to make the general prediction that VoIP services sharing "basic characteristics similar to DigitalVoice" might not be jurisdictionally severable for the purpose of confining state regulation to the intrastate component of the service. *Preemption Order* ¶ 32 (MPUC Add. 21); *cf. Illinois Bell Tel. Co.*, 883 F.2d at 110, 113, 116 (upholding the FCC's authority to preempt where marketing reality required that the interstate and intrastate components of the service be sold as a package).

CONCLUSION

The petitions for review should be dismissed to the extent petitioners have raised issues that are not properly before the Court. In all other respects, the petitions for review should be denied.

Respectfully submitted,

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December 1, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MINNESOTA PUBLIC UTILITIES COMMISSION, ET AL.,	)	
PETITIONERS,	)	
v.	)	05–1069, 05–1122, 05–3114, & 05–3118
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's order of September 27, 2005, because it contains 16981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2002.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it uses a 14-point proportionally spaced typeface (Times New Roman).

3. The diskette containing an electronic copy of this brief has been scanned for viruses and is virus free.

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STATUTORY APPENDIX

Contents:

1. Section 2 of the Communications Act of 1934 (47 U.S.C. § 152) provides in pertinent part as follows:

> (a) The provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * *.
>
> (b) [N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier * * *.

2. Section 230(b) of the Communications Act of 1934 (47 U.S.C. § 230(b)) provides in pertinent part as follows:

> POLICY.—It is the policy of the United States—
>
> > (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> >
> > (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

3. Section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 157 note) provides as follows:

> ADVANCED TELECOMMUNICATIONS INCENTIVES.
>
> (a) IN GENERAL.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (b) INQUIRY.—The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry

concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) DEFINITIONS.—For purposes of this subsection:

(1) ADVANCED TELECOMMUNICATIONS CAPABILITY.—The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as highspeed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) ELEMENTARY AND SECONDARY SCHOOLS.—The term "elementary and secondary schools" means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).