79909-1

NO. 58154-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

QWEST CORPORATION, Respondent

vs.

CITY OF BELLEVUE, Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The Superior Court erred in granting Qwest Corporation's Cross-Motion for Summary Judgment on March 29, 2006, and in denying the City of Bellevue's Motion for Reconsideration on April 28, 2006.

No. 2: The Superior Court erred to the extent it made a finding of fact that *all* of the charges the City of Bellevue seeks to tax, including charges Qwest labels consumer access line charges, as well as charges for ATM service, frame relay service, and private line service, are charges for, or access to, interstate services.

No. 3: The Superior Court erred in ruling that the City of Bellevue is not permitted to impose its utility occupation tax upon any federally tariffed charges.

No. 4: The Superior Court abused its discretion in denying the City of Bellevue's Rule 56(f) Motion to allow discovery on issues critical to the determination of Qwest's Cross-Motion for Summary Judgment.

No. 5: The Superior Court abused its discretion by denying the City's Motion to Dismiss Qwest's complaint based on the doctrines of exhaustion of administrative remedies and primary jurisdiction.

Issues Pertaining to Assignments of Error

Under Washington law and federal law, is the City of Bellevue entitled to levy its utility occupation tax on federally regulated or federally tariffed charges if the charges are for services which originate and terminate within the state of Washington? (Assignment of Error No. 1)

As a factual matter, are Qwest's charges for ATM, frame relay, and private line services charges for interstate or intrastate service? Are charges that Qwest labels customer access line charges only charges for access to interstate service, or a surcharge added to customers'

bills that is unrelated to "access to interstate service?" (Assignment of Error No. 2)

Is the City of Bellevue entitled to impose its utility occupation tax upon federally tariffed charges? (Assignment of Error No. 3)

Should the City of Bellevue have been afforded the opportunity to take discovery to determine whether the services at issue in this case for which Qwest charged its customers are *interstate* or *intrastate* in nature and whether certain charges that Qwest describes as customer access line charges are in fact charges for access to interstate service? (Assignment of Error No. 4)

Should the Superior Court have dismissed the case since the matter was pending before the City's Hearing Examiner? (Assignment of Error No. 5)

STATEMENT OF THE CASE

Qwest Corporation ("Qwest") commenced its lawsuit against the City of Bellevue ("Bellevue" or the "City") on October 11, 2005 when it filed a complaint with the Superior Court for the State of Washington for King County. Qwest's complaint sought a declaratory judgment that the City may not impose a utility occupation tax ("UOT") on (i) certain charges that Qwest labels customer access line charges and (ii) certain other charges regulated by the Federal Communications Commission ("FCC"). CP 3-7. Separately, on October 28, 2005, the City issued a tax assessment against Qwest and Qwest Government Services, Inc. dba Qwest (collectively "Qwest"). The assessment provided that Qwest owed the City close to $6 million in back taxes, including UOTs, penalties and interest, for an audit period going back five years. CP 40-41. On November 23, 2005, under the City's administrative process, Qwest filed a notice of appeal of the tax assessment with the City Hearing Examiner. CP 30-76. Qwest's administrative appeal raised several defenses to the tax assessment, including the identical claims raised in Qwest's state court complaint, namely that the City may not lawfully impose its UOT on customer access line charges and other charges regulated by the FCC. CP 32.

The City filed a motion to dismiss the complaint on December 9, 2005 on the grounds that, among other things, Qwest had failed to exhaust its administrative remedies through its administrative appeal to the City Hearing Examiner, which appeal was then and is still pending. CP 77-84. Upon a request by Qwest, the City agreed to continue the hearing date on its motion to dismiss in order to provide Qwest with more time to respond to the motion. CP 98-99. On January 13, 2006, Qwest filed not only its opposition to the City's motion to dismiss, CP 307-319, but also a motion for summary judgment and a motion to continue the hearing date on the City's motion to dismiss until the scheduled hearing date for Qwest's summary judgment motion. CP 320-336; CP 94-97. The Superior Court granted Qwest's motion to continue the hearing date on the City's motion to dismiss. CP 112-113.

Thereafter, the City filed a Rule 56(f) motion ("Motion for Continuance") to allow the City to take discovery on factual issues the City believed were directly relevant to the determination of Qwest's summary judgment motion. CP 157-163. The court denied the City's Motion for Continuance, CP 221-222, and thereby denied the City any opportunity to take discovery in this lawsuit. At a hearing held on March 10, 2006, the Superior Court granted Qwest's summary judgment motion and denied the City's motion to dismiss. CP 251-252; CP 253-

254. The City filed a Motion for Reconsideration on April 7, 2006. CP 255-266. The court denied the Motion for Reconsideration on April 28, 2006. CP 269-270.

Factual Background

Qwest provides telecommunications services to customers in the City of Bellevue, Washington. CP 4. Included among the types of telecommunications services Qwest provides in Bellevue are dedicated communication connections between specific customer locations. These dedicated lines use various types of technology to transport customer data between two points, including what is known as private line, frame relay and ATM service. CP 321; CP 337-338 (¶ 3); CP 339-423. Qwest also collects a certain charge from its customers in the City which the company labels a customer access line charge ("CALC"). CP 5.

During the year preceding Qwest's filing of this lawsuit, the City conducted a tax audit of the company. Specifically, the City audited Qwest's Business and Occupation Tax and UOT liability for the period January 1, 2000 through June 30, 2005. CP 40-41. The City concluded, based on the audit, that Qwest owed the City $5,809,517.09, representing $4,645,227.11 in back taxes, $232,261.36 in penalties, and $932,028.62 in interest. *Id.*

Qwest's activities as a telecommunications provider subject it to the jurisdictions of various tax and regulatory bodies. Both the FCC and the Washington Utilities and Transportation Commission ("WUTC") regulate the company's service. CP 4-5 (¶¶ 6-8). Qwest's FCC Tariff 1 ("FCC Tariff") sets out a formula to determine regulatory jurisdiction between these two bodies. *See generally,* CP 358. The FCC does not tax Qwest's services. The City of Bellevue has authority to tax Qwest's charges for, and its provision of access to, intrastate services.

During the course of its one-year audit, the City repeatedly requested information from Qwest to assist the City in determining whether certain private line, frame relay and ATM services being provided by Qwest were *intrastate* or *interstate* services. *See, e.g.,* CP 207-208 (¶¶ 4-6); CP 284-292; CP 116-117 (¶¶ 4-5), 121-129, 138-145. Qwest refused to provide any of the requested information. CP 208 (¶ 6); CP 118 (¶ 5), 135-145. However, through its own research the City determined that some of these services are entirely intrastate in nature. Specifically, the City had records of a frame relay, dedicated access line it had purchased from Qwest, which was being used to transmit data between City offices and between the City and other local agencies in the State (i.e. shared emergency services, other police departments, etc.). CP 208-209 (¶¶ 7-8); 211-214; CP 118-119 (¶ 6),

128-129, 146-156. Because these dedicated access lines are being used exclusively for communications between points within the State of Washington, they are entirely *intrastate* in nature.

In addition to refusing to provide information about these dedicated access lines, Qwest refused to provide the City with information as to the true nature of its CALC charges, and specifically whether these charges were really for access to interstate services. CP 209 (¶ 9); CP 140-145. The City presented evidence below that raised doubts as to whether all of these CALCs were end user access charges authorized under the FCC Tariff. Specifically, the FCC Tariff authorizes Qwest to charge an end user access fee of $5.85 per month for residential customers. CP 352. Yet the total amount of CALC revenues received by Qwest from residential customers for the test month of October 2004 was a number (sealed) that ended with 42 cents. CP 71-76. It is mathematically impossible for any multiple of $5.85 to result in a number ending in 42 cents, meaning that some of the revenues being reported by Qwest as residential CALC charges are not in fact FCC authorized end user charges. Similarly, the total CALC revenues Qwest received from business customers during the same test month was an amount that is not divisible by $5.85. CP 71-76; CP 354.

The City presented to the Superior Court and argued that not only did this present a genuine issue as to a material fact, meaning summary judgment must be denied, but that it showed why the City needed the opportunity to more fully explore all of these issues through discovery. However, the City's arguments fell on deaf ears. The Superior Court denied the City's Motion for Continuance and refused to allow the City to take discovery on these issues. The Court thereafter granted Qwest's motion for summary judgment, ruling that the City "shall not assess to Qwest Corporation a utility occupation tax, on (1) charges for access to interstate service, including but not limited to, consumer access line charges imposed pursuant to 47 C.F.R. Part 69 and private line, frame relay, and ATM access charges purchased under a Federal Communications Commission tariff; (2) charges for interstate services; or (3) federally tariffed charges." CP 425-426.

SUMMARY OF ARGUMENT

The Superior Court erred in holding that the City of Bellevue may not levy its utility occupation tax upon what Qwest refers to as CALCs, as well as upon revenues Qwest receives for other services that may be regulated by the FCC, including ATM, frame relay, and private line service. Neither federal law nor Washington law prohibits the City from levying its UOT on Qwest's charges for its provision of service

within the state of Washington. Regarding federal law, the Supreme Court has clearly recognized that state governments may tax the provision of any telecommunications service, including interstate service, so long as the states have a sufficient nexus to the call in question. In this case, the Washington Legislature has empowered the City to tax charges for services that originate and terminate within the state of Washington, *i.e.*, services that are *intrastate* in nature. And while the FCC regulates Qwest, it has not demonstrated any intent to preempt local taxes. Moreover, the UOT is a tax, not a regulation; as such, it is not preempted by conflicting FCC regulation of interstate service.

Likewise, Washington law does not prohibit the City from levying its UOT on income Qwest receives from the provision of *intrastate* service. Washington prohibits cities from imposing taxes on charges for "access to, or charges for, *interstate* services." RCW 35A.82.060. Contrary to what Qwest argued below and to what the Superior Court held, charges for ATM, frame relay, and private line services are not by definition charges for "access to, or charges for, interstate services." They are simply "charges for" services. The issue of whether the services are *interstate* or *intrastate* in nature is a question of fact that will vary on a case-by-case basis. Thus, a dedicated access

services are not by definition charges for "access to, or charges for,

line (whether using private line transport, frame relay or ATM technology) between two points in Washington would be intrastate, not interstate. Below, the City provided the Superior Court with uncontroverted evidence that Qwest had charged the City for dedicated access lines connecting City offices with each other and with other regional offices, all within the State of Washington. Those are intrastate charges and are certainly subject to the UOT. Accordingly, it was error for the Superior Court to determine that all private line, frame relay and ATM services purchased under a FCC tariff are interstate in nature as a matter of law.

On the other hand, while CALCs may indeed be charges for "access to" interstate service, as intended under the Washington statute, any charge imposed above and beyond that which is found in a company's FCC tariff is not such a charge. The City presented evidence to the Superior Court that Qwest was imposing what it labeled as CALCs in an amount that varied from the amount authorized by its FCC tariff. Any additional amount Qwest charged its customers that is over and above what it was authorized to charge under its FCC tariff is not a charge for "access" to interstate service and, as such, is subject to the City's UOT. At a minimum, there were genuine disputes as to material

issues of fact. As such, it was error for the Superior Court to have granted Qwest summary judgment.

The Superior Court also erred in denying the City's Motion for Continuance pursuant to Rule 56(f). The City had sought a continuation of 120 days in order to conduct discovery into the issue of whether Qwest has collected CALCs and charges for ATM service, frame relay service, and private line service in connection with its provision of interstate service, intrastate service, or both. By denying the Motion for Continuance, the Superior Court improperly deprived the City of any opportunity to conduct critically important discovery into the factual issues at the center of this case. This was an abuse of discretion.

Finally, the Superior Court erred by denying the City's Motion to Dismiss. The City has a clearly defined procedure for the review of tax claims such as the challenge brought by Qwest here. Although it subsequently commenced an appeal with the City's Hearing Examiner, Qwest failed to pursue that action to completion before continuing to prosecute this lawsuit. Given the policies animating the doctrines of exhaustion of administrative remedies and primary jurisdiction, it was an abuse of discretion for the Superior Court to deny the City's Motion to Dismiss.

STANDARD OF REVIEW

The Court reviews the Superior Court's ruling on Qwest's Cross-Motion for Summary Judgment *de novo*. *Sheikh v. Choe*, 156 Wn. 2d 441, 447, 128 P.3d 574 (2006) ("The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court."). The Court reviews the Superior Court's rulings on the City's Motion for Continuance and its Motion to Dismiss for an abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001); *Reeves v. City of Wenatchee*, 130 Wn. App. 153, 55, 121 P.3d 777 (2005).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN RULING ON SUMMARY JUDGMENT THAT THE CITY OF BELLEVUE MAY NOT TAX QWEST'S CALC CHARGES, ITS CHARGES FOR ATM, FRAME RELAY, AND PRIVATE LINE SERVICES, AND ANY FEDERALLY TARIFFED CHARGES.

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment can be granted in favor of Qwest and against the City "only if, after considering the evidence in the light most favorable to [the City], 'reasonable persons could reach but one conclusion.'" *Overton v. Consolidated Ins. Co*, 145 Wn.2d 417, 429, 38

P.3d 322 (2002). The Court must also consider all reasonable inferences in the light most favorable to the City. *Stenger v. State*, 104 Wn.App. 393, 398, 16 P.3d 655 (2001).

In light of these standards, the Superior Court erred in granting Qwest's motion for summary judgment. Contrary to the Court's ruling, neither federal law nor Washington law prohibits the City from imposing taxes on charges for telecommunications services, provided that such charges are for the provision of *intrastate* services. The Superior Court wrongly held that the City is prohibited from imposing its UOT on all "charges for access to interstate service," including what Qwest refers to as CALCs, private line, frame relay and ATM access charges purchased under an FCC tariff, and any federally tariffed charges. Yet, the City introduced below uncontroverted evidence showing that at least some of the charges at issue in this lawsuit are *intrastate* in nature, and hence are subject to the City's UOT. Thus, Qwest failed to meet its burden of proving that there is no genuine issue of fact, *Reynolds v. Kuhl*, 58 Wn.2d 313, 315, 362 P.2d 589 (1961). Moreover, the Superior Court erred in ruling that federally tariffed charges are exempt from City taxes. Neither federal law nor Washington law exempts federally tariffed charges from state and local taxes.

A. Federal Law Does Not Prohibit the City from Levying its Utility Occupation Tax on Qwest's Charges for Telecommunications Service.

Federal law does not prohibit the City from levying its utility occupation tax on Qwest's charges for its provision of telecommunications service. The Supreme Court has clearly recognized that states may tax the provision of telecommunications service,[1] so long as a state has a sufficient nexus to the call in question. *Goldberg v. Sweet*, 488 U.S. 252 (1989). The Court recognized:

> only two States have a nexus substantial enough to tax a consumer's purchase of an interstate phone call. The first is a State ... which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the origination or termination of an interstate telephone call billed or paid within that state.

Id. at 263.[2] In this case, the City of Bellevue only seeks to tax charges for service which *both* originates and terminates within the state of Washington, that is, charges for service that is wholly *intrastate* in nature.[3]

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[1] States may then empower local governments to levy taxes, as the state of Washington has done here. *See* RCW 35A.11.020, RCW 35A.82.020.

[2] Qwest did not, and therefore now may not, challenge the UOT pursuant to the Commerce Clause.

[3] The City does not claim that all services that Qwest provides are *intrastate* in nature. The City simply maintains that Qwest has provided no evidence that its private line, frame relay, and ATM services, for which it charges customers, as well as its CALCs, are *wholly interstate* in nature. The Superior Court abused its discretion by not allowing the parties to conduct discovery on this critical question before ruling on Qwest's summary judgment motion. *See* Part II, *infra*.

1. The FCC's Regulatory Jurisdiction Preempts Conflicting State and Local Regulation, not State and Local Taxation.

The FCC's regulatory jurisdiction over telecommunications service does not preempt the City's taxation authority. Under the Supremacy Clause of the Constitution, a valid exercise of congressional power preempts any conflicting state legislation. U.S. Const. Art. VI. Although there is a vast amount of federal legislation restricting the states' *regulatory* powers, Congress has restricted the states' powers to tax in only highly specific circumstances. *See* J. Hellerstein, *State Taxation*, 1999 WL 1398851 (3rd ed. 2005) ("Historically there has been relatively little federal legislation restricting state taxing power, at least by comparison to the vast body of federal legislation restricting state regulatory power.") In fact, the Communications Act, through which the FCC derives its authority, explicitly states that local taxation power is preserved:

> [N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation ...

Section 601, 47 U.S.C. § 152(c)(2) nt., 110 Stat. 143.[4] While it is true that

[4] The statute proceeds to note exceptions for sections 622 and 653(c) of the Act, neither of which is applicable here.

the FCC has *regulatory* jurisdiction over true access charges for interstate services, 47 C.F.R. § 69.1, as well as over charges for private line, frame relay, and ATM services in certain cases, *see* FCC Tariff, CP 358, the FCC does not tax such services, and has not claimed that it preempts local taxation of such charges or services. *Cf. In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, WC Docket No. 03-211, *Memorandum Opinion and Order* (Nov. 12, 2004) at ¶ 14, n.47, attached hereto as Ex. 1 (preempting the state of Minnesota's "regulations" but not its "laws concerning taxation").

2. The Utility Occupation Tax is a Tax, Not a Regulation.

The utility occupation tax is a tax and, accordingly, it is not preempted by the FCC's regulations. The evidence that the UOT is a tax, not a regulation, is overwhelming. Bellevue City Code § 4.03.010 sets out the purpose of the City's "Tax Administrative Code" by stating that it "implements Washington Constitution Article XI, Section 12." *See* Ex. 2 hereto (Excerpts from Bellevue City Code, § 4.03.010). Article XI, Section 12 of the Washington Constitutions is entitled "Assessment and Collection of Taxes in Municipalities" and states:

> The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal

> corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

Wn. Const. Art. XI, § 12. The City of Bellevue is a code city in the state of Washington. RCW 35A.01.010; *see City of Bellevue v. Painter*, 58 Wn. App. 839, 843, 795 P.2d 174 (1990) ("The City of Bellevue, as a code city under Title 35A RCW, enjoys the broadest powers available under the Constitution unless expressly denied by statute.") Washington law provides:

> Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits *all powers of taxation for local purposes* except those which are expressly preempted by the state . . . (emphasis added).

RCW 35A.11.020 (emphasis added). Washington law further provides:

> A code City may exercise the authority authorized by general law for any class of city to license and revoke the same for cause, to regulate, make inspections and *to impose excises for* regulation or *revenue* in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity . . .

RCW 35A.82.020 (emphasis added). The UOT is implemented under the "Utility Occupation Tax Code," BCC Ch. 4.10, and is subject to the Tax

Administrative Code, BCC Ch. 4.03; BCC § 4.10.015. *See* Ex. 2 hereto (excerpts of Bellevue City Code). The statute implementing the UOT provides:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in utility occupation activities. Such tax shall be measured by the application against gross proceeds of sales from customers within the City.

BCC § 4.10.025.

Despite the overwhelming evidence that the UOT is, in fact, a tax, Qwest nevertheless argued, and the Superior Court appears to have concluded, that the UOT is not a tax but a regulation and therefore it is inconsistent with the FCC's regulatory jurisdiction. Qwest made this strained claim by reading too much into a single phrase in the Bellevue City Code -- "license for revenue." BCC 4.10.010. BCC 4.10.010 declares:

> The provisions of this Chapter 4.10 BCC constitute an exercise of the power of the city to license for revenue.

Stressing the word *license*, Qwest suggested below that the UOT must be a regulation, not a tax, presumably since licensing is often equated with regulation. However, the Washington Supreme Court has rejected attempts to read the phrase "license for revenue" so narrowly, finding that the expression includes separate regulatory and taxation components.

Pacific Telephone & Telegraph Co. v. City of Seattle, 172 Wn. 649, 654, 21 P.2d 721(1933), *aff'd,* 291 U.S. 300 (1934).

In *Pacific Telephone*, Pacific Telephone & Telegraph challenged a 4% tax imposed by the City of Seattle on its telegraph and telephone business. Like the UOT here, the Seattle tax provision authorized the City to "license for revenue." 172 Wn. at 651. The Seattle statute further provided:

> Section 5. Occupations Subject to Tax-Amount.: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows . . .

Id. This closely resembles the language of BCC § 4.10.025, as set forth above.

Pacific Telephone & Telegraph challenged the tax as exceeding the City's taxing authority under state law. The Supreme Court rejected the challenge, holding that the City was authorized to impose the tax under a much earlier Washington statute, then Rem. Comp. Stat. § 8966, which provided:

> Any such city shall have power . . . 33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefore, and to provide for revoking the same . . .

172 Wn. at 652. Thus, even though the state statute did not specifically discuss taxing authority, unlike RCW 35A.82.020, the Court held that municipalities enjoyed the power to impose license taxes for the purpose of revenue. *Id.* at 653. The Court then explained the distinction between a regulatory license and a tax:

> It must be kept in mind that the power granted to the city to issue licenses is dual: (1) For regulation; (2) for revenue. The power here exercised is for revenue and not for regulation. Here the granting of the license is an incident to the power to raise revenues. The license is the means, not the end. It is the method provided for raising the revenues. The penalty provided is merely a mode of enforcing payment, and the license is only receipt for the tax. . . . The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property. . . . A license is granted under the police power; an excise is imposed under the taxing power.

Id. at 654. Thus, the Washington Supreme Court has clearly recognized that the power to "license for revenue" confers a power to raise revenue separate and apart from a power to regulate. The "license" simply acts as a receipt for the tax. This is plainly not the sort of license or regulation that would be preempted by the FCC's superior licensing or regulatory authority. *Cf. City of Seattle v. Campbell*, 27 Wn. App. 37, 40, 611 P.2d 1347 (1980) ("The ordinance is purely a revenue raising measure and does not impinge upon the ... power to regulate ...".)

To suggest that the UOT should be viewed as a regulation under the exercise of the City's police powers borders on the absurd. The UOT is in no way designed to protect the public health, safety, or morals of the people of Bellevue; it is designed to generate revenue, a goal which is perfectly appropriate under the Washington state law provisions outlined above. *See also* 9 McQuillin Mun. Corp. § 26:21 (3rd ed. Updated Oct. 2005) ("The distinction between fees for regulation and taxes for revenue exists relative to license fees and excise taxes in that a license fee may be imposed on occupations, corporate privileges, sales and other activities merely to pay for licensing and regulating them, where an excise tax may be placed on these subjects purely for revenue."). The UOT is not a fee for purposes of regulation; it is a tax for purposes of revenue.

At the hearing on Qwest's *Cross-Motion*, Qwest argued that the Washington Supreme Court's decision in *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993), dictates a different result. It does not. In fact, the case is not on point. That case concerned a legal challenge of a Seattle ordinance that required apartment owners to register their buildings and pay a registration fee. Apartment building owners argued, among other things, that the registration fee was in fact an unauthorized tax. *Id.* at 642. The Court never addressed the issue of whether Seattle's authority to "license for revenue" authorized the

registration fee, or whether the authority was regulatory or based on its taxing authority. *Id.* (remanding the issue for additional briefing and consideration). If anything, the case bolsters the City's position that UOT is a tax, not a regulation. *Id.* at 635 (distinguishing a tax from a regulation by assessing whether the "primary purpose of legislation is regulation rather than raising revenue"). The UOT is not designed to regulate CALCs or other federally regulated charges. Like any other tax, it is appropriately aimed at raising revenue for the City.

Likewise, the tariffs that Qwest has filed with the FCC do not demonstrate any intent to preempt a state or local government's ability to tax. While Qwest's FCC Tariff sets out a formula for the "Determination of Jurisdiction for Mixed Interstate and Intrastate Private Line Transport Service, Frame Relay Service, Expanded Interconnection-Collocation Service and Access Service Billing," *see* CP 358, this formula signifies a division of *regulatory* jurisdiction over a given service. *See id.* ("the service will be provided in accordance with the applicable *rules and regulations* of this tariff") (emphasis added). The FCC Tariff does not address taxation or the preemption of taxation.

In sum, the Superior Court erred to the extent it concluded that federal law, including the FCC's superior regulatory jurisdiction, renders invalid the City's levy of the UOT on Qwest's intrastate services.

B. Washington Law Does Not Prohibit the City from Levying its Utility Occupation Tax on Intrastate Services.

Washington law does not outlaw the City's application of its UOT on Qwest's charges for its provision of *intrastate* services. Washington law only forbids fees and taxes upon access to, and charges for, *interstate* service:

> ...the City shall not impose the fee or tax on that portion of network telephone service which represents charges to another telecommunications company, as defined in RCW 80.04.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or *for access to, or charges for, interstate services*, or charges for network telephone service that is purchased for the purpose of resale, or charges for mobile telecommunications services provided to customers whose place of primary use is not within the city.

RCW 35A.82.060(1) (emphasis added). The word "interstate" has been defined as:

> Literally, between states (crossing a state line). Services, traffic or facilities that originate in one state, crossing over and terminating in another.

Newton's Telecom Dictionary (15th ed. 1999) at 436. Importantly, RCW 35A.82.060(1) does not outlaw City taxes levied upon "access to, or charges for, *intrastate* services." Newton's Telecom Dictionary (15th ed. 1999) at 438 (defining "intrastate" as "[s]ervices, traffic or facilities that

originate and terminate within the same state"). As discussed more fully below, the City has reason to believe that at least some of Qwest's CALCs as well as its charges for private line, frame relay, and ATM service have been collected in exchange for Qwest's provision of wholly *intrastate* service. In addition, the fact that FCC tariffs set rates for *interstate* services does not impact the question of whether the City may tax *intrastate* services under Washington law.

1. The Charges In Question Are Not Solely Charges For, or Access to, Interstate Services.

a. Qwest's Charges for Private Line, Frame Relay, and ATM Service Are Not "Access to" Interstate Service, and Are Not Solely Charges for Interstate Services.

Qwest's charges for private line, frame relay, and ATM Service are not solely charges for, or access to, interstate services. Private line service, ATM service, and frame relay service are simply different services for the transportation of data. Private line service is defined as service which provides "a direct channel specifically dedicated to a customer's use between specified points." Ex. 3 (Newton's Telecom Dictionary (15th ed. 1999) at 658). Frame relay is a packet-switching protocol for connecting devices on a Wide Area Network. *See* Ex. 4 (http://www.webopedia.com/TERM/F/Frame_Relay.html). The service uses packets in the form of "frames" which are variable in length. Ex. 3

(Newton's Telecom Dictionary (15th ed. 1999) at 350-51). In contrast, ATM, short for Asynchronous Transfer Mode, uses packets of a small, constant size and creates a fixed channel or route between two points whenever data transfer begins. Ex. 5 (http://www/webopedia.com/TERM/A/ATM.html); Ex. 3 (Newton's Telecom Dictionary (15th ed. 1999) at 69, 71-72).

Under RCW 35A.82.060(1), charges for private line, frame relay, and ATM service are plainly not charges for "access to....interstate service."[5] They are simply "charges for" a given service. The only question under the statute is therefore what type of service (interstate or intrastate) Qwest is providing. Had the Superior Court granted the City's Motion for Continuance and allowed the City to conduct relevant discovery, *see* Part II, *infra*, the City believes it could have shown in even greater detail that some portion of the private line, frame relay, and ATM services Qwest provides to customers in Bellevue are actually services that originate and terminate within the state of Washington, *i.e.*, wholly *intrastate* services. Although Qwest refused to provide any evidence to the City on this issue, the City was able to use its own records to

[5] The Court may contrast these charges with end user access charges, which, at least on their face, would appear to be charges for "access to" interstate service. *See* 47 C.F.R. § 69.1. However, as discussed below, the City has reason to believe that Qwest's CALCs are not so limited. *See* Part I. B.1.b, *infra*.

determine that certain of the dedicated line connections the City purchased from Qwest (using frame relay technology) were used to connect City offices with each other and with other regional offices located entirely within the State of Washington. CP 208-209 (¶¶ 7-8), 211-214; CP 118-119 (¶ 6), 128-129, 146-156. In other words, the service for which Qwest charged the City was entirely *intrastate* in nature. Nothing under Washington law would forbid a tax on Qwest's charge for such service.

The New York State Department of Taxation and Finance considered a similar issue when a telephone company alleged that its receipts from its sale of private line circuits should be excluded from sales tax as an interstate telephone service. The Department issued an advisory opinion that concluded:

> In those cases where the private line circuit used for clearing and sorting ATM transactions *originates* at an ATM located *in New York State* and *terminates* at a bank's central processing center located *in New York State* or vice versa, then the transmission will be considered to be an *intrastate* transaction subject to sales tax. On the other hand, in those cases where the private line circuit used for clearing and sorting ATM transactions *originates* at an ATM located *in New York State* and *terminates* at a bank's central processing center located *outside New York State* or vice versa, then the transmission will be considered to be an interstate transaction that is not subject to sales tax.

Advisory Opinion, New York State Department of Taxation and Finance, Taxpayer Services Division, Technical Services Bureau, TSB-A-93 (26)S

(April 12, 1993) (attached hereto as Ex. 6). *Cf. Concentric Network Corp. v. Pennsylvania*, 877 A.2d 542 (Pa.Commw. Ct. 2005) (holding ATM and frame relay services are subject to tax); *MCI Telecomms Corp. v. Dept. of Treasury, Revenue Div.*, 136 Mich. App. 28, 32 (Mich. Ct. App. 1984) ("The fact that its customers make calls using parts of the interstate network does not change the fact that petitioner has purchased an exchange service which was in all respects provided and located in Michigan."). The Court should apply the same principle here: if Qwest is charging for private line, frame relay, or ATM services that *originates and terminates within the state of Washington*, such charges are not "charges for, *interstate* service" and are therefore subject to UOT.

b. Qwest's Customer Access Line Charges Are Not Solely Charges For, or Access to, Interstate Services.

The charges Qwest labels "customer access line charges" are not necessarily charges for, or access to, interstate services, just because Qwest gives them this label. Qwest contends that CALCs are "access charges for interstate or foreign access services provided by telephone companies on or after January 1, 1984." 47 C.F.R. § 69.1. After AT&T was ordered to divest its telephone subsidiaries effective January 1, 1984, *United States v. ATT*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983), the United States was

divided into 161 "local access and transport areas" ("LATAs"). After that decision, a single company could not provide service both *within* a LATA and *between* LATAs. Instead, long distance companies had to purchase "access" to local exchange networks. *See AT&T Communications of the Mountain States v. State of Colorado, Department of Revenue*, 778 P.2d 677, 678-79 (Colo. 1989) (discussing history of access charges).

It appears that Qwest, a company that provides service only *within* a LATA, collects access fees from both end users and other carriers that rely on its local loop for the provision of interstate service. *See, e.g.*, 47 C.F.R. § 69.5; FCC Tariff, §§ 4.1, 4.3, CP 342-343, (describing end user common line fees, which are charged directly to the end user customer). At least in theory then, Qwest collects CALCs to compensate it for the costs arising out of the use of its local network for purposes of interstate calls. *National Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 737 F.2d 1095, 1114 (D.C. Cir. 1984); *Qwest Corp. v. State of Wyoming*, 130 P.3d 507, 512 (Wyo. 2006).

In light of this history, Qwest argued that its CALCs are charges for access to interstate service by definition, CP 328, and thus, such charges should never be subject to any further scrutiny. However, the City has no way of knowing whether Qwest's charges are indeed being imposed for access to interstate services or are instead surcharges being

imposed on all customers simply to increase Qwest's profits. As detailed in the statement of facts above, the City has reason to believe that at least some of Qwest's CALCs are surcharges levied in addition to the $5.85 CALC authorized by the FCC Tariff. The City presented the Superior Court with evidence that the total amount of CALC revenues received by Qwest from residential and business customers during the audit test month of October 2004 were numbers that are not divisible by $5.85, which strongly suggests that at least some of the revenues being reported by Qwest as CALCs are not in fact charges for access to interstate services authorized by the FCC. To the extent such charges are not actually charges for interstate service or access to interstate service, they are charges for intrastate services and accordingly are subject to the UOT. *See, e.g., State of Colorado, Department of Revenue*, 778 P.2d at 684 (concluding that charges to interstate carrier for access to local exchange network are intrastate telephone services subject to tax under Colorado law).

2. The City May Tax Services That Are Federally Tariffed.

The Superior Court also held that the City "may not assess to Qwest a Utility Occupation Tax on ... (3) federally tariffed charges." CP 425-426. This is wrong both because FCC regulation does not preempt

state and local taxation, *see* Part I.A.1, and because Washington law does not measure a service's taxability on whether it is subject to an FCC tariff. Instead, the test under RCW 35A.82.060(1) is whether a tax is "for access to, or charges for, interstate services." Thus, the plain language of the statute unambiguously requires a court to look to the nature of the services in question, not to FCC tariffs. Since this is unambiguous, resorting to the statute's legislative history would be inappropriate:

> Where statutory language is "'plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute.'"... "Only where the legislative intent is not clear from the words of a statute may the court 'resort to extrinsic aids...'"

Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citations omitted). However, even if a legislative history analysis were appropriate, the legislative history of RCW 35A.82.060(1) strongly suggests that Washington cities currently are entitled to tax charges for intrastate services whose rates for interstate service are contained in FCC tariffs. Prior to 1986, RCW 35A.82.060(1) expressly prohibited cities from taxing services whose rates were federally tariffed by the FCC. The statute read:

> ...the city shall not impose the fee or tax on that portion of network telephone service, as defined in RCW 82.04.065, which represents access to, or charges for, interstate services, *for which rates are*

contained in tariffs filed with the federal communications commission. (emphasis added).

Laws of 1986, ch. 70, § 4. However in 1986, the Washington legislature struck the italicized language from the statute in its entirety. By removing this reference, the Legislature plainly demonstrated that the statute's test is not the existence of FCC tariffs, but whether the service in question is, in fact, interstate. Under basic principles of statutory construction, an enacted statute cannot be given the same meaning as a version of the statute that the legislative body had previously rejected. *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). The Legislature was surely aware of this basic canon in amending the statute. If it had intended to broaden the limitation on taxation authority to reach all charges regulated by the FCC, the Legislature simply could have tweaked the pre-1986 language so that it prohibited taxes on any service "which represents access to, or charges for, interstate services *or any services* for which rates are contained in tariffs filed with the federal communications commission." This, the Legislature did not do. Accordingly, after 1986, the statute's test is the nature of service, not whether an FCC tariff has been filed. Unless Qwest can provide some

clear evidence to suggest otherwise, Qwest may not turn back the clock to 1986 to read RCW 35A.82.060(1) as if the Legislature had never amended it. The Superior Court erred in holding that the City may not assess UOT on federally tariffed charges.[6]

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY DENYING THE MOTION FOR CONTINUANCE PURSUANT TO RULE 56(F).

The Superior Court abused its discretion by denying the City's Motion for Continuance pursuant to Rule 56(f). CP 157-163. Washington Superior Court Rule 56(f) states:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The City sought a reasonable continuation of 120 days in order to conduct discovery into whether or not charges Qwest identifies as CALCs and charges for certain other services provided by Qwest, including ATM service, frame relay service, and private line service, were *interstate* or *intrastate* in nature. CP 157-163. As required by Rule 56(f), the City

[6] Even if the tariffs were controlling, they cannot be controlling for charges assessed *beyond* that which the tariffs themselves allow. The City presented evidence below that Qwest's CALCs were not consistent with its tariff rates.

provided an affidavit showing its basis for believing that at least some of the services in question were intrastate in nature, how the City had attempted to obtain such evidence and how Qwest had steadfastly refused to provide it, and why it believed that evidence necessary to counter Qwest's motion for summary judgment could be obtained through discovery during a 120-day continuance. CP 116-156. The Superior Court denied the Motion for Continuance on February 28, 2006. CP 221-222.

A. The Superior Court's Denial of the Motion for Continuance Was an Abuse of Discretion.

The Superior Court's denial of the Motion for Continuance was an abuse of discretion. As Wright and Miller have indicated in discussing Rule 56(f)'s counterpart under the Federal Rules, "The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective." Wright & Miller, *Federal Practice and Procedure*, Civil 3d § 2740 (1998). A trial court abuses its discretion if it bases a decision on untenable or unreasonable grounds. *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Washington courts have held that a trial court may deny a motion for a continuance when:

> (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.

Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003).

None of these reasons justified the Superior Court's denial in this case. First, the City had a very good reason for delay in obtaining evidence as to whether the CALC and charges for ATM, frame relay, and private line service had been applied to Qwest's provision of interstate or intrastate service: Qwest refused to provide any such information when the City asked for it. CP 118 (¶5). Second, the City made clear what evidence would be established by further discovery: namely, the intrastate or interstate nature of the service for which Qwest has collected CALCs and the other charges in question. As discussed above, *see* Part I.B, *supra*, a critical issue under RCW 35A.82.060(1) is whether the City is attempting to tax "access to, or charges for, interstate service." Whether the services for which Qwest charged its customers are interstate or intrastate in nature is therefore a critical question of fact.[7] Third, there can be no doubt that evidence showing that Qwest's services were purely intrastate in nature would raise a genuine issue of fact in this suit. "The

[7] Likewise, the issue of whether the charges Qwest labels CALCs are solely aimed at providing "access to interstate services" could be explored through discovery.

primary consideration in the trial court's decision on the motion for a continuance should [be] justice." *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003) (*citing Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990)). By denying the Motion for Continuance and depriving the City of the opportunity to explore a critical factual issue, the Superior Court deprived the City of such justice. *Cf. Cofer v. Pierce County*, 8 Wn. App. 258, 263, 505 P.2d 476 (1973) (finding that a "failure to accord the nonmoving party a reasonable opportunity to show the existence of an issue of material fact constitutes an abuse of discretion"); *Alaska Nat. Ins. Co. v. Bryan*, 125 Wn. App. 24, 41, 104 P.3d 1 (2004) (after granting first continuance for discovery, trial court did not abuse discretion in denying latter request for continuance since the court had provided "ample opportunity to conduct the necessary discovery").

Here, the Superior Court's denial of the City's Motion for Continuance was even more egregious because the City had presented hard evidence that at least some of the services that Qwest were claiming to be *interstate* in nature were in fact *intrastate* in nature. The City presented evidence showing that certain frame relay connection service being provided to the City was between points in the state of Washington, meaning the transmissions were entirely *intrastate*. CP 208-209 (¶¶ 5,7,9); CP 118-119 (¶ 6), 128-129, 146-156. In light of this evidence,

the Court should have granted the City's Motion for Continuance to allow it conduct further discovery on these issues. Its failure to do so was an abuse of discretion.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION BY DENYING THE CITY'S MOTION TO DISMISS.

The Superior Court also abused its discretion by denying the City's Motion to Dismiss. The City made its Motion on the grounds that Qwest's lawsuit was premature because the company failed to exhaust it remedies by completing its administrative appeal to the City's Hearing Examiner. The City has a clearly defined procedure for the review of tax claims such as the one asserted by Qwest. *See* Section BCC 4.03.140 (Ex. 2). BCC 4.03.140 sets forth the process for filing an appeal, provides for a hearing, and requires that the hearing examiner issue a written decision supported by findings and conclusions. The Hearing Examiner's decision may then be appealed to the Superior Court. Sec. 4.03.150. The Superior Court should have given the Hearing Examiner the chance to complete its administrative review before permitting Qwest to proceed with its lawsuit.

A. The Superior Court Erred By Not Dismissing The Suit Based on the Exhaustion-of-Administrative Remedies Doctrine.

As the City noted in its Motion to Dismiss, under Washington law, a party must exhaust it administrative remedies before challenging

an administrative action in court. "'In general an agency action cannot be challenged on review until all rights of administrative appeal have been exhausted.'" *South Hollywood Hills Cits. v. King County*, 101 Wn. 2d 68, 73, 677 P.2d 114 (1984) (*quoting Spokane Cy. Fire Protection Dist. 9 v. Spokane Cy. Boundary Rev. Bd.*, 97 Wn.2d 922, 928, 652 P.2d 1356 (1982)). The requirement that a party exhaust its administrative remedies before challenging an agency action in court is absolute:

> (1) when a claim is cognizable in the first instance by the agency alone;
> (2) when the agency's authority establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties; and
> (3) when the relief sought . . . can be obtained by resort to an exclusive or adequate administrative remedy.

South Hollywood Hills Cits., 101 Wn. 2d at 73, 677 P.2d 114 (*quoting State v. Tacoma-Pierce Cy. Multiple Listing Serv.*, 95 Wn. 2d 280, 622 P.2d 1190(1980)).

Here, each of these elements is satisfied. First, the claim asserted by Qwest – that it does not owe UOTs on certain of its revenues – is cognizable in the first instance by the City alone. Unless and until the City determines that Qwest owes the taxes, the company has no claim to assert. In fact, the possibility always existed that the Hearing Examiner would agree with Qwest on some or all of its claims and hence, there

would be no claims left to assert in the state court lawsuit. Second, the City has a clearly defined procedure for the submission, evaluation and resolution of tax disputes such as the one asserted by Qwest. Finally, the relief sought by Qwest can be obtained by an administrative hearing, as discussed above.

The doctrine serves several important purposes:

> (1) it insures against premature interruption of the administrative process;
> (2) it allows the agency to develop the necessary factual background on which to base a decision;
> (3) it allows exercise of agency expertise in its area;
> (4) it provides a more efficient process; and
> (5) it protects the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts.

Id. at 73-74; *Phillips v. King County*, 87 Wn. App. 468, 479-80, 943 P.2d 306 (1997); *Bellevue 120th Assoc. v. City of Bellevue*, 65 Wn. App. 594, 597-98, 829 P.2d 182 (1992).

Each purpose is served in this case. To be clear, there is presently an ongoing administrative proceeding to resolve the dispute over whether Qwest owes the City additional taxes. After conducting an audit, the City's Finance Department, Tax Division, made an initial determination that Qwest owes taxes. CP 40-41. Qwest appealed the City's initial determination. CP 30-76.

By permitting Qwest to pursue its lawsuit before the City was able to conduct its administrative hearing and issue a final decision, the Court prematurely interrupted the City's ongoing administrative process. Specifically, Qwest took the Superior Court's erroneous summary judgment ruling and used it as the basis for filing a partial summary judgment motion in the administrative proceeding, based on collateral estoppel. That motion was granted by the Hearing Examiner. *See* Ex. 6 hereto (Hearing Examiner Order on Motions). Thus, not only was the City's administrative process disrupted, the very result the exhaustion-of-administrative-remedies doctrine is intended to avoid, but the City was denied its day in Court in its own administrative process after being denied its day in court by the Superior Court.

The Superior Court failed to recognize that allowing the City to complete its administrative process before it considered Qwest's claims would have allowed the City to further develop the factual background on which the City's final decision on the taxes would be based. Had the court allowed the City to complete the administrative process, the City would have been able to take discovery concerning the services that are at issue here, and to determine whether such services are intrastate or interstate. Further, the Hearing Examiner's final decision on these issues would have been supported by written findings and conclusions,

as required under the City Code, BCC § 4.03.140.B.6 (Ex. 2), which ultimately would have assisted the Court in addressing the issues. Further, it would have allowed the City to exercise its expertise in the area of imposing and assessing City taxes.

Allowing the administrative process to play out first would also have been more efficient. If the administrative process had ultimately led to a finding that Qwest did not owe the UOTs in question, it would have precluded the need for Qwest's lawsuit altogether. Moreover, allowing the administrative process to play out would have ensured that there would be at most a single lawsuit based on an appeal of the City's final decision. In contrast, by allowing Qwest's present lawsuit to go forward, the Superior Court allowed for the very real possibility that there will be two lawsuits: the present declaratory judgment suit and a second lawsuit based on an appeal of the City's final determination as to the amount of taxes owed. The reason for this is that Qwest raises other challenges in its appeal to the City, not just its claims as to the legality of imposing the taxes in the first place.[8] CP 30-76. It would have been far more efficient to address all of these issues in a single lawsuit, which

[8] Qwest's challenges of the UOT on CALCs and certain other charges, including those for private line, frame relay and ATM services, comprise some but not all of Qwest's claims in its administrative appeal. A hearing as to the remaining issues will go forward.

may or may not have been necessary, following the final decision by the Hearing Examiner.

Finally, allowing the City to complete its administrative process before allowing the lawsuit to proceed would have enabled the City to correct errors the City might have made, if any, in assessing taxes against Qwest. It would have also ensured that taxpayers comply with the City's administrative process in the future rather than ignoring the City's procedures and resorting to the Courts.

B. The Superior Court Erred By Not Dismissing the Suit Based on the Doctrine of Primary Jurisdiction.

The Superior Court also abused its discretion in not dismissing the suit based on the doctrine of primary jurisdiction. *Kerr v. Department of Game*, 14 Wn. App. 427, 542 P.2d 467 (1975). Under that doctrine, a court should defer to an administrative body if:

> (1) The administrative agency has the authority to resolve the issues that would be referred to it by the court. [...];
>
> (2) The agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues [...]; and
>
> (3) The claim before the court involves issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme.

In re Real Estate Brokerage Antitrust Litigation, 95 Wn.2d 297, 302-303, 622 P.2d 1185 (1980).

The Superior Court abused its discretion in its failure to recognize that the City Hearing Examiner has primary jurisdiction over this dispute. First, it is undisputed that the City has the authority to resolve the issues involved here. This is made clear by the fact that Qwest has challenged precisely the same issues by filing an appeal with the City. Second, the City has special competence and expertise in the area of imposing and assessing City taxes. While it is true that issues of statutory interpretation need not be referred to an administrative agency, *State ex rel. Graham v. Northshore Sch. Dist. 417*, 99 Wn.2d 232, 242, 662 P.2d 38 (1983), this case is not limited to legal questions. Qwest's appeal with the City lists at least eight distinct grounds for appeal, many of which are factually based. An administrative hearing is a more appropriate forum to fully explore these factual questions and the City could resolve the issue without having to address the legality of the tax. Finally, there is a real danger that premature judicial action would interfere with the City's regulatory scheme for resolution of such disputes.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the Superior Court's judgment that the City of Bellevue may not levy its UOT

on Qwest's CALCs, its charges for ATM, frame relay, and private line service, and other federally tariffed charges, and remand for further proceedings consistent with the Court of Appeals' ruling. The Court should reverse the Superior Court's denial of the City's Motion to Dismiss on the grounds that such denial was an abuse of discretion based on the doctrines of exhaustion of administrative remedies and primary jurisdiction, with instructions to grant the Motion to Dismiss. Finally, if the Court does not order the Superior Court to grant the City's Motion to Dismiss, it should reverse the Superior Court's denial of the City's Motion for Continuance with instructions that the Court grant the motion.

DATED this 14th day of July, 2006.

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APPENDIX

1 *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, WC Docket No. 03-211, *Memorandum Opinion and Order* (Nov. 12, 2004) ..... Appendix 1

2 Excerpts of Bellevue City Code ..... Appendix 43

3 Newton's Telecom. Dictionary Definitions ..... Appendix 64

4 Webopedia Definition – Frame Relay ..... Appendix 73

5 Webopedia Definition – ATM ..... Appendix 75

6 Hearing Examiner Order on Motions ..... Appendix 78

APPENDIX – EXHIBIT 1

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

In the Matter of	)	
	)	
Vonage Holdings Corporation	)	WC Docket No. 03-211
Petition for Declaratory Ruling Concerning an	)	
Order of the Minnesota Public Utilities	)	
Commission	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 2004 **Released: November 12, 2004**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein concurring and issuing separate statements.

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I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we preempt an order of the Minnesota Public Utilities Commission (Minnesota Commission) applying its traditional "telephone company" regulations to Vonage's DigitalVoice service, which provides voice over Internet protocol (VoIP) service and other communications capabilities. We conclude that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders

adopted this year regarding VoIP – the *Pulver Declaratory Ruling*[1] and the *AT&T Declaratory Ruling*[2] – by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities. For such services, comparable regulations of other states must likewise yield to important federal objectives. Similarly, to the extent that other VoIP services are not the same as Vonage's but share similar basic characteristics, we believe it highly unlikely that the Commission would fail to preempt state regulation of those services to the same extent.[3] We express no opinion here on the applicability to Vonage of Minnesota's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices. We expect, however, that as we move forward in establishing policy and rules for DigitalVoice and other IP-enabled services, states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints.

2. Our decision today will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping us answer the questions that remain after today's Order – questions regarding the regulatory obligations of providers of IP-enabled services. We plan to address these questions in our *IP-Enabled Services Proceeding*[4] in a manner that fulfills Congress's directions "to promote the continued development of the Internet"[5] and to "encourage the deployment" of advanced telecommunications capabilities.[6] Meanwhile, this Order clears the way for increased investment and innovation in services like Vonage's to the benefit of American consumers.

II. BACKGROUND

3. On September 22, 2003, Vonage filed a petition for declaratory ruling[7] requesting that the Commission preempt an order of the Minnesota Commission imposing regulations applicable to providers of telephone service on Vonage's DigitalVoice.[8]

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[1] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (*Pulver Declaratory Ruling* or *Pulver*).

[2] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (*AT&T Declaratory Ruling*).

[3] *See infra* para. 31 and notes 93, 113 (referring to VoIP services of other providers, including facilities-based providers).

[4] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services Proceeding*).

[5] 47 U.S.C. § 230(b)(1).

[6] 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996 (1996 Act)).

[7] *See* Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC 03-211 (filed Sept. 22, 2003) (Vonage Petition). The Commission requested and received comment on the Vonage Petition. *See Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, Public Notice, 18 FCC Rcd 19325 (2003). See Appendix for a list of commenters.

A. Vonage's DigitalVoice Service

4. DigitalVoice is a service[9] that enables subscribers to originate and receive voice communications and provides a host of other features and capabilities that allow subscribers to manage their personal communications over the Internet.[10] By enabling the sending and receiving of voice communications and providing certain familiar enhancements like voicemail, DigitalVoice resembles the telephone service provided by the circuit-switched network. But as described in detail here, there are fundamental differences between the two types of service.

5. First, Vonage customers must have access to a broadband connection to the Internet to use the service.[11] Because Vonage does not offer Internet access services, DigitalVoice customers must obtain a broadband connection to the Internet from another provider.[12] In marked contrast to traditional circuit-switched telephony, however, it 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. Rather, Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet.[13] According to Vonage, it does not know where in the world its users are when using DigitalVoice.[14]

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[8] *In the Matter of Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (issued Sept. 11, 2003) (*Minnesota Vonage Order*).

[9] DigitalVoice provides VoIP, among other capabilities. Although the Commission has adopted no formal definition of "VoIP," we use the term generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony. *See IP-Enabled Services Proceeding*, 19 FCC at 4866, para. 3 n.7. VoIP services are available in a number of different forms. *See, e.g.*, Minnesota Commission Reply at 3 ("[VoIP] is a technology that has many current applications and potentially many more future applications."); *see also Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at 24-26 (rel. Sept. 9, 2004) (*Fourth Section 706 Report*) (describing VoIP services generally).

[10] We use the term "Internet" in this Order similarly to how the Commission has used it previously, inclusive of interconnected public, private, managed, and non-managed IP networks. *See, e.g., Pulver*, 19 FCC Rcd at 3309, para. 4 (citing *GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22468, para. 5 (1998) (*GTE ADSL Order*)); *see also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4799 n.1 (2002) (*Cable Modem Declaratory Ruling*), *aff'd in part, vacated in part, and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *stay granted pending cert.* (April 9, 2004), *petitions for cert. filed*, Nos. 04-277 (Aug. 30, 2004), 04-281 (Aug. 27, 2004).

[11] *See* Vonage Petition at 4; Letter from William B. Wilhelm, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211, at 2 (filed Oct. 1, 2004) (Vonage Oct. 1 *Ex Parte* Letter) (suggesting a minimum upstream connection speed of 128k).

[12] *See* Vonage Petition at 7, 15; Vonage Reply at 8. According to Vonage, its service operates with any type of broadband connection (*e.g.*, cable modem, digital subscriber line, or satellite), but will not work with dial-up Internet access. *See* Vonage Petition at 4.

[13] *See* Vonage Petition at 4; Vonage Oct. 1 *Ex Parte* Letter at 2.

[14] *See* Vonage Petition at 2, 5, 28-29.

6. Second, Vonage indicates that DigitalVoice requires customers to use specialized customer premises equipment (CPE).[15] Customers may choose among several different types of specialized CPE: (1) a Multimedia Terminal Adapter (MTA), which contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and has a standard telephone jack connection; (2) a native Internet Protocol (IP) phone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone).[16] Although customers may in some cases attach conventional telephones to the specialized CPE that transmits and receives these IP packets, a conventional telephone alone will not work with Vonage's service.[17]

7. Third, DigitalVoice offers customers a suite of integrated capabilities and features that allows the user to manage personal communications dynamically, including but not limited to real-time, multidirectional voice functionality.[18] In addition to voice, these features include voicemail, three-way calling, online account and voicemail management, and geographically independent "telephone" numbers.[19] Vonage's Real-Time Online Account Management feature allows customers to access their accounts 24 hours a day through an Internet web page to manage their communications by configuring service features, handling voicemail, and editing user information.[20] At the user's discretion, the user may, among other options, play voicemails back through a computer or receive them in e-mails with the actual message attached as a sound file.[21] Using other features, users may request that DigitalVoice ring simultaneously the user's Vonage number plus any other number in the United States or Canada regardless of who provides the service connected with that other number.[22]

8. Among these features, DigitalVoice provides the capability to originate and terminate real-time voice communications. Once the CPE and software are installed and configured, the customer may place or receive calls over the Internet to or from anyone with a telephone number – including another Vonage customer, a customer of another VoIP provider, a customer of a commercial mobile radio service (CMRS) provider, or a user reachable only through the public switched telephone network (PSTN).[23] In any case,

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[15] *See id.* at 5.

[16] *See id.* at 5; Vonage Reply at 8-9; *see also* 8x8 Comments at 8-10. Vonage states that most of its customers use an MTA. In addition to the CPE to convert voice signals, as a practical matter, most users also require a router. *See* Vonage Petition at 5.

[17] *See* Vonage Petition at 5; Vonage Reply at 8 ("[A]n analog telephone device is neither necessary nor sufficient for use with Vonage's service."); *see also* 8x8 Comments at 9.

[18] *See* Vonage Petition at 4; *see also IP-Enabled Services Proceeding*, 19 FCC Rcd at 4866, para. 3 n.7.

[19] *See, e.g.*, Vonage Oct. 1 *Ex Parte* Letter at 4-5; Vonage, *Take Your Number With You* (visited Oct. 28, 2004) <http://www.vonage.com/features.php?feature=traveling>.

[20] *See* Vonage Oct. 1 *Ex Parte* Letter at 4; *see also* Vonage, *Real-Time Online Account Management* (visited Oct. 28, 2004) <http://www.vonage.com/features.php?feature=online_account_mgt>. For example, the voicemail service integrated into DigitalVoice allows the user to access voicemail and select delivery options through interaction with the customer's web account on the Internet.

[21] Vonage is currently adding functionality so that users may customize voicemail controls by scheduling recorded greetings for different hours of the day and different days of the year. *See* Oct. 1 *Ex Parte* Letter at 5; *see also* Vonage, *Voicemail Plus* (visited Oct. 28, 2004) <http://www.vonage.com/features.php?feature=voicemail>.

[22] *See, e.g.*, Vonage, *Call Forwarding* (visited Oct. 28, 2004) <http://www.vonage.com/features.php?feature=call_forwarding>.

[23] *See* Vonage Petition at 6.

the subscriber's outgoing calls originate on the Internet and are routed over the Internet to Vonage's servers. If the destination is another Vonage customer or a user on a peered service, the server routes the packets to the called party over the Internet and the communication also terminates via the Internet.[24] If the destination is a telephone attached to the PSTN, the server converts the IP packets into appropriate digital audio signals and connects them to the PSTN using the services of telecommunications carriers interconnected to the PSTN. If a PSTN user originates a call to a Vonage customer, the call is connected, using the services of telecommunications carriers interconnected to the PSTN, to the Vonage server, which then converts the audio signals into IP packets and routes them to the Vonage user over the Internet.[25] Together, these integrated features and capabilities allow customers to control their communications needs by determining for themselves how, when, and where communications will be sent, received, saved, stored, forwarded, and organized.

9. Fourth, although Vonage's service uses North American Numbering Plan (NANP) numbers as the identification mechanism for the user's IP address, the NANP number is not necessarily tied to the user's physical location for either assignment or use, in contrast to most wireline circuit-switched calls.[26] Rather, as Vonage explains, the number correlates to the user's digital signal processor to facilitate the exchange of calls between the Internet and the PSTN using a convenient mechanism with which users are familiar to identify the user's IP address.[27] In other words, and again in marked contrast to traditional circuit-switched telephony, a call to a Vonage customer's NANP number can reach that customer anywhere in the world and does not require the user to remain at a single location.

B. History of Vonage's Petition

10. In July 2003, the Minnesota Department of Commerce filed an administrative complaint against Vonage with the Minnesota Commission, asserting that Vonage was providing telephone exchange service in Minnesota and was thus subject to state laws and regulations governing a "telephone company." Among other things, the laws and regulations in question require such companies to obtain operating authority, file tariffs, and provide and fund 911 emergency services.[28] The Minnesota Department of Commerce sought an administrative order from the Minnesota Commission to compel Vonage to comply with these state regulatory requirements. In response to the administrative complaint,

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[24]Vonage-to-Vonage calls are not transmitted over the PSTN. *See id.* at 7. Calls from Vonage customers to customers of certain other IP service providers with which Vonage has a peering arrangement also are not transmitted over the PSTN, but solely over the Internet. *See* Vonage Oct. 1 *Ex Parte* Letter at 3-4. In this respect, the communication is similar to communications that occur over Pulver's Free World Dialup (FWD) service between FWD members. *See Pulver*, 19 FCC Rcd at 3309-10, paras. 5-6. If Vonage does not have a peering arrangement with a particular VoIP provider, calls between users of the two services are routed in part over the PSTN but originate and terminate via the Internet. *See* Vonage Oct. 1 *Ex Parte* Letter at 4.

[25]*See* Vonage Petition at 5-8; *see also* 8x8 Comments at 10.

[26]*See* Vonage Petition at 8.

[27]For calls to and from other VoIP users, Vonage could choose to use other identifiers to match the IP address. NANP numbers are not necessarily required for VoIP calls that remain on the Internet and do not connect with the PSTN. *See Pulver*, 19 FCC Rcd at 3309, para. 5 (explaining that Pulver's FWD service uses five or six digit FWD identification numbers rather than NANP numbers); *see also* Vonage Petition at 7-8; Vonage Oct. 1 *Ex Parte* Letter at 3-5.

[28]*See* Minn. Stat. §§ 237.07, 237.16, 237.49, 237.74(12); Minn. Rules §§ 7812.0200(1), 7812.0550(1).

Vonage argued that these state laws and regulations do not apply to it and that, even if they do, they are preempted by the Communications Act of 1934, as amended (Communications Act or Act).[29]

11. In September 2003, the Minnesota Commission issued an order asserting regulatory jurisdiction over Vonage and ordering the company to comply with all state statutes and regulations relating to the offering of telephone service in Minnesota.[30] In so holding, the Minnesota Commission declined to decide whether Vonage's service is a telecommunications service or an information service under the Act. Instead, it found DigitalVoice to be a "telephone service" as defined by Minnesota law, thus subjecting Vonage to the state requirements for offering such a service. In response, Vonage filed suit against the Minnesota Commission in the U.S. District Court for the District of Minnesota. In October 2003, the district court entered a permanent injunction in favor of Vonage.[31] The court determined that Vonage is providing an information service under the Act and that the Act preempts the Minnesota Commission's authority to subject such a service to common carrier regulation.[32] The court concluded that "VoIP services necessarily are information services, and state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated."[33] In January 2004, the court denied a motion by the Minnesota Commission for reconsideration, and an appeal to the U.S. Court of Appeals for the Eighth Circuit followed. The appeal remains pending.[34]

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[29] *See* Vonage Oct. 1 *Ex Parte* Letter, Exh. 3 at 5-12.

[30] *See, e.g., Minnesota Vonage Order* at 8. While the order states "the Commission will require that Vonage comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service," the order does not enumerate the statutory and rule provisions to which it is referring other than those specifically listed in note 27 above. *See supra* note 28. We will refer to these requirements, collectively, throughout this Order as either "telephone company regulations" or "economic regulations." It appears, however, that many Minnesota Commission rules other than those specifically mentioned in the *Minnesota Vonage Order* would only apply to Vonage as a result of its status as a certificated entity in Minnesota. *See* Minn. Stat. § 237.16(a). As a result, because, as described below, we specifically preempt Minnesota's certification requirements for DigitalVoice in this Order, regulations applicable to certificated entities would not be applicable to Vonage for DigitalVoice.

[31] *See Vonage Holding Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *appeal pending, Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. 04-1434 (8th Cir.). We reject commenters' contentions that we should dismiss the Vonage Petition as moot because the Minnesota district court granted a permanent injunction. *See, e.g.*, Minnesota Commission Comments at 4; Qwest Comments at 2; New York State AG Reply at 3. The Minnesota district court's permanent injunction is currently subject to appeal, and other courts and state commissions have open proceedings considering these issues. Accordingly, we find that this petition continues to present a "controversy" or "uncertainty" regarding the jurisdictional nature of DigitalVoice that may be addressed in a declaratory ruling. *See* 47 C.F.R. § 1.2. We also disagree that these issues are not ripe because Vonage can seek waivers of the Minnesota requirements. *See, e.g.*, MTA Comments at 8. The Minnesota order directs Vonage to comply with Minnesota Statutes and Rules within 30 days without mentioning the possibility of waiver. *See Minnesota Vonage Order* at 9. The possibility of waiver, however, does not eliminate the conflict with our rules and policies.

[32] *See Vonage Holding Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d at 996-1003.

[33] *Id.* at 1002.

[34] *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. 04-1434 (8th Cir.). The Commission sought a primary jurisdiction referral from the Eighth Circuit on the issues presented in this case. *See* Brief for the United States and the Federal Communications Commission as *Amici Curiae*, *Vonage Holdings Corp. v. Minnesota Pub.*

12. At the same time that it filed suit in the district court in Minnesota, Vonage filed the instant petition with the Commission. Specifically, Vonage's petition for declaratory ruling requests that the Commission preempt the Minnesota Commission's order and find that (1) Vonage is a provider of "information services," and is not a "telecommunications carrier," as those terms are defined in the Act,[35] and (2) state regulation of this service would unavoidably conflict "with the national policy of promoting unregulated competition in the Internet and information service market."[36] In the alternative, Vonage seeks a determination that the Minnesota Commission's order is preempted because it is impossible to separate this service, regardless of its regulatory classification, into distinct interstate and intrastate communications.[37] Vonage also seeks a ruling that certain specific E911 requirements imposed by the Minnesota Commission are in conflict with federal policies.[38] On August 13, 2004, Vonage submitted additional information to the Commission in this matter, requesting that we act expeditiously on its pending petition insofar as it concerned the jurisdictional nature of the service, explaining that such a determination could be rendered independent of the statutory classification of the service.[39]

13. Since Vonage filed its petition, a number of other states have opened proceedings to examine the jurisdictional nature of VoIP services offered in their states.[40] For example, in May 2004, the New York State Public Service Commission (New York Commission) adopted an order finding that Vonage, in offering and providing DigitalVoice in New York, is a "telephone corporation" as defined by New York state law, and is therefore subject to certain requirements.[41] The New York Commission asserted jurisdiction over Vonage and ordered it to obtain state certification and to file a tariff, but permitted Vonage to seek waivers of New York regulations that it deemed inappropriate or with which it was not readily able to comply.[42] Vonage sought, and in July the U.S. District Court for the Southern District of New York granted, a preliminary injunction of the *New York Vonage Order*.[43] The court held that

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Utils. Comm'n, No. 04-1434 (8th Cir. filed Apr. 21, 2004) (requesting a primary jurisdiction referral). The Eighth Circuit has not yet ruled on the primary jurisdiction referral. Oral argument is scheduled for November 17, 2004.

[35]*See* 47 U.S.C. § 153(20) (defining "information service"); 47 U.S.C. § 153(43) (defining "telecommunications"); 47 U.S.C. § 153(44) (defining "telecommunications carrier"); 47 U.S.C. § 153(46) (defining "telecommunications service").

[36]*See* Vonage Petition at 1.

[37]*Id.*

[38]*Id.*; *see also* 8x8 Comments at 15-17.

[39]*See* Letter from William B. Wilhelm, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1-2 (filed Aug. 13, 2004) (Vonage Aug. 13 *Ex Parte* Letter).

[40]*See, e.g., Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Investigation 04-02-007, Order Instituting Investigation (issued Feb. 11, 2004) (initiating a proceeding by the California Public Utilities Commission to investigate VoIP services).

[41]*See Complaint of Frontier Telephone of Rochester, Inc. against Vonage Holdings Corporation Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Case 03-C-1285, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation at 10 (issued May 21, 2004) (*New York Vonage Order*).

[42]*See id.* at 17.

[43]*See Vonage Holdings Corp. v. New York State Public Service Comm'n,* 04 Civ. 4306 (DFE) (S.D.N.Y. July 16, 2004) (Order of Magistrate Judge Eaton) (*New York Preliminary Injunction*) (entering a preliminary injunction against the New York Commission's order).

"Vonage has shown that it is likely to succeed on the merits of its claim that the [*New York Vonage Order*] is preempted by federal law"; that "Vonage has demonstrated that the [*New York Vonage Order*] will interfere with interstate commerce"; and that this Commission's guidance, via orders in the *IP-Enabled Services Proceeding* or the instant proceeding, "may aid in final resolution of the matter."[44] The court has scheduled a status conference on December 13, 2004 to consider whether there is a need for further proceedings in this matter, including a determination on Vonage's request for permanent injunctive relief.[45]

III. DISCUSSION

14. We grant Vonage's petition in part[46] and preempt the *Minnesota Vonage Order*.[47] We find that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy. We reach this decision irrespective of the definitional classification of DigitalVoice under the Act, *i.e.*, telecommunications or information service, a determination we do not reach in this Order. Although Congress did not explicitly prescribe the regulatory framework for Internet-based communications like DigitalVoice when it

[44] *Id.* at 2-3.

[45] *See id.* at 3.

[46] We do not determine the statutory classification of DigitalVoice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future. These issues are currently the subject of our *IP-Enabled Services Proceeding* where the Commission is comprehensively examining numerous types of IP-enabled services, including services like DigitalVoice. *See generally IP-Enabled Services Proceeding*, 19 FCC Rcd 4863. That proceeding will resolve important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, concerning issues such as the Universal Service Fund, intercarrier compensation, 911/E911, consumer protection, disability access requirements, and the extent to which states have a role in such matters. In addition, the Commission recently initiated a rulemaking proceeding to address law enforcement's needs relative to the Communications Assistance for Law Enforcement Act (CALEA), including the scope of services that are covered, who bears responsibility for compliance, the wiretap capabilities required by law enforcement, and acceptable compliance standards. Our decision in this Order does not prejudice the outcome of our proceeding on CALEA. *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295; RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676 (2004); *see also* DOJ/FBI Comments at 10-13; DOJ/FBI Reply at 7-10. These issues are complex and critically important matters. While these matters are being comprehensively addressed, however, it is essential that we take action to bring some greater measure of certainty to the industry to permit services like DigitalVoice to evolve. By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry. *See, e.g.*, PacWest/RCN Reply at 5; USA DataNet Comments at 2-3 (urging the Commission to act on the Vonage Petition). *But see, e.g.*, DOJ/FBI Comments at 9; Minnesota Commission Comments at 4; Montana Independent Telecommunications Systems Comments at 5; Qwest Comments at 3-4; USTA Comments at 3-4; DOJ/FBI Reply at 5-7; Minnesota Commission Reply at 3; Verizon Reply at 6 (urging the Commission not to act on the Vonage Petition, but instead to decide these issues in a comprehensive rulemaking proceeding).

[47] As we noted above, this Order does not address Minnesota's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing, advertising, billing and other business practices. *See supra* para. 1.

amended the Act in 1996,[48] its statements regarding the Internet and advanced telecommunications capabilities in sections 230 and 706 indicate that our actions here are consistent with its intent concerning these emerging technologies. In addition, we address the fact that multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states. Finally, although we preempt the *Minnesota Vonage Order*, including its 911 requirements imposed as a condition to entry, we fully expect Vonage to continue its efforts to develop a 911 capability as we work toward resolving this important public safety issue in the *IP-Enabled Services Proceeding* as discussed below.[49]

A. Preemption of the *Minnesota Vonage Order*

15. We begin our analysis by briefly examining the distribution of authority over communications services between federal and state agencies under the Act. We then discuss judicial precedent that recognizes circumstances where state jurisdiction must yield to federal jurisdiction through the Commission's authority to preempt state regulations that thwart the lawful exercise of federal authority over interstate communications. Next, we explain our current federal rules and policies for services like DigitalVoice followed by our demonstration of the impossibility of separating DigitalVoice into interstate and intrastate components for purposes of complying with the Minnesota regulations without negating federal policies and directly conflicting with our own regulations. We conclude that preempting the *Minnesota Vonage Order* is compelled to avoid thwarting valid federal objectives for innovative new competitive services like DigitalVoice, finding consistency between our action here and Congress's articulated policies in sections 230 and 706 of the Act.

1. Commission Jurisdiction over DigitalVoice

16. In the absence of a specific statutory provision regarding jurisdiction over services like DigitalVoice, we begin with section 2 of the Act.[50] In 1934, Congress set up a dual regulatory regime for communications services.[51] In section 2(a) of the Act, Congress has given the Commission exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged . . . in such communication."[52] Section 2(b) of the Act reserves to the states jurisdiction "with respect to intrastate communication service . . . of any carrier."[53]

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[48]Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (1996 Act).

[49]Access to emergency services for VoIP services, including 911, is a critical public safety issue. This issue, and the extent to which states may have a role in such matters, will be addressed in the *IP-Enabled Services Proceeding*. We address this issue in a limited manner in this Order only because of the manner in which Minnesota ties its 911 requirements to entry authority. *See infra* paras. 42-44.

[50]*See Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

[51]*See generally* 47 U.S.C. § 152.

[52]47 U.S.C. § 152(a). Congress defined "interstate communication" as "communication or transmission . . . from any State, Territory, or possession of the United States. . . to any other State, Territory, or possession of the United States . . . but shall not . . . include wire or radio communication between points in the same State . . . through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. § 153(22).

[53]47 U.S.C. § 152(b). "[I]ntrastate communications" is not separately defined in the Act except to the extent it is described in the definition of "interstate communication" as a "wire or radio communication between *points* in the same State." 47 U.S.C. § 153(22) (emphasis added). We note that section 2(b) reserves to the states only matters

17. In applying section 2 to specific services and facilities, the Commission has traditionally applied its so-called "end-to-end analysis" based on the physical end points of the communication.[54] Under this analysis, the Commission considers the "continuous path of communications," beginning with the end point at the inception of a communication to the end point at its completion, and has rejected attempts to divide communications at any intermediate points.[55] Using an end-to-end approach, when the end points of a carrier's service are within the boundaries of a single state the service is deemed a purely intrastate service, subject to state jurisdiction for determining appropriate regulations to govern such service.[56] When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction.[57] Services that are capable of communications both between intrastate end points and between interstate end points are deemed to be "mixed-use" or "jurisdictionally mixed" services.[58] Mixed-use services are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies.[59] In such circumstances, the Commission may exercise its authority to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations.[60]

18. Thus, our threshold determination must be whether DigitalVoice is purely intrastate (subject only to state jurisdiction) or jurisdictionally mixed (subject also to federal jurisdiction). The nature of DigitalVoice precludes any suggestion that the service could be characterized as a purely intrastate service.[61] As Vonage has indicated, it has over 275,000 subscribers located throughout the United States,

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connected with "carriers," which means "common carriers" or "telecommunications carriers" under sections 3(10) and 3(44) of the Act. 47 U.S.C. § 153(10), (44). Here, we do not determine whether Vonage is a "carrier"; however, our analysis with respect to section 2(b) assumes that it is. This assumption for purposes of this Order, however, in no way prejudges how the Commission may ultimately classify DigitalVoice.

[54]*See, e.g., Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000); *see infra* para. 24 (addressing difficulties with an end-to-end approach for services involving the Internet).

[55]*See, e.g., Pulver*, 19 FCC Rcd at 3320-21, para. 21.

[56]*See* 47 U.S.C. § 152(b)(1).

[57]*See* 47 U.S.C. § 153(22).

[58]*See, e.g., MTS and WATS Market Structure Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 1 FCC Rcd 1287 (1987); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1620, para. 7 (1992) (*BellSouth MemoryCall*); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

[59]*See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986) (finding a basis for Commission preemption where compliance with both federal and state law is in effect physically impossible) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); *BellSouth MemoryCall*, 7 FCC Rcd at 1622-23, paras. 18-19.

[60]Indeed, the Eighth Circuit has recently noted the Commission's authority to preempt in the area of jurisdictionally mixed special access services. *See Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 380 F.3d 367, 374 (8th Cir. 2004) (finding that, with respect to special access services, the Commission "*certainly has the wherewithal to preempt state regulation in this area if it so desires*") (emphasis added).

[61]We need not address in this Order the case of purely intrastate service, which is not the service we have before us in this petition.

each with the ability to communicate with anyone in the world from anywhere in the world.[62] While DigitalVoice clearly enables intrastate communications, it also enables interstate communications. It is therefore a jurisdictionally mixed service,[63] and this Commission has exclusive jurisdiction under the Act to determine the policies and rules, if any, that govern the interstate aspect of DigitalVoice service.[64]

2. Commission Authority To Preempt State Regulations

19. Although the Communications Act establishes dual federal-state authority to regulate certain communications services, courts routinely recognize that there may be circumstances where state regulation would necessarily conflict with the Commission's valid exercise of authority.[65] Where separating a service into interstate and intrastate communications is impossible or impractical, the Supreme Court has recognized the Commission's authority to preempt state regulation that would thwart or impede the lawful exercise of federal authority over the interstate component of the communications.[66]

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[62] *See* Vonage Oct. 1 *Ex Parte* Letter at 2 (explaining that its subscribers have billing addresses in each of the 50 states, the District of Columbia and throughout Canada, that its subscribers regularly use the service from countries outside North America, including "Argentina, Australia . . . and the United Kingdom," and that customers have used the service "from virtually every inhabitable continent in the world").

[63] We analyze DigitalVoice for purposes of preemption as a jurisdictionally mixed service due to its recognized capability to enable communications to occur not only between different states but within a particular state. This notwithstanding, it is possible that the Commission may find, in the context of the *IP-Enabled Services Proceeding*, that this type of service simply has no intrastate component.

[64] *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360 (explaining how the Act would seem to divide the world of domestic telephone service into two hemispheres – one comprised of interstate service, over which the Commission has "plenary authority"); *see also Ivy Broad. Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 490 (2d Cir. 1968) ("The Supreme Court has held that the establishment of this broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law.").

[65] *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375 n.4 (citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977) *cert. denied*, 434 U.S. 874 (1977) (upholding Commission preemption of state regulation because it was not possible to separate the interstate and intrastate components of the asserted Commission regulation)); *see also New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (affirming Commission order preempting state and local entry regulation of satellite master antenna television); *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, WT Docket No. 99-217; CC Docket Nos. 96-98, 88-57, First Report and Order and Further Notice of Proposed Rulemaking; Fifth Report and Order and Memorandum Opinion and Order; Fourth Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 22983, 23031-32, para. 107 (2000) (preempting state regulation of fixed wireless antennas as an impediment to the full achievement of important federal objectives).

[66] *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69. The Court also said that the "critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369. As summarized by the Supreme Court, federal law and policy preempt state action in several circumstances: (1) where compliance with both federal and state law is in effect physically impossible (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132); (2) when there is outright or actual conflict between federal and state law (citing *Free v. Bland*, 369 U.S. 663 (1962)); (3) where the state law stands as an obstacle to the accomplishment and

The D.C. Circuit, for example, applied this impossibility exception in affirming a Commission order preempting state regulation of the rate a local exchange carrier (LEC) charged an interexchange carrier for a disconnection service.[67] The court explained that Commission preemption of state regulation is permissible when the matter to be regulated has both interstate and intrastate aspects; preemption is necessary to protect a valid federal regulatory objective; and "state regulation would 'negate[ ] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[68] Such is the case with DigitalVoice service as discussed in detail below.

3. Conflict With Commission Rules and Policies

20. Regardless of the definitional classification of DigitalVoice under the Communications Act, the *Minnesota Vonage Order* directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice.[69] Were DigitalVoice to be classified a telecommunications service, Vonage would be considered a nondominant, competitive telecommunications provider for which the Commission has eliminated entry and tariff filing requirements with respect to services like DigitalVoice.[70] In particular,

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execution of the full objectives of Congress (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)); (4) when Congress expresses a clear intent to preempt state law; (5) where there is implicit in federal law a barrier to state regulation; and (6) where Congress has legislated comprehensively, thus occupying an entire field of regulation. Additionally, the Supreme Court has held that preemption may result not only from action taken by Congress but also from a federal agency action that is within the scope of the agency's congressionally delegated authority. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369 (citing *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)).

[67] *See Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990).

[68] *Id.* at 1515 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429-31 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C. Cir. 1989); *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1329, 1331-33 (D.C. Cir. 1989)).

[69] While we do not rely on it as a basis for our action in this Order, we also note that section 253 of the Act provides the Commission additional preemption authority over state regulations that "prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253. *See* Vonage Petition at 28 n.55 (indicating it does not submit its petition under section 253). Were DigitalVoice to be classified as a telecommunications service, however, it is possible that we could find state economic regulation such as that imposed by Minnesota to be a prohibition on the provision of an interstate and intrastate telecommunications services under section 253. *See* Vonage Petition at 11, 28 (describing that it is technically and practically impossible to comply with Minnesota's "telephone company" rules).

[70] *See, e.g., Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372-75, paras. 12-16 (1999) (*Section 214 Order*) (granting blanket section 214 authority for new lines of all domestic carriers including dominant carriers like the Bell operating companies (BOCs)); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 245(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Interexchange Detariffing Order*) (adopting mandatory detariffing of most domestic interstate, interexchange services); Order on Reconsideration, 12 FCC 15014 (1997); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *aff'd, MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1 (1980) (subsequent history

in completely eliminating interstate market entry requirements, the Commission reasoned that retaining entry requirements could stifle new and innovative services whereas blanket entry authority, *i.e.*, unconditional entry, would promote competition.[71] State entry and certification requirements, such as the Minnesota Commission's, require the filing of an application which must contain detailed information regarding all aspects of the qualifications of the would-be service provider, including public disclosure of detailed financial information, operational and business plans, and proposed service offerings.[72] The application process can take months and result in denial of a certificate, thus preventing entry altogether.[73] Similarly, when the Commission ordered the mandatory detariffing of most interstate, domestic, interexchange services (including services like DigitalVoice), the Commission found that prohibiting such tariffs would promote competition and the public interest, and that tariffs for these services *may actually harm consumers* by impeding the development of vigorous competition.[74] Tariffs and "price lists," such as those required by Minnesota's statutes and rules, are lengthy documents subject to specific filing and notice requirements that must contain every rate, term, and condition of service offered by the provider, including terms and conditions to which the provider may be subject in its certificate of authority.[75] The Minnesota Commission may also require the filing of cost-justification information or order a change in a rate, term or condition set forth in the tariff.[76] The administrative process involved in entry certification and tariff filing requirements, alone, introduces substantial delay in time-to-market and ability to respond to changing consumer demands, not to mention the impact these processes have on how an entity subject to such requirements provides its service.

21. On the other hand, if DigitalVoice were to be classified as an information service, it would be subject to the Commission's long-standing national policy of nonregulation of information services,[77]

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omitted) (*Competitive Carrier Proceeding*) (adopting regulatory framework based on dominant or nondominant status of carriers).

[71] *See Section 214 Order*, 14 FCC Rcd at 11373, para. 14 ("By its very terms, blanket authority removes regulatory hurdles to market entry, thereby promoting competition."); *id.* at 11373, para. 13 ("Rather than maintaining [entry requirements] that may stifle new and innovative services[,] ... we believe it is more consistent with the goals of the 1996 Act to remove this hurdle.").

[72] *See* Minn. Rule § 7812.0200.

[73] *See* Minn. Stat. § 237.16(c)

[74] *See Interexchange Detariffing Order*, 11 FCC Rcd at 20760, para. 52 (emphasis added) ("[W]e find that not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment."); *id.* at 20750, para. 37 ("We also adopt the tentative conclusion that in the interstate, domestic, interexchange market, requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services may harm consumers by impeding the development of vigorous competition, which could lead to higher rates."). We note that certain exceptions to the Commission's mandatory detariffing rules exist; however, these exceptions would not apply to services like DigitalVoice were it to be classified a telecommunications service.

[75] *See* Minn. Stat. § 237.07; *see also, e.g.*, Minn. Rules §§ 7812.0300(6), 7812.0350(6), 7812.2210(2).

[76] *See, e.g.*, Minn. Rule §§ 7812.2210(4),(8).

[77] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I NOI*); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No.

particularly regarding economic regulation such as the type imposed on Vonage in the *Minnesota Vonage Order*.[78] In a series of proceedings beginning in the 1960's, the Commission issued orders finding that economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically. The Commission found the market for these services to be competitive and best able to "burgeon and flourish" in an environment of "free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements."[79]

22. Thus, under existing Commission precedent, regardless of its definitional classification, and unless it is possible to separate a Minnesota-only component of DigitalVoice from the interstate component, Minnesota's order produces a direct conflict with our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services such as DigitalVoice. This notwithstanding, some commenters argue that the traditional dual regulatory scheme must nevertheless apply to DigitalVoice *because it is functionally similar* to traditional local exchange and long distance

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16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Computer II Tentative Decision*); *Computer II Final Decision,* 77 FCC 2d 384 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*) (subsequent history omitted) (collectively the *Computer Inquiry Proceeding*). In its *Second Computer Inquiry* proceeding, the Commission "adopted a regulatory scheme that distinguished between the common carriage offering of basic transmission services and the offering of enhanced services." *Computer II Final Decision,* 77 FCC 2d at 387; *see also Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040, 6064, para. 38 (1998). The former services are regulated under Title II and the latter services are not. *See Computer II Final Decision,* 77 FCC 2d at 428-30, 432-43, paras. 113-18, 124-49 (indicating it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation under Title II because, among other things, the enhanced services market was "truly competitive"). The 1996 Act uses different terminology (*i.e.*, "telecommunications services" and "information services") than used by the Commission in its *Computer Inquiry* proceeding, but the Commission has determined that "enhanced services" and "information services" should be interpreted to extend to the same functions, although the definition in the 1996 Act is even broader. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56, para. 102 (1996) (*Non-Accounting Safeguards Order*) (subsequent history omitted) (explaining that all enhanced services are information services, but information services are broader and may not be enhanced services).

[78] *See, e.g., Pulver*, 19 FCC Rcd at 3317-20, paras. 17-20 (explaining the Commission's policy of nonregulation for information services and how the 1996 Act reinforces this policy). This policy of nonregulation refers primarily to economic, public-utility type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws. Indeed, the preeminence of federal authority over information services has prevailed unless a carrier-provided information service could be characterized as "purely intrastate," *see California v. FCC*, 905 F.2d 1217, 1239-42 (9th Cir. 1990), or it is possible to separate out the interstate and intrastate components and state regulation of the intrastate component would not negate valid Commission regulatory goals. *See California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995) (affirming Commission preemption of certain state requirements for separation of facilities and personnel in the BOC provision of jurisdictionally mixed enhanced services as state regulations would negate national policy).

[79] *See Computer II Final Decision,* 77 FCC 2d at 425-33, paras. 109-27 (citing *Computer I, Tentative Decision*, 27 FCC 2d at 297-298).

voice service.[80] Were it appropriate to base our decision today on the applicability of Minnesota's "telephone company" regulations to DigitalVoice solely on the functional similarities between DigitalVoice and other existing voice services (as the Minnesota Commission appears to have done),[81] we would find DigitalVoice *far more similar* to CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues.[82] Indeed, in view of these differences, CMRS, including IP-enabled CMRS, is expressly exempt from the type of state economic regulation Minnesota seeks to impose on DigitalVoice.[83] Commenters that argue that the Act requires the Commission to recognize state jurisdiction over DigitalVoice to the extent it enables "intrastate" communications to occur completely ignore the considerations that dictate preemption here.[84] Indeed, the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation. We have acknowledged similar "intrastate" communications capabilities in other services involving the Internet, where for regulatory purposes, treatment as an interstate service prevailed despite this "intrastate" capability.[85]

4. Preemption Based on "Impossibility"

23. In this section, we examine whether there is any plausible approach to separating DigitalVoice into interstate and intrastate components for purposes of enabling dual federal and state regulations to coexist without "negating" federal policy and rules.[86] We find none. Without a practical means to

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[80]*See, e.g.*, ITTA Comments at 10-12; Minnesota Commission Comments at 3; MTA Comments at 13-14; RIITA Comments at 2; Surewest Comments at 4-5; GVNW Reply at 2-3; Minnesota Commission Reply at 4-5, 7; NASUCA Reply at 9, 11-12; Sprint Reply at 2-3. *But see* Verizon Reply at 2-6.

[81]*See Minnesota Vonage Order* at 8 (finding Vonage's service to be "functionally no different than any other telephone service").

[82]Indeed, other commenters note how DigitalVoice is like CMRS. *See, e.g.*, California Commission Comments at 20-22; HTBC Comments at 9.

[83]*See* 47 U.S.C. § 332(c)(3)(A). Pursuant to section 332 of the Act, state and local governments are specifically preempted from regulating the "*entry of or the rates charged* by any commercial mobile service or any private mobile service." *Id.* (emphasis added).

[84]*See, e.g.*, New York Commission Comments at 3; California Commission Comments at 4, 19; NASUCA Reply at 15; OTA/WIT Reply Comment at 8; Sprint Reply at 6-7.

[85]For example, the Commission concluded that some traffic over GTE's asymmetrical digital subscriber line (ADSL) service would, in fact, be terminated in the state where it originated, or even locally, but the service is "an interstate service and is properly tariffed at the federal level." *See GTE ADSL Order*, 13 FCC Rcd at 22466, 22478-79, paras. 1, 22. The Commission left open the possibility that a purely intrastate xDSL service may be offered which would be tariffed at the state level. *See id.* at 22481, para. 27. The Commission similarly determined that cable modem service is an interstate service because the points among which cable modem communications travel are often in different states and countries. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59. The jurisdictionally interstate finding of cable modem service was not an issue on appeal. *See Brand X Internet Services v. FCC*, 345 F.3d 1120. Finally, in *Pulver*, the Commission held that Pulver's "intrastate capabilities" should not remove the service from our jurisdiction. *See Pulver*, 19 FCC Rcd at 3320-22, paras. 20-22.

[86]*See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 368 (holding that the Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law and explaining the numerous bases for preemption); *see also Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d at 1515 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d at 429-31); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 880 F.2d at 425 ("We conclude that the Commission may only preempt state regulation over intrastate wire communication to the degree

separate the service, the *Minnesota Vonage Order* unavoidably reaches the interstate components of the DigitalVoice service that are subject to exclusive federal jurisdiction. Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber. Even, however, if this information were reliably obtainable, Vonage's service is far too multifaceted for simple identification of the user's location to indicate jurisdiction. Moreover, the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers.[87]

24. DigitalVoice harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. 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. As we noted above, however, the Commission has historically applied the geographic "end-to-end" analysis to distinguish interstate from intrastate communications.[88] As networks have changed and the services provided over them have evolved, the Commission has increasingly acknowledged the difficulty of using an end-to-end analysis when the services at issue involve the Internet.[89] DigitalVoice shares many of the same characteristics as these other services involving the Internet, thus making jurisdictional determinations about particular DigitalVoice communications based on an end-point approach difficult, if not impossible.[90]

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necessary to keep such regulation from negating the Commission's exercise of its lawful authority over interstate communication service.").

[87]*See* Letter from William B. Wilhelm, Jr. and Ronald W. Del Sesto, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211, at 5 (filed Oct. 19, 2004) (Vonage Oct. 19 *Ex Parte* Letter)

[88]*See supra* para. 17.

[89]For example, in attempting to apply an end-to-end analysis to an incumbent LEC's digital subscriber line (DSL) telecommunications service to determine whether federal or state tariffing requirements should attach, the Commission noted that "an Internet communication does not necessarily have a point of 'termination' in the traditional sense." *GTE ADSL Order*, 13 FCC Rcd at 22478-79, para. 22. In a later proceeding involving the provision of Telecommunications Relay Service over the Internet, the Commission similarly noted the difficulty in pinpointing the origination of an IP-Relay call arising over the Internet because Internet addresses do not have geographic correlates equivalent to the PSTN's automatic number identifiers, which are tied to geographic locations, and thus, there is no automatic way to determine whether any call is intrastate or interstate. *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC 7779, 7784, para. 15 (2002) (*IP-Relay Second FNPRM*). Significantly, as recently as June, the Commission issued yet another Further Notice of Proposed Rulemaking in this proceeding, recognizing the continued technological inability to identify the location of an IP-Relay user. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571, 98-67; CG Docket No. 03-123, Report and Order; Order on Reconsideration; Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, 12561, para. 221 (2004) (*2004 IP-Relay FNPRM*). In *Pulver*, the Commission concluded that the concept of "end points" and an end-to-end analysis were not relevant to Pulver's Internet-based VoIP information service. *See Pulver*, 19 FCC Rcd at 3316-23, paras. 15-25.

[90]*See* Vonage Petition at 5, 28.

25. In fact, the geographic location of the end user at any particular time is only one clue to a jurisdictional finding under the end-to-end analysis. The geographic location of the "termination" of the communication is the other clue; yet this is similarly difficult or impossible to pinpoint. This "impossibility" results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously, none of which the provider has a means to separately track or record.[91] For example, a DigitalVoice user checking voicemail or reconfiguring service options would be communicating with a Vonage server. A user forwarding a voicemail via e-mail to a colleague using an Internet-based e-mail service would be "communicating" with a different Internet server or user. An incoming call to a user invoking forwarding features could "terminate" anywhere the DigitalVoice user has programmed. A communication from a DigitalVoice user to a similar IP-enabled provider's user would "terminate" to a geographic location unknown either to Vonage or to the other provider.[92] These functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it. Indeed, it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications.[93] Consequently, Vonage has no service-driven reason to know users' locations,[94] and

[91] *See, e.g.,* Vonage Oct. 19 *Ex Parte* Letter at 4-5 (explaining that in addition to having no way to determine a geographic origination point, determining a geographic destination is not possible either); *see also* Letter from Glenn T. Reynolds, BellSouth Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36; 03-211, Attach. at 6-12 (filed Oct.26, 2004) (BellSouth Oct. 26 *Ex Parte* Letter) (explaining the multitude of simultaneous capabilities during a single communication that makes a point of destination unknown); Letter from Howard Symons, Counsel for NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36 Attach. at 2-3 (filed Oct.28, 2004) (NCTA Oct. 28 *Ex Parte* Letter) (describing the core integrated features that "cable VoIP" provides to subscribers); Letter from Adam D. Krinsky, Counsel for CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36; 03-211, (filed Oct.25, 2004) (CTIA Oct. 25 *Ex Parte* Letter) (explaining that IP-enabled services do not have definable termination points).

[92] *See* Vonage Oct. 19 *Ex Parte* Letter at 4-5.

[93] We note that these integrated capabilities and features are not unique to DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers. *See infra* note 113 for a brief summary of these basic characteristics; *see also, e.g.*, Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211 at 1-3 (filed Nov. 1, 2004) (Verizon Nov. 1 *Ex Parte* Letter) (describing Verizon's VoiceWing service); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211 (filed Sept. 27, 2004) (Qwest Sept. 27 *Ex Parte* Letter) (describing Qwest's VoIP architecture and service); Letter from Judy Sello, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211 at 1-4, (filed Oct. 21, 2004) (AT&T Oct 21 *Ex Parte* Letter) (describing AT&T's CallVantage service); Letter from James K. Smith, Executive Director – Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-29, 04-36, Attach. at 4-11 (filed Oct. 8, 2004) (SBC Oct. 8 *Ex Parte* Letter) (describing SBC's VoIP architecture and service); Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 6-12 (filed Oct. 26, 2004) (BellSouth Oct. 26 *Ex Parte* Letter) (describing BellSouth's VoIP architecture and service); Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 4 (filed Oct. 7, 2004) (BellSouth Oct. 7 *Ex Parte* Letter) (describing BellSouth's VoIP architecture and service); Letter from Howard J. Symons, Counsel for National Cable & Telecommunications Association (NCTA), to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 3-5 (filed Oct. 28, 2004) (NCTA Oct. 28 *Ex Parte* Letter) (describing cable VoIP architecture).

Vonage asserts it presently has no way to know.[95] Furthermore, to require Vonage to attempt to incorporate geographic "end-point" identification capabilities into its service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose.[96] Rather than encouraging and promoting the development of innovative, competitive advanced service offerings,[97] we would be taking the opposite course, molding this new service into the same old familiar shape.

26. In the absence of a capability to identify *directly* DigitalVoice communications that originate and terminate within the boundaries of Minnesota, we still consider whether some method exists to identify such communications *indirectly*, such that Minnesota's regulations could nonetheless apply to only that "intrastate" usage such as voice calls between persons located in the same state.[98] For example, assume Minnesota were to use DigitalVoice subscribers' NPA/NXXs as a proxy for those subscribers' geographic locations when making or receiving calls. If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.[99]

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[94] *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) ("Internet protocols were designed to ignore rather than document geographic location.").

[95] We acknowledge that certain geolocation products may be capable of identifying, to some degree, the geographic location of a Vonage user in the future, *see, e.g.*, Sprint Reply at 7, but the record does not reflect that such information is readily obtainable at this time. *See, e.g.*, 8x8 Comments at 14-15. Should Vonage decide in the future to incorporate geolocation capabilities into its service to facilitate additional features that may be dependent on reliable location determining capabilities, *e.g.*, E911-type features or law enforcement surveillance capabilities, this would not alter the fact that the service enables the user's location to change continually. *See* Vonage Oct. 19 *Ex Parte* Letter at 3-6 (explaining how user location information for emergency services purposes would have no relevance to an end to end jurisdictional analysis for DigitalVoice).

[96] *See Pulver*, 19 FCC Rcd at 3320-21, para. 21 ("Attempting to require Pulver to locate its members for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose.").

[97] *See, e.g.*, Letter from Staci L. Pies, The VON Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 02-361, 03-211, 03-266, 04-36, Attach. at 1 (filed Aug. 19, 2004) (VON Coalition Aug. 19 *Ex Parte* Letter).

[98] Where the Commission has found it difficult to apply an end-to-end approach for jurisdictional purposes, it has proposed or adopted proxy or allocation mechanisms to approximate an end-to-end result. *See, e.g., GTE ADSL Order*, 13 FCC Rcd at 22479, para. 23 (applying the 10% rule for determining interstate jurisdiction for federal tariffing purposes); *IP-Relay Second FNPRM*, 17 FCC Rcd at 7784, para. 15 (proposing either an allocator to approximate the mix of interstate/intrastate traffic or a user self-identification mechanism to identify its end-point location); *2004 IP-Relay FNPRM*, 19 FCC Rcd at 12561-64, paras. 221-30 (proposing either user-registration or allocation mechanisms to determine interstate or intrastate use; asking whether, in the alternative, all IP-Relay calls should simply be deemed interstate). We find a 'percentage' proxy to be unhelpful in addressing the conflict between the federal and state regulatory regimes (in particular, the tariffing and certification requirements) at issue in this proceeding, because using such a proxy would not avoid frustration of the Commission's policy objectives discussed above. *See supra* section III.A.3. *But see, e.g.*, MTA Comments at 10.

[99] In this example, if we further assume Minnesota requires entry certification for Vonage, but has an entry condition that Vonage cannot meet, Vonage could be subject to state sanctions for "operating" in the state without authority to

27. Similarly, if a Minnesota NPA/NXX subscriber residing in Minnesota used its service outside the state to call someone in Minnesota, that call would appear to be an intrastate call when it is actually interstate. Some commenters suggest that because Vonage markets DigitalVoice to provide "local" and "long distance" calls it surely has an ability to distinguish between intrastate and interstate calls.[100] These commenters fail to recognize that these calls are not "local" and "long distance" in the sense that they are for traditional wireline telephone services. Rather, like we have seen with the proxy example above, Vonage describes these calling capabilities for convenience in terms that its subscribers understand. A DigitalVoice call that would be deemed "local," for example, is actually a call between two NPA/NXXs associated with particular rate centers in a particular state, yet when the actual communication occurs one or both parties can be located outside those rate centers, outside the state, or even on opposite ends of the world.

28. We further consider whether Minnesota could assert jurisdiction over DigitalVoice communications based on whether the subscriber's billing address or address of residence are in Minnesota. This too fails. When a subscriber with a Minnesota billing address or address of residence uses DigitalVoice from any location outside the state to call a party located in Minnesota, Minnesota would treat that communication as "intrastate" based on the address proxy for that subscriber's location, yet in actuality it would be an interstate call.[101]

29. These proxies are very poor fits, yet even their implementation would impose substantial costs retrofitting DigitalVoice into a traditional voice service model for the sole purpose of making it easier to apply traditional voice regulations to only a small aspect of Vonage's integrated service.[102] Forcing such changes to this service 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.[103] Indeed, Vonage would have to change multiple aspects of its service operations that are not nor were ever designed to incorporate geographic considerations, including modifications to systems that track and identify subscribers' communications activity and facilitate billing; the development of new rate and service structures; and sales and marketing efforts,[104] just for regulatory purposes.[105] The Commission has previously recognized the significant efforts and inefficiency to attempt to separate out an intrastate

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the extent any of its customers nationwide obtain Minnesota NPA/NXXs and use the service to communicate with someone in Minnesota even though that subscriber never had a physical presence in Minnesota.

[100] *See, e.g.*, NASUCA Reply at 15.

[101] In this example, if we further assume Minnesota has imposed a specific rate requirement on DigitalVoice's intrastate communications, this rate requirement would apply to all DigitalVoice communications made by that subscriber to someone in Minnesota even though many of those communications are interstate under the Act.

[102] *See Pulver*, 19 FCC Rcd at 3321-23, paras. 22, 24 (finding it similarly impossible to separate Pulver's VoIP service).

[103] *See, e.g.*, Vonage Oct. 19 *Ex Parte* Letter at 6.

[104] In reviewing a challenge to a Commission requirement for BOC joint CPE/service marketing because it would "surely 'affect' charges for" and regulate "intrastate communications services," and preemption of inconsistent state regulation, the D.C. Circuit affirmed the Commission stating that "[e]ven if [it] were a purely intrastate service, the FCC might well have authority to preemptive regulate its marketing if – as would appear here – it was typically sold in a package with interstate services. Marketing realities might themselves create inseparability." *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 112-13 & n.7 (D.C. Cir. 1989) (referencing *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355).

[105] *See generally* Vonage Oct. 19 *Ex Parte* Letter.

component of other services for certain regulatory purposes where the provider, like Vonage here, *had no service-driven reason to incorporate such capability into its operations.*[106] We have declined to require such separation in those circumstances, treating the services at issue as jurisdictionally interstate for the particular regulatory purpose at issue and preempting state regulation where necessary.[107] For example, in preempting a state regulation specifying default per line blocking of a customer's "Caller ID" for intrastate calls based on "impossibility," the Commission found that "we need not demonstrate absolute future impossibility to justify federal preemption here. We need only show that interstate and intrastate aspects of a regulated service or facility are inseverable as a practical matter in light of prevailing technological and economic conditions."[108]

30. In the case of DigitalVoice, Vonage could not even avoid violating Minnesota's order by trying *not* to provide intrastate communications in that state.[109] For the same reasons that Vonage cannot identify a communication that occurs within the boundaries of a single state, it cannot prevent its users from making such calls by attempting to block any calls between people in Minnesota.[110] Indeed, Vonage could not avoid similar "intrastate" regulations if imposed by any of the other more than 50 separate jurisdictions. Due to the intrinsic ubiquity of the Internet, *nothing short of Vonage ceasing to offer its service entirely* could guarantee that any subscriber would not engage in some communications where a

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[106]*See MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, n.7 (1989) (*MTS/WATS Market Structure Separations Order*) (finding that "mixed use" special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to the Commission's jurisdiction for jurisdictional separations purposes because separating interstate from intrastate traffic on many such lines could not be measured without "significant additional administrative efforts"); *see also Qwest Corp. v. Minnesota Pub. Utils. Comm'n,* 380 F.3d 367, 374 (finding that the Commission's preemptive intent concerning the *de minimis* rule relates to cost allocation for ratemaking purposes rather than plenary regulatory authority but stating that the Commission "*certainly has the wherewithal to preempt state regulation in this area if it so desires*") (emphasis added); *BellSouth MemoryCall,* 7 FCC Rcd at 1620, para. 7 (preempting order of a state commission imposing regulatory conditions on the offering of the intrastate portion of a jurisdictionally mixed service because of the expense, operational, and technical difficulties associated with identifying the intrastate portion and the effect it would likely have on the provider's continued offering of the interstate portion).

[107]*See, e.g., MTS/WATS Market Structure Separations Order,* 4 FCC Rcd 5660, n.7; *BellSouth MemoryCall,* 7 FCC Rcd at 1620, para. 7

[108]*See Rules and Policies Regarding Calling Number Identification Service – Caller ID,* Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 10 FCC Rcd 11700, 11727-28, para. 77 (1995) (citing *California v. FCC,* 39 F.3d 919 (9th Cir. 1994)), *aff'd, California v. FCC,* 75 F.3d 1350 (9th Cir. 1996). The Ninth Circuit affirmed the Commission's preemption in this case, finding it to fit within the impossibility exception. *See California v. FCC,* 75 F.3d at 1360. Indeed, when possible, this Commission prefers that economic and market considerations drive the development of technology, rather than regulatory requirements. *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Order on Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, FCC 04-248, para. 19 (rel. Oct. 18, 2004) (concluding that decision regarding "which broadband technologies to deploy is best left to . . . the market . . . . We decline to second-guess or skew those technology choices . . . .").

[109]*See* Vonage Petition at v, 31; *see also American Libraries Ass'n v. Pataki,* 969 F. Supp. at 171 (explaining that no aspect of the Internet can fairly be closed off to users from any state).

[110]*See* Vonage Petition at v, 31.

state may deem that communication to be "intrastate" thereby subjecting Vonage to its economic regulations absent preemption.

31. There is, quite simply, no practical way to sever DigitalVoice into interstate and intrastate communications that enables the *Minnesota Vonage Order* to apply only to intrastate calling functionalities without also reaching the interstate aspects of DigitalVoice, nor is there any way for Vonage to choose to avoid violating that order if it continues to offer DigitalVoice anywhere in the world.[111] Thus, to whatever extent, if any, DigitalVoice includes an intrastate component, because of the impossibility of separating out such a component, we must preempt the *Minnesota Vonage Order* because it outright conflicts with federal rules and policies governing interstate DigitalVoice communications.

32. Indeed, the practical inseverability of other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent as described herein. Specifically, these basic characteristics include: a requirement for a broadband connection from the user's location; a need for IP-compatible CPE; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video.[112] In particular, the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services,[113] we would preempt state regulation to an extent comparable to what we have done in this Order.

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[111] *See Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375, the court upheld preemption of a Texas Public Utility Commission order prohibiting an incumbent LEC from providing interconnection to the PSTN to a customer where the FCC cannot "separate the interstate and the intrastate components of [its] asserted regulation."); *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d at 1515 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375, to uphold Commission's preemption of a state commission's prescribed rates for LEC charges to interexchange carriers for customer disconnections based on the impossibility exception).

[112] *See, e.g.*, SBC Oct. 8 *Ex Parte* Letter, Attach. at 4-11; BellSouth Oct. 26 *Ex Parte* Letter, Attach. at 6-12; BellSouth Oct. 7 *Ex Parte* Letter, Attach. at 4.

[113] *See, e.g.*, Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1-2 (filed Oct. 27, 2004) ("This network design also permits providers to offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines. . . . In addition to call setup, these functions include generation of call announcements, record-keeping, CALEA, voice mail and other features such as *67, conferencing and call waiting. ... [T]here are no facilities at the local level of a managed voice over IP network that can perform these functions."); Letter from Henk Brands, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 2, 9 (filed Oct. 29, 2004) (Time Warner Oct. 29 *Ex Parte* Letter) ("[T]he Commission should take a broader approach by recognizing additional characteristics of IP-based voice services and extend the benefits of preemption to all VoIP providers. . . . [B]y its nature, VoIP is provided on a multistate basis, making different state regulatory requirements particularly debilitating."); NCTA Oct. 28 *Ex Parte* Letter, Attach. at 1 ("Cable VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service. . . . A cable company may have no idea whether a customer is accessing these features from home or from a remote location. The integral nature of these features and functions renders cable VoIP service an interstate offering subject to exclusive FCC jurisdiction. . . . Not every cable VoIP service has the same mix of features and functionalities . . . , but all cable VoIP offers the types of enhancements that render it an interstate service. Similarly, while the network architecture

5. Policies and Goals of the 1996 Act Consistent With Preemption of Minnesota's Regulations

33. We find that Congress's directives in sections 230 and 706 of the 1996 Act are consistent with our decision to preempt Minnesota's order. As we have noted, Congress has included a number of provisions in the 1996 Act that counsel a single national policy for services like DigitalVoice.[114]

34. Congress's definition of the Internet in the Act recognizes its global nature.[115] In addition to defining the Internet in section 230 of the Act, Congress used section 230 to articulate its national Internet policy. There, Congress stated that "[i]t is the policy of the United States - 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."[116] We have already determined in a prior order that section 230(b)(2) expresses Congress's clear preference for a national policy to accomplish this objective.[117] In *Pulver*, we found this policy to provide support for preventing state attempts to promulgate regulations that would apply to Pulver's service.[118] While we found Pulver's FWD service to be an information

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of each cable VoIP system will not be identical, they share the same centralized network design that impart an interstate nature."); Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 1 (filed Oct. 27, 2004) ("Functions integral to every call, such as CALEA compliance, voicemail recording, storage, and retrieval, call record-keeping, 3-way calling and other functions are provided from these central facilities. These facilities are often located in a state different from the origin of the call.").

[114] *See supra* para. 14; *see also, e.g.,* BellSouth Comments at 3; SBC Comments at 2; VON Coalition Comments at 13; MCI/CompTel Reply at 11; VON Coalition Aug. 19 *Ex Parte* Letter, Attach at 12-13; Time Warner Oct. 29 *Ex Parte* Letter at 8-9; Letter from Carolyn W. Brandon, Vice President, Policy, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 2 (filed Nov. 2, 2004).

[115] In section 230(f) of the Act, Congress describes the Internet as "an *international* network of federal and non-federal interoperable packet switched data networks." *See* 47 U.S.C. § 230(f)(1) (emphasis added). Similarly, in section 231, the Internet is defined in terms of computer facilities, transmission media, equipment and software "comprising the interconnected *worldwide* network of computer networks." 47 U.S.C. § 231(e)(3) (emphasis added). Courts have similarly described it. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (stating that section 230 represents Congress's approach to a problem of national and international dimension "whose international character is apparent"). DigitalVoice is a service that falls squarely within the phrase "Internet and other interactive computer services" as defined in sections 230(f)(1) & 230(f)(2), contrary to the claims of some commenters. *See* Minnesota Independent Coalition Comments at 5 (claiming 230(f) definitions pertain to content services which DigitalVoice does not meet). While we do not decide the classification of DigitalVoice today so as to specify what type of "interactive computer service" it is under section 230(f)(2), that determination is unnecessary for purposes of demonstrating its nexus to section 230. DigitalVoice is unquestionably an "Internet" service as defined in section 230(f)(1), a definition which is not limited to any particular content as we discuss in more detail below.

[116] 47 U.S.C. § 230(b)(2).

[117] *See Pulver*, 19 FCC Rcd at 3319, para. 18 n.66.

[118] *See id.* We found Pulver's FWD service to be an information service – a determination which further supported a national federal regulatory regime for that service. Indeed, were we to reach a similar statutory "information service" classification determination for DigitalVoice in this Order, there would be no question that Congress intended it to remain free from state-imposed economic, public-utility type regulation, consistent with the Commission's long-standing policy of non-regulation for information services. *See id.* at 3317-22, paras. 17-22. In *Pulver*, we explained that through codifying the Commission's decades old distinction between "basic services" and

service, the Internet policy Congress included in section 230 is indifferent to the statutory classification of services that may "promote its continued development."[119] Rather, it speaks generally to the "Internet and other interactive computer services," a phrase that plainly embraces DigitalVoice service.[120] Thus, irrespective of the statutory classification of DigitalVoice, it is embraced by Congress's policy to "promote the continued development" and "preserve the vibrant and competitive *free* market" for these types of services.[121]

35. While the majority of those commenting on the applicability of section 230 in this proceeding share this view,[122] others claim that section 230 relates only to content-based services and DigitalVoice is not the type of content-based service Congress intended to reach.[123] We are cognizant, as we must be, of context as we review the statute, but we look primarily to the words Congress chose to use.[124] While we acknowledge that the title of section 230 refers to "offensive material," the general policy statements regarding the Internet and interactive computer services contained in the section are not similarly confined to offensive material. In the case of section 230, Congress articulated a very broad policy regarding the "Internet and other interactive computer services" without limitation to content-based services. Through codifying its Internet policy in the Commission's organic statute, Congress charges the Commission with the ongoing responsibility to advance that policy consistent with our other statutory obligations. Accordingly, in interpreting section 230's phrase "unfettered by Federal or State regulation," we cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations such as Minnesota's on DigitalVoice and still meet our responsibility to realize Congress's objective.

"enhanced services" as "telecommunications services" and "information services," respectively, in the 1996 Act, and by specifically excluding information services from the ambit of Title II, Congress indicated, consistent with the Commission's long-standing policy of nonregulation, that information services not be regulated. *See id.* at 3318-19, para. 18; *see also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56, para. 102; *IP-Enabled Services Proceeding*, 19 FCC Rcd at 4879-81, 4890-91, paras. 25-27, 39. While Congress has indicated that information services are not subject to the type of regulation inherent in Title II, Congress has provided the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its mandates under the Act. Although the Commission has clear authority to do so, it has only rarely sought to regulate information services using its Title I ancillary authority. *See Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and* Customer *Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999).

[119] 47 U.S.C. § 230(b)(1).

[120] 47 U.S.C. § 230(b)(1), (2) (emphasis added). Indeed, the communications that occur when a subscriber uses the DigitalVoice service are Internet communications, no less than e-mail, instant messaging, or chat rooms. *See, e.g.*, VON Coalition Aug. 19 *Ex Parte* Letter, Attach at 2. Although DigitalVoice may be functionally similar in some respects to voice communications that are not dependent upon the Internet, this does not change the fact that *DigitalVoice is an Internet-based communications service. See also supra* note 115.

[121] 47 U.S.C. § 230(b)(1), (2) (emphasis added).

[122] *See, e.g.*, MCI/CompTel Comments at 11; Motorola Comments at 12; SBC Comments at 2-4; VON Coalition Comments at 13; AT&T Reply at 2; Vonage Aug. 13 *Ex Parte* Letter, Attach. at 3; VON Coalition Aug. 19 *Ex Parte* Letter, Attach. at 13.

[123] *See, e.g.*, California Commission Comments at 15-17; Minnesota Independent Coalition Comments at 4-6; MTA Comments at 6.

[124] *See* 47 U.S.C. § 230.

36. We are also guided by section 706 of the 1996 Act, which directs the Commission (and state commissions with jurisdiction over telecommunications services) to encourage the deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market" and removing "barriers to infrastructure investment."[125] Internet-based services such as DigitalVoice are capable of being accessed only via broadband facilities, *i.e.*, advanced telecommunications capabilities under the 1996 Act,[126] thus driving consumer demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706.[127] Indeed, the Commission's most recent *Fourth Section 706 Report* to Congress recognizes the nexus between VoIP services and accomplishing the goals of section 706.[128] Thus, precluding multiple disparate attempts to impose economic regulations on DigitalVoice that would thwart its development and potentially result in it exiting the market will advance the goals and objectives of section 706.

37. Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on DigitalVoice, which could severely inhibit the development of this and similar VoIP services.[129] We cannot, and will not, risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet. To do so would ignore the Act's express mandates and directives with which we must comply, in contravention of the pro-competitive deregulatory policies the Commission is striving to further.

B. Commerce Clause

38. We note that our decision today is fully consistent with the Commerce Clause of the United States Constitution. The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States."[130] As explained by the Supreme Court, "[t]hough

[125] 47 U.S.C. § 157 nt. Section 706 of the 1996 Act is located in the notes of section 7 of the Communication Act. To implement section 706's mandate, the Commission has considered, among other things, whether its rules promote the delivery of innovative advanced services offerings. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*FNPRM*), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory. Util. Comm'rs v. United States Telecom Ass'n*, 73 USLW 3234 (U.S. Oct. 12, 2004) (Nos. 04-12, 04-15, 04-18). We find that our actions in this ruling are also consistent with this provision of the Act.

[126] *See* 47 U.S.C. § 157 nt. (c)(1) (defining "advanced telecommunications capability").

[127] *See* 8x8 Comments at 5; VON Coalition Aug. 19 *Ex Parte* Letter, Attach at 7-8.

[128] *See Fourth Section 706 Report* at 38 ("[S]ubscribership to broadband services will increase in the future as new applications that require broadband access, *such as VoIP*, are introduced into the marketplace, and consumers become more aware of such applications.") (emphasis added); *see also id.* at 3 (Statement of Chairman Powell) ("Disruptive VoIP services are acting as a demand-driver for broadband connections, lighting the industry's fuse, and exciting a moribund market."); APT Comments at 2; Motorola Comments at 12.

[129] *See Pulver*, 19 FCC Rcd at 3319-20, para. 19; *see also American Libraries Ass'n v. Pataki*, 969 F. Supp. at 183 ("Haphazard and uncoordinated state regulation [of the Internet] can only frustrate the growth of cyberspace.").

[130] U.S. Const. art. 1, § 8, cl. 3.

phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[131] Under the Commerce Clause jurisprudence, a state law that "has the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders" is a violation of the Commerce Clause.[132] In addition, state regulation violates the Commerce Clause if the burdens imposed on interstate commerce by state regulation would be "clearly excessive in relation to the putative local benefits."[133] Finally, courts have held that "state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause."[134]

39. Minnesota's regulation likely has "the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders."[135] Because the location of Vonage's users cannot practically be determined,[136] Vonage would likely be required to comply with Minnesota's regulation for all use of DigitalVoice – including communications that do not originate or terminate in Minnesota, or even involve facilities or equipment in Minnesota – in order to ensure that it could fully comply with the regulations for services in Minnesota. And, as we have explained above, this would likely be the result even if Vonage elected to discontinue seeking subscribers in Minnesota, given that end users could use the service from any broadband connection in Minnesota.[137] While states can and should serve as laboratories for different regulatory approaches, we have here a very different situation because of the nature of the service – our federal system does not allow the strictest regulatory predilections of a single state to crowd out the policies of all others for a service that unavoidably reaches all of them. For these reasons,

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[131] *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994) (citations omitted); *see also PSINet, Inc. v. Chapman*, 362 F.3d 227, 239 (4th Cir. 2004) (quoting *General Motors Corp. v. Tracey*, 519 U.S. 278, 287 (1997)); *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 173 (holding that the Internet is an instrument of "interstate commerce" under the Commerce Clause).

[132] *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989); *see also Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is *per se* invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.") (emphasis added) (citation omitted).

[133] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Cotto Waxo Co. v. Williams*, 46 F.3d at 793 ("[I]f the challenged statute regulates evenhandedly, then it burdens interstate commerce indirectly and is subject to a balancing test. Under the balancing test, a state statute violates the Commerce Clause only if the burdens it imposes on interstate commerce are 'clearly excessive in relation to the putative local benefits.'") (citation omitted).

[134] *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 169 (citing *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886)); *see id.* at 181 ("The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level."); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999).

[135] *Healy v. Beer Institute*, 491 U.S. at 332; *see also American Libraries Ass'n v. Pataki*, 969 F. Supp. at 173-74, 177; *American Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (acknowledging that because of "the Internet's boundary-less nature," regulations of Internet communications may not be "wholly outside" a state's borders, but nonetheless may impose extraterritorial regulation in violation of the Commerce Clause).

[136] *See supra* para. 5.

[137] *See supra* para. 30.

Minnesota's regulation would likely have the "practical effect" of regulating beyond its borders and therefore would likely violate the Commerce Clause.[138]

40. In addition, we believe the burdens imposed on interstate commerce by the Minnesota Commission's regulation would likely be "clearly excessive in relation to the putative local benefits."[139] The Minnesota regulation would impose significant burdens on interstate commerce.[140] As discussed above, even if it were relevant and possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical and costly.[141] At the same time, we believe that the local benefits of state economic regulation would be limited. In a dynamic market such as the market for Internet-based services, we believe that imposing this substantial burden on Vonage would serve no useful purpose and would almost certainly be significant and negative for the development of new and innovative interstate Internet-based services.

41. Finally, DigitalVoice, like other Internet services, is likely the type of commerce that is of such a "unique nature" that it "demand[s] cohesive national treatment" under the Commerce Clause.[142] Because DigitalVoice is not constrained by geographic boundaries and cannot be excluded from any particular state, inconsistent state economic regulation could cripple development of DigitalVoice and services like it. If Vonage's DigitalVoice service were subject to state regulation, it would have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations.[143]

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[138] *See* Vonage Petition at 29 ("Vonage has no way of assuring that it is in compliance with the [*Minnesota Vonage Order*] unless it blocks a substantial amount of interstate traffic as well."); *id.* at 31 ("[S]ince *any* Vonage customer could, in theory, travel to Minnesota at any time and connect their MTA computer to a broadband Internet connection, Vonage could never prevent *all* intrastate Minnesota use of its service unless it blocked *all* interstate 'calls' as well.") (emphasis in original); *id.* at 25, 27; *see also American Libraries Ass'n v. Pataki*, 969 F. Supp. at 171 ("[N]o aspect of the Internet can feasibly be closed off to users from another state.").

[139] *See Pike v. Bruce Church, Inc.*, 397 U.S. at 142; *see also Cotto Waxo Co. v. Williams*, 46 F.3d at 793. *See generally* Michael A. Bamberger, *The Clash Between the Commerce Clause and State Regulation of the Internet*, Internet Newsletter, Apr. 2002 (explaining that "[f]or the most part, courts have analyzed the constitutionality of state Internet regulation under the test employed by the *Pike* court") (emphasis added).

[140] Indeed, one federal court has already determined, in the specific context of Vonage, that state entry regulation of DigitalVoice would interfere with interstate commerce. *See New York Preliminary Injunction* at 2; *see also American Booksellers Found. v. Dean*, 342 F.3d at 104 ("We think it likely that the [I]nternet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand [] a single uniform rule.'") (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851)).

[141] *See supra* para. 29; *see also American Libraries Ass'n v. Pataki*, 969 F. Supp. at 170 ("The Internet is wholly insensitive to geographic distances. . . . Internet protocols were designed to ignore rather than document geographic location . . . .").

[142] *American Libraries Ass'n v. Pataki*, 969 F. Supp. at 69 (citing *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557); *see also American Civil Liberties Union v. Johnson*, 194 F.3d at 1162 ("As we observed, . . . certain types of commerce have been recognized as requiring national regulation. . . . The Internet is surely such a medium.").

[143] *See also American Libraries Ass'n v. Pataki*, 969 F. Supp. at 169 ("The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation - and in particular, the national infrastructure of communications and trade - as a whole.") (citing *Quill Corp. v. North Dakota,* 504 U.S. 298, 312 (1992)).

As discussed above, because of the unbounded characteristics of the Internet, Vonage would likely be required in practical effect to subject its service to all customers across the country to the regulations imposed by Minnesota. Moreover, state regulation of Internet-based services, such as DigitalVoice, would make them unique among Internet services as the only Internet service to be subject to such state obligations. Indeed, allowing the imposition of state regulation on Vonage would likely eliminate any benefit of using the Internet to provide the service. The Internet enables individuals and small providers to reach a global market simply by attaching a server to the Internet; requiring Vonage to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of Internet-based communication. Thus, services, such as DigitalVoice, are likely of a "unique nature" that "demand[s] cohesive national treatment," and therefore, inconsistent state regulations would likely violate the Commerce Clause.[144]

C. Public Safety Issues

42. As discussed above, we preempt the *Minnesota Vonage Order* because it imposes entry and other requirements on Vonage that impermissibly interfere with this Commission's valid exercise of authority. As Vonage indicates in its Petition, 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."[145] In the *Minnesota Vonage Order*, the Minnesota Commission specifically subjected Vonage to this requirement.[146] 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. Vonage explains that there is no practicable way for it to comply with this requirement: it

[144]Federal court decisions applying the Commerce Clause to state regulation of Internet services have come to similar conclusions. In *American Libraries Ass'n v. Pataki*, a leading case on this issue, a federal district court struck down a New York state statute making it a crime to disseminate indecent material to minors over the Internet. The court held that the New York law violated the Commerce Clause because it (1) overreached by seeking to regulate conduct occurring outside its borders; (2) imposed burdens on interstate commerce that exceeded any local benefit; and (3) subjected interstate use of the Internet to inconsistent regulations. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. at 183-84. In several subsequent cases, federal courts of appeal expressly adopted these holdings. *See PSINet, Inc. v. Chapman*, 362 F.3d 227; *American Booksellers Found. v. Dean*, 342 F.3d 96; *American Civil Liberties Union v. Johnson*, 194 F.3d 1149; *see also American Libraries Ass'n v. Pataki*, 969 F. Supp. at 182 ("The Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.").

We also note examples from other network-based industries where, although an intrastate component may exist, state authority must nonetheless yield to exclusive federal jurisdiction in the area of economic or other state regulations affecting interstate commerce. For example, in the case of railroads, the Supreme Court struck down a state regulation regarding the length of trains, holding that "examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783-84 (1945). Similarly, in trucking cases, the Supreme Court has invalidated state laws regulating the length of trucks under the Commerce Clause when the regulation imposes a burden on interstate trucking that is not outweighed by the local interest. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). In another transportation case, the Court struck down an Illinois law mandating a particular type of mudguards on trucks operating in the state, concluding that the regulation imposed significant burdens on interstate trucking with no countervailing benefits. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

[145]*See* Vonage Petition at 25 (citing Minn. Rule § 7812.0550 subp. 1).

[146]*See Minnesota Vonage Order* at 8.

cannot today identify with sufficient accuracy the geographic location of a caller, and it has not obtained access in all cases to incumbent LEC E911 trunks that carry calls to specialized operators at public safety answering points (PSAPs).[147] Under the Minnesota "telephone company" rules, therefore, this requirement bars Vonage from entry in Minnesota. To that extent, this requirement is preempted along with all other entry requirements contained in Minnesota's "telephone company" regulations as applied to DigitalVoice.[148] Although we preempt Minnesota from imposing its 911 requirements on Vonage as a condition of entry, this does not mean that Vonage should cease the efforts it has undertaken to date and we understand is continuing to take both to develop a workable public safety solution for its DigitalVoice service and to offer its customers equivalent access to emergency services.

43. There is no question that innovative services like DigitalVoice are having a profound and beneficial impact on American consumers.[149] While we do not agree with unnecessary economic regulation of DigitalVoice designed for different services, we do believe that important social policy issues surrounding services like DigitalVoice should be considered and resolved.[150] Access to emergency services, a critically important public safety matter, is one of these important social policy issues. In this proceeding, Vonage has indicated that it is devoting substantial resources toward the development of standards and technology necessary to facilitate some type of 911 service, working cooperatively with Minnesota agencies and other state commissions, public safety officials and PSAPs, the National Emergency Number Association (NENA), and the Association of Public-Safety Communications Officials (APCO).[151] Moreover, it has demonstrated that it is offering its version of 911 capability to all its customers, including those in Minnesota, and has provided us information indicating what actions its customers must take to activate this 911 capability.[152] We are also aware that Vonage recently announced the successful completion of an E911 trial in Rhode Island, a state that has not, to our knowledge, attempted to regulate DigitalVoice. In collaboration with the State of Rhode Island, Vonage has developed a technical solution to deliver a caller's location and call back number to emergency service personnel for 911 calls placed in that state by DigitalVoice users.[153] We fully expect Vonage to continue

[147] *See* Vonage Petition at 8-9, 24-25.

[148] *See supra* paras. 20-22 (explaining preemption of entry requirements). Indeed, Vonage notes in its petition that "[I]f the Commission preempts Minnesota's certificate requirement . . . this issue [911 comparability to an incumbent LEC] will be moot." *See* Vonage Petition at 25. Similarly, to the extent the Minnesota Commission demands payment of 911 fees as a condition of entry, that requirement is preempted.

[149] *See* VON Coalition Aug. 19 *Ex Parte* Letter at 4.

[150] As explained above, these issues are currently being considered in pending proceedings before this Commission. *See supra* note 46. *See also, e.g.*, Minnesota Commission Comments at 4; Surewest Comments at 12; Texas 911 Agencies Comments at 2-3 (urging the Commission to consider public safety issues related to VoIP services).

[151] *See* NENA Reply at 1-2; Vonage Aug. 13 *Ex Parte* Letter at 1-2; Minnesota Statewide 911 Program Comments at 4.

[152] In offering its "911" capability to its customers, Vonage has provided the Commission information regarding how and what it tells its customers about its limited 911 capabilities such that its customers are fully aware of those limitations when they subscribe to the service and clearly understand that it is not a comparable emergency service to the 911 capability they obtain with local exchange service. We fully expect Vonage to continue providing customers information such as this about its "911" capability. *See* Vonage Oct. 1 *Ex Parte* Letter at 3-4 & Exhibit 10.

[153] *See* Letter from William B. Wilhelm, Jr. and Ronald W. Del Sesto, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1 (filed Oct. 14, 2004).

its 911 development efforts and to continue to offer some type of public safety capability during the pendency of our *IP-Enabled Services Proceeding*.[154]

44. We emphasize that while we have decided the jurisdictional question for Vonage's DigitalVoice here, we have yet to determine final rules for the variety of issues discussed in the *IP-Enabled Services Proceeding*. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as universal service, intercarrier compensation, section 251 rights and obligations,[155] numbering, disability access, and consumer protection in that proceeding.[156]

45. Furthermore, we acknowledge that a U.S. District Court in New York has recently ordered Vonage "to continue to provide the same emergency 911 calling services currently available to Vonage customers" within that state[157] and to "make reasonable good faith efforts to participate on a voluntary basis" in workshops pertaining to the development of VoIP 911 calling capabilities.[158] Because DigitalVoice is a national service for which Vonage cannot single out New York "intrastate" calls (any more than it can Minnesota "intrastate" calls), as a practical matter, the District Court's order reaches DigitalVoice wherever it is used.[159] Thus, we need not be concerned that as a result of our action today, Vonage will cease its efforts to continue developing and offering a public safety capability in Minnesota. The District Court order ensures that these efforts must continue while we work cooperatively with our state colleagues and industry to determine how best to address 911/E911-type capabilities for IP-enabled services in a comprehensive manner in the context of our *IP-Enabled Services Proceeding*.[160]

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[154]We look beyond Vonage's efforts of today, however, toward work that remains to be done in the area of 911 and the opportunities that this new technology presents for public safety. To that end, we are aware of the six principles NENA has advanced: (1) establish a national E911 VoIP policy; (2) encourage vendor and technology neutral solutions and innovation; (3) retain consumer service quality expectations; (4) support dynamic, flexible, open architecture system design process for 911; (5) develop policies for 911 compatible with the commercial environment for IP communications; and (6) promote a fully funded 911 system. *See* National Emergency Number Association, *E9-1-1, Internet Protocol & Emergency Communications*, Press Release (Mar. 22, 2004). We applaud NENA's vision in establishing these principles to support a process to "promote a fully functional 9-1-1 system that responds any time, anywhere from every device." *See id.*. We endorse these principles because they provide a sound blueprint for the development of a national 911 solution for VoIP services and we encourage all VoIP providers and industry participants to work toward their realization.

[155]We note that nothing in this Order addressing the Commission's jurisdictional determination of or regulatory treatment of particular retail IP-enabled services impacts competitive LEC access to the underlying facilities on which such retail services ride. *See* Letter from Jason D. Oxman, General Counsel, Association for Local Telecommunications Services, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 04-29, 04-36 (filed Nov. 2, 2004).

[156]*See supra* note 46.

[157]*See New York Preliminary Injunction* at 3. We note that Vonage's "emergency 911 calling service" is not a service that is provided pursuant to the New York Commission's rules or any other state commission's rules. This is a service Vonage has voluntarily undertaken in response to consumer demand.

[158]*See New York Preliminary Injunction* at 4.

[159]We recognize that Vonage's 911 capability relies on the cooperation of its customers in accurately registering and re-registering their user location when they move about with the service.

[160]*See IP-Enabled Services Proceeding*, 19 FCC Rcd at 4897-901, paras. 51-57.

IV. CONCLUSION

46. For the reasons set forth above, we preempt the *Minnesota Vonage Order*. As a result, the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state. Moreover, for services having the same capabilities as DigitalVoice, the regulations of other states must likewise yield to important federal objectives. To the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.

V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 3, 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-53, 154(i), 303(r), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Vonage's Petition for Declaratory Ruling IS GRANTED in part and the *Minnesota Vonage Order* IS PREEMPTED.

48. IT IS HEREBY FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX
LIST OF COMMENTERS

Comments in WC Docket No. 03-211

Comments	Abbreviation
8x8, Inc.	8x8
Alliance for Public Technology	APT
Association of Public-Safety Communications Officials	APCO
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
CenturyTel, Inc.	CenturyTel
Cinergy Communications Company	Cinergy
Cisco Systems, Inc.	Cisco
Dr. Robert A. Collinge	Collinge
Communications Workers of America	CWA
DJE Teleconsulting, LLC	DJE Teleconsulting
Frontier and Citizens Telephone Companies	Frontier/Citizens
The High Tech Broadband Coalition	High Tech Broadband Coalition
ICORE, Inc.	ICORE
Independent Telephone and Telecommunications Alliance	ITTA
Iowa Utilities Board	Iowa Commission
Level 3 Communications, LLC	Level 3
MCI CompTel	MCI/CompTel
Metropolitan 911 Board	Metropolitan 911 Board
Minnesota Attorney General's Office	Minnesota AG
Minnesota Department of Commerce	Minnesota Department of Commerce
Minnesota Independent Coalition	Minnesota Independent Coalition
Minnesota Public Utilities Commission	Minnesota Commission
Minnesota Statewide 911 Program	Minnesota Statewide 911 Program
Montana Independent Telecommunications Systems	Montana Independent Telecommunications Systems
Montana Telecommunications Association	MTA
Motorola, Inc.	Motorola
National Association of State Utility Consumer Advocates	NASUCA
National Exchange Carrier Association	NECA
National Telecommunications Cooperative Association	NTCA
New York State Department of Public Service	New York Commission
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
PAETEC Communications, Inc.	PAETEC
Public Utilities Commission of Ohio	Ohio Commission
Qwest Communications International Inc.	Qwest
Rural Iowa Independent Telephone Association	RIITA

SBC Communications Inc.	SBC
Sprint Corporation	Sprint
SureWest Communications	SureWest
Telcom Consulting Associates, Inc.	TCA
Texas Commission on State Emergency Communications and Texas Emergency Communications Districts	Texas 911 Agencies
Texas Coalition of Cities for Utility Issues	TCCFUI
Time Warner Telecom, Inc.	Time Warner Telecom
USA DataNet	USA DataNet
U.S. Department of Justice Federal Bureau of Investigation	USDOJ/FBI
United States Telecom Association	USTA
The Verizon Telephone Companies	Verizon
The Voice on the Net Coalition	VON Coalition
Warinner, Gesinger & Associates, LLC	WG&A
Washington Enhanced 911 Program	Washington E911 Program

Replies in WC Docket No. 03-211

Replies	**Abbreviation**
8x8, Inc.	8x8
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Earthlink, Inc.	Earthlink
GVNW Consulting, Inc.	GVNW
Inclusive Technologies	Inclusive Technologies
Iowa Utilities Board	Iowa Commission
MCI CompTel	MCI/CompTel
Michigan Public Service Commission	Michigan Commission
Minnesota Public Utilities Commission	Minnesota Commission
Montana Telecommunications Association	MTA
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Association of Telecommunications Officers and Advisors National League of Cities The National Association of Counties The Alliance for Community Media	NATOA *et al.*
National Emergency Number Association	NENA
Attorney General of the State of New York	New York State AG
Oregon Telecommunications Association Washington Independent Telephone	OTA/WIT
PacWest Telecom, Inc. RCN Corporation	PacWest/RCN
Pennsylvania Public Utility Commission	Pennsylvania Commission
Sprint Corporation	Sprint

Telecommunications for the Deaf, Inc.	TDI
Texas Coalition of Cities for Utility Issues	TCCFUI
U.S. Department of Justice Federal Bureau of Investigation	USDOJ/FBI
The Verizon Telephone Companies	Verizon
Vonage Holdings Corp.	Vonage

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order in WC Docket No. 03-211.

Since 1870 home telephone service has been essentially the same—two phones connected by a wire. This landmark order recognizes that a revolution has occurred. Internet voice services have cracked the 19th Century mold, to the great benefit of consumers. VoIP services certainly enable voice communications between two or more people, just as the traditional telephone network does, but that is where the similarity ends. Internet voice is an internet application that takes its place alongside email and instant messaging as an incredibly versatile tool for communicating with people all over the world. As such it has truly unique characteristics.

Internet Voice is More Personal: VOIP services allow people to dynamically structure the way they communicate and to customize and personalize messages in a way that is impossible with traditional telephones. Just as consumers personalize their cell phones with ring tones, pictures and applications, the same is possible with internet voice. Consumers have come to expect technology to be tailored to their preferences—"My Amazon," "My Tivo," "My Ipod." Internet voice, ushers in the era of "My Telephone." Adding enhancements to voice is no longer a highly complex and expensive modification to the network – now it is just a matter of adding to the next software release.

Internet Voice is Cheaper: Consumers always want to pay less and VOIP promises enormous value. Because of the efficient technology and underlying economics of the service, Consumers can expect flat rate prices, for unlimited services and features. Just as consumers have responded strongly to buckets of minutes at low fixed prices in mobile phone service, the same characteristics will bring these innovative pricing models to the wired phone world. The proof is in the pudding, VOIP is barely a few years old as a retail offering and providers have already cut prices several times to compete for consumers. VoIP providers have begun offering local and long-distance calling plans for as low as $14.99 and $19.99 per month. Most recently, Vonage and AT&T slashed the monthly prices of their unlimited local and long-distance calling plans by $5 per month. If we let competition and innovation rage, unencumbered by the high cost of regulation, Consumers can expect more of the same—lower prices, more choice, and more innovative offerings.

Internet Voice is Global: Today's decision lays a jurisdictional foundation for what consumers already know – that the Internet is global in scope. The genius of the Internet is that it knows no boundaries. In cyberspace, distance is dead. Communication and information can race around the planet and back with ease. The Order recognizes that several technical factors demonstrate that VoIP services are unquestionably interstate in nature. VoIP services are nomadic and presence-oriented, making identification of the end points of any given communications session completely impractical and, frankly, unwise. In this sense, Internet applications such as VoIP are more border busting than either long distance or mobile telephony– each inherently, and properly classified, interstate services.

To subject a global network to disparate local regulatory treatment by 51 different jurisdictions would be to destroy the very qualities that embody the technological marvel that is the Internet. The founding fathers understood the danger of crushing interstate commerce and enshrined the principle of federal jurisdiction over interstate services in the commerce clause of the U.S. Constitution. In the same vein, Congress rightly recognized the borderless nature of mobile telephone service and classified it an interstate communication. VOIP properly stands in this category and the Commission is merely affirming the obvious in reaching today's jurisdictional decision.

This is not to say that there is no governmental interest in VOIP. There will remain very important questions about emergency services, consumer protections from waste, fraud and abuse and recovering the fair costs of the network. It is not true that states are or should be complete bystanders with regard to these issues. Indeed, there is a long tradition of federal/state partnership in addressing such issues, even with regard to interstate services. For example, in long distance services, the FCC and state commissions have structured a true partnership to combat slamming and cramming. We have also worked closely with the states to strike a balance in the area of do-not-call enforcement. In the mobile services area, the FCC has worked closely with states on E911 implementation. With regard to critical 911 capability for VOIP, I note already that several Internet voice providers have entered into an agreement with the National Emergency Number Association to extend 911 capabilities to Internet voice services to "promote a fully functional 9-1-1 system that responds any time, anywhere from every device." Efforts such as these are essential to educating policy makers and providing a basis for solutions to complex technical problems. These can and will serve as models for VOIP.

While today's item preempts an order of the Minnesota Commission applying its traditional "telephone company" regulations to Vonage's DigitalVoice service, it is important that I emphasize that the Commission expresses no opinion here on the applicability to Vonage of state's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing and advertising. Just as this ruling does not alter traditional state powers, we do not alter facilities-based competitor rights, or state authority pursuant to section 252 of the Act. It is my hope that the Commission's decision today will focus the debate and permit our colleagues in the industry and at the state commissions to direct their resources toward helping the Commission answer the important questions that remain after today's Order.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order in WC Docket No. 03-211.

This decision provides much-needed clarity regarding the jurisdictional status of Vonage's DigitalVoice service and other VoIP services. By fencing off these services from unnecessary regulation, this Order will help unleash a torrent of innovation. Indeed, by facilitating the IP revolution, rather than erecting roadblocks, our action will drive greater broadband adoption and deployment, and thereby promote economic development and consumer welfare.

There is no doubt that VoIP services of the type provided by Vonage are inherently interstate in nature. As the Order describes in detail, several factors combine to make it impossible to isolate any intrastate-only component of such services. These factors include the architecture of packet-switched networks and the enhanced features that are offered as an integral part of VoIP services. Together, these attributes necessarily result in the interstate routing of at least some packets. These services are also marked — in striking contrast to circuit-switched communications — by a complete disconnect between the subscriber's physical location and the ability to use the service. A subscriber's physical location is not only unknown in many instances, but also completely irrelevant. Allowing state commissions to impose traditional public-utility regulations on these interstate communications services would frustrate important federal policy objectives, including the congressional directive 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."[1]

Thus, while I do not lightly arrive at any decision to preempt state regulatory authority, I believe it is imperative for the Commission to do so here. Allowing the Minnesota utility regulations — or comparable state regulations — to stand would authorize a single state to establish default national rules for all VoIP providers, given the impossibility of isolating any intrastate-only component. Equally troubling is the prospect of subjecting providers of these innovative new services — which are being rolled out on a regional, national, and even global scale — to a patchwork of *inconsistent* state regulations. In short, failure to preempt state utility regulations would likely sound the death knell for many IP-enabled services and would deprive consumers of the cost savings and exciting features they can deliver.

As necessary as preemption may be, I want to underscore my view that our assertion of exclusive federal jurisdiction still permits states to play an important role in facilitating the rollout of IP-enabled services. To begin with, as the Order makes clear, states will continue to enforce generally applicable consumer protection laws, such as provisions barring fraud and deceptive trade practices. Moreover, I have often emphasized that, even where the FCC alone possesses the ultimate decisionmaking authority, this Commission and state regulators can and should collaborate in the development of sound policy — much as we have done through our Federal-State Joint Boards and Joint Conferences, the approval of Section 271 applications, and in other contexts. Indeed, I am encouraged that an increasing number of state commissioners agree that "preemption . . . does not preclude collaboration with States on key issues including public safety, consumer protection and reform of intercarrier compensation and universal service."[2] These state commissioners further note that "clearly establishing the domain in which the

[1] 47 U.S.C. § 230(b)(2).

[2] Letter of Gregory Sopkin, Chairman, Colorado Public Utilities Commission; Thomas Welch, Chairman, Maine Public Utilities Commission; Jack Goldberg, Vice-Chairman, Connecticut Department of Public Utility Control;

regulatory treatment of IP-enabled services will be determined will facilitate resolution of these issues in a more streamlined manner and with less incentive for costly and protracted litigation."[3]

I also want to acknowledge the concerns expressed by commenters who argued that the Commission should resolve outstanding questions about access to E911, the preservation of universal service, and other important policy matters before addressing this jurisdictional issue. Ideally, the Commission would have decided the jurisdictional issue in tandem with the various rulemaking issues. But the decision of several states to impose utility regulations on VoIP services, and the ensuing litigation arising from such forays, makes it imperative for the Commission to establish our exclusive jurisdiction as the first order of business. This Commission runs significant risks if we remain on the sidelines and leave it to the courts to grapple with such issues of national import without the benefit of the expert agency's views.[4] Looking ahead, I agree that the Commission should proceed with the rulemaking on IP-enabled services as expeditiously as possible. We should adopt rules to the extent necessary to ensure the fulfillment of our core policy goals, including access to E911, the ability of law enforcement to conduct lawful surveillance, access for persons with disabilities, and the preservation of universal service. And we should provide a thorough and careful analysis of whether IP-enabled services are information services or telecommunications services, given the potentially far-reaching implications of that classification.

Finally, by the same token, I sympathize with parties who contend that the Commission should conclusively resolve the jurisdictional status of *all* VoIP services, rather than limiting our analysis to a subset of VoIP. I have endeavored to make our jurisdictional analysis as inclusive as possible, given the state of the record and the scope of the Declaratory Ruling Petition. This Order should make clear the Commission's view that all VoIP services that integrate voice communications capabilities with enhanced features and entail the interstate routing of packets — whether provided by application service providers, cable operators, LECs, or others — will not be subject to state utility regulation.

James Connelly, Commissioner, Massachusetts Department of Telecommunications & Energy; Charles Davidson, Commissioner, Florida Public Service Commission; Susan Kennedy, Commissioner, California Public Utilities Commission; and Connie Murray, Commissioner, Missouri Public Service Commission, at 6 (November 2, 2004).

[3] *Id.*

[4] *Cf. Brand X Internet Service v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petition for cert. filed* (Aug. 27, 2004) (No. 04-281).

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order (WC Docket No. 03-211)

We all marvel at the tremendous and transformative potential of IP services. They have the power significantly to remake the telecommunications landscape by flooding the market with innovative new services and providers. But to unleash the full potential of this new technology and to ensure that these services succeed, we need rules of the road—clear, predictable and confidence-building.

Today's decision finds that VoIP services like Vonage's DigitalVoice have an undeniably interstate character. That's fine as far as it goes—but it doesn't go very far. Proclaiming the service "interstate" does not mean that everything magically falls into place, the curtains are raised, the technology is liberated, and all questions are answered. There are, in fact, difficult and urgent questions flowing from our jurisdictional conclusion and they are no closer to an answer after we act today than they were before we walked in here. So rather than sailing boldly into a revolutionary new Voice Over communications era, we are, I think, still lying at anchor. By not supplying answers, we are clouding the future of new technology that has the power to carry us over the horizon.

So I can only concur in today's decision. While I agree that traditional jurisdictional boundaries are eroding in our new Internet-centric world, we need a clear and comprehensive framework for addressing this new reality. Instead the Commission moves bit-by-bit through individual company petitions, in effect checking off business plans as they walk through the door. This is not the way we should be proceeding. We need a framework for all carriers and all services, not a stream of incremental decisions based on the needs of individual companies. We need a framework to explain the consequences for homeland security, public safety and 911. We need a framework for consumer protection. We need a framework to address intercarrier compensation, state and federal universal service, and the impact on rural America. But all I see coming out of this particular decision is . . . more questions.

The Commission's constricted approach denies consumers, carriers, investors and state and local officials the clarity they deserve. These are not just my musings. A growing chorus of voices is urging the Commission to stop its cherry-picking approach to VoIP issues. When the National Governors Association, the Association of Public Safety Communications Officials, the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the Communications Workers of America, AARP, the Independent Telephone and Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Western Telecommunications Alliance, the National Association of Regulatory Utility Commissioners, the National Association of Telecommunications Officers and Advisors, the National Consumers League and local directors of 911 service in cities and counties around the country all suggest that moving ahead in piecemeal fashion is irresponsible, I think we should take heed.

I want to point to language in this item—albeit it's in a footnote—that warns people not to draw unwarranted conclusions from the narrow jurisdictional finding that we make. What we do today should not be interpreted as anything more than it is. Yes, Vonage's DigitalVoice service has an interstate character. But what exactly that entails we do not say. All that important work lies ahead. Wouldn't it be sad if we were to let it go at this, pretending we have done something truly responsive to the questions that need to be answered, and then not proceed to tackle the related issues quickly and comprehensively? And wouldn't it be tragic if the blunt instrument of preemption was permitted to erode our partnership

with the states? We have worked long and hard to nourish a common federal-state commitment to a pro-competitive telecommunications environment. This is no time to abandon that commitment.

Sometimes I wonder what the strategy is in this Commission's approach to VoIP. Some warn that it may be a camel's nose under the tent strategy, proceeding inch-by-inch to far-reaching conclusions that a more straight-forward approach could not sustain. I hope that is not the case and this decision should not be so interpreted. What I hope this decision does is to force us finally to face up to the larger issues. We are, after all, face-to-face here with issues that go to the very core of our statutory responsibilities. These issues can't be ducked and they can't be dodged if we are truly serious about these technologies realizing their full transformative potentials. So I'll withhold my approval for that happy day when we step up to the plate and begin answering the hard questions about what these technologies and services are and how they fit into America's communications landscape.

CONCURRING STATEMENT OF JONATHAN S. ADELSTEIN

Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, FCC 04-267 (2004).

While this Order rightly acknowledges the importance and unique qualities of Internet-based services, including Voice over Internet Protocol (VoIP) services, I am concerned that the Commission overlooks important public policy issues that will impact consumers across our country, and particularly in Rural America.

I concur to this item because it appropriately recognizes the unique nature of many IP-enabled services and the importance of reducing barriers to entry for Internet-based services. Indeed, I share my colleagues' enthusiasm for the promise of Internet Protocol (IP)-enabled services. All indications are that IP is becoming the building block for the future of telecommunications and its use is integral to the explosion of choices for consumers. It is becoming increasingly apparent that IP-based services will play an important role in our global economic competitiveness, by enabling economic productivity, providing a platform for innovation, and driving demand for broadband facilities. Whether through PDA phones, voice through Instant Messaging, or countless other innovative services, this technology is giving customers far greater control over, and flexibility in the use of, their communications services. With that control, consumers can convert messages with ease from voice-to-text and back, and can take their IP-services wherever they go. Though I am not comfortable with all of the analysis in this item, the Order reasonably reflects the unique qualities of Vonage's service and recognizes the challenges that this service poses for the Commission's traditional jurisdictional analysis.

Where this Order falls short is its failure to account in a meaningful way for essential policy issues, including universal service, public safety, law enforcement, consumer privacy, disabilities access, and intercarrier compensation, and the effect of our preemption here. In February of this year, we opened a VoIP-specific rulemaking proceeding to address not only the issue raised here, the jurisdiction of IP-based services, but to address the broader implications of VoIP services in a comprehensive and coordinated fashion. At that time, we acknowledged the social importance of these Congressionally-mandated policy objectives and the need to assess the potentially disparate impact of our decisions on particular communities. I am concerned that this Order may have dramatic implications for these Congressional objectives, yet we afford them no meaningful or comprehensive consideration here. I am also concerned that our inability to specify the exact parameters of the services at issue and the breadth of our preemption will have unintended effects, including effects on incentives for investment in these technologies, that could have been avoided with a more comprehensive approach. I highlight, below, two of the most pressing concerns – universal service and public safety.

The Act charges this Commission with maintaining universal service, which is crucial in delivering communications services to our nation's schools, libraries, low income consumers, and rural communities. Universal service has been the cornerstone of telecommunications policy for over 70 years and has enabled this country to enjoy unparalleled levels of access to essential communications services. That access has improved our economic productivity and our public safety in immeasurable ways and has been vital in fostering economic development in rural and underserved areas. The Act also expressly permits States to adopt consistent approaches to preserve and advance universal service. At least 24 States have answered that call, disbursing over $1.9 billion annually from their own universal service programs. Many of those States and other commenters express legitimate concern that our decision here could increase pressure on the federal universal service mechanisms and could potentially lead to rate increases for rural and low income consumers. With those reasons in mind, I've called for the Commission to quickly convene a universal service solutions summit modeled after the ones we've held

for other public policy issues. Regrettably, this item does not acknowledge its potential impact on those programs, nor does it propose any solutions, or even make firm commitments to resolving these issues. We are left to hope that these unaddressed issues do not gridlock or curtail the full reach of the promised IP superhighway.

I also have reservations about our preemption of a State's efforts to ensure the public safety of its citizens, based here on the linkage of the 911 requirement with a State certification. Our approach of overriding States' public safety efforts without clear federal direction takes us into a dangerous territory in which consumers may come to rely on services without the benefit of the critical safety net that they have come to expect.

Ultimately, I cannot fully endorse an approach that leaves unanswered so many important questions about the future of communications services for so many Americans. Rural and low-income Americans, the countless governmental and public interest groups who have expressed concern about our piecemeal approach, and the communications industry, itself, all deserve more from this Commission. If this Commission is to ensure that innovative services are widely available and also achieve the important public policy goals that Congress has articulated, the Commission must begin to wrestle in earnest with difficult issues that are largely ignored this Order. We simply cannot afford to slow roll these issues.

APPENDIX – EXHIBIT 2

Chapter 4.03
TAX ADMINISTRATIVE CODE

Sections:

4.03.010 Purpose.
4.03.015 Application of chapter stated.
4.03.020 Definitions.
4.03.025 Registration/license requirements.
4.03.030 Registration/license certificates.
4.03.035 City subject to tax.
4.03.040 When due and payable – Reporting periods – Monthly, quarterly, and annual returns – Threshold provisions or relief from filing requirements – Computing time periods – Failure to file returns.
4.03.050 Payment methods – Mailing returns or remittances – Time extension – Deposits – Recording payments – Payment must accompany return – NSF checks.
4.03.060 Records to be preserved – Examination – Estoppel to question assessment.
4.03.070 Accounting methods.
4.03.080 Public work contracts – Payment of fee and tax before final payment for work.
4.03.090 Underpayment of tax, interest, or penalty – Interest.
4.03.095 Time in which assessment may be made.
4.03.100 Overpayment of tax, penalty, or interest – Credit or refund – Interest rate – Statute of limitations.
4.03.110 Late payment – Disregard of written instructions – Evasion – Penalties.
4.03.120 Cancellation of penalties and interest.
4.03.125 Voluntary registration.
4.03.130 Taxpayer quitting business – Liability of successor.
4.03.140 Correction of tax – Administrative appeal.
4.03.150 Judicial review of hearing examiner decision.
4.03.160 Administration – Director to make rules.
4.03.170 Ancillary allocation authority of director.
4.03.180 Mailing of notices.
4.03.190 Tax declared additional.
4.03.200 Public disclosure – Confidentiality – Information sharing.
4.03.210 Tax constitutes debt.
4.03.220 Unlawful actions – Violation – Penalties.
4.03.230 Suspension or revocation of business registration [license].
4.03.240 Closing agreement provisions.
4.03.250 Charge-off of uncollectible taxes.
4.03.260 Severability.
4.03.270 Collection of tax.
4.03.280 City subject to tax.
4.03.290 Tax amnesty.

4.03.010 Purpose.

This section implements Washington Constitution Article XI, Section 12 and RCW 35A.82.020 and 35A.11.020 (code cities); RCW 35.22.280(32) (first class cities); RCW 35.23.440(8) (second class cities); RCW 35.27.370(9) (fourth class cities and towns), which give municipalities the authority to license for revenue. In the absence of a legal or constitutional prohibition, municipalities have the power to define taxation categories as they see fit in order to respond to the unique concerns and responsibilities of local government. It is intended that this chapter be as uniform as possible among the various municipalities. Uniformity with provisions of state tax laws should not be presumed, and references in this section to statutory or administrative rule changes do not mean state tax statutes or rules promulgated by the Department of Revenue. (Ord. 5436 § 1, 2003.)

4.03.015 Application of chapter stated.

The provisions of this chapter shall apply with respect to the taxes imposed under Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; Chapter 4.14 BCC, Gambling Tax Code, and to such other chapters and sections of the Bellevue City Code in such manner and to such extent as expressly indicated in each such chapter or section. (Ord. 5436 § 1, 2003.)

4.03.020 Definitions.

For purposes of this chapter:

The definitions contained in Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14 BCC, Gambling Tax Code, shall apply equally to the provisions of this chapter unless the term is defined otherwise in this chapter. In addition, the following definitions will apply.

A. "Chapter," unless otherwise clearly indicative by the context, means Chapter 4.03 BCC, as it may be amended from time to time.

B. Cost of Living Adjustment. Whenever a "cost of living adjustment" is required or permitted pursuant to any section of BCC Title 4, such adjustment shall be an amount equal to the amount and direction of change determined by reference to the U.S. City Average Urban Wage Earners and Clerical Workers Consumer Price Index (CPI) for each 12-month period ending on September 30th as published by the United States Department of Labor. To calculate this adjustment, the current rate will be multiplied by one plus or minus, as the case may be, the annual change in the CPI.

C. "Department" means the finance department or successor department.

D. "Director" means the director of the finance department or his or her designee or other person designated by the city manager.

E. "Family" means one or more persons (but not more than six unrelated persons) living together as a single housekeeping unit. For purposes of this definition, children with familial status within the meaning of Title 42 U.S.C., Section 3602(k) and persons with handicaps within the meaning of Title 42 U.S.C, Section 3602(h) will not be counted as unrelated persons.

F. "Reporting period" means:

1. A one-month period beginning the first day of each calendar month (monthly); or

2. A three-month period beginning the first day of January, April, July or October of each year (quarterly); or

3. A 12-month period beginning the first day of January of each year (annual).

G. "Return" means any document a person is required by the city to file to satisfy or establish a tax or fee obligation that is administered or collected by the city and that has a statutorily defined due date.

H. "Successor" means any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, any part of the materials, supplies, merchandise, inventory, fixtures, or equipment of the taxpayer. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor.

I. "Tax year" or "taxable year" means the calendar year. (Ord. 5436 § 1, 2003.)

4.03.025 Registration/license requirements.

Any person who engages in any business or performs any act which is subject to the provisions of Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14 BCC, Gambling Tax Code, even if such person is not subject to any tax imposed thereby, shall apply under such rules and regulations as the department may prescribe and, upon

approval, receive from the department a registration certificate applicable to all such business engaged in or activity performed.

No person shall engage in any business without being registered in compliance with the provisions of this section except the following:

A. Any farmer who is exempt from the business and occupation tax pursuant to BCC 4.09.090(J); or

B. Any "family" as defined in BCC 4.03.020(E).

C. Any person who performs activities subject to the provisions of Chapter 4.09 BCC and meets the requirements of BCC 4.09.030(L)(4). This exemption does not apply to any person engaged in activities that are subject to the provisions of other chapters of BCC Title 4. (Ord. 5605 § 1, 2005; Ord. 5436 § 1, 2003.)

4.03.030 Registration/license certificates.

A registration fee of $25.00 shall be due at the time of filing of the application. Such registration certificate shall be personal and nontransferable and shall be valid as long as the taxpayer continues in such business and pays any tax imposed by the city.

The registration fee shall be administratively adjusted by the director on January 1, 2004, in an amount equal to the cost of living adjustment applicable for that year. The amount of the registration fee so calculated shall be rounded to the nearest $1.00.

In the event business is transacted at two or more separate places by one taxpayer, a separate registration certificate for each place at which business is transacted shall be required. Such additional certificates shall be issued at no additional fee. Where a taxpayer changes the nature of business conducted or conducts additional activities upon which a tax is imposed by Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14 BCC, Gambling Tax Code, such taxpayer shall apply for and receive a new registration certificate at no additional fee.

Each registration certificate shall be numbered and shall show the name, business location, mailing address and such other information as the department deems necessary. The certificate of registration shall be posted in a conspicuous place at the place of business for which it is issued.

Where a place of business of the taxpayer is changed, the taxpayer shall notify the department and upon approval a new certificate will be issued free of charge for the new place of business. (Ord. 5436 § 1, 2003.)

4.03.035 City subject to tax.

Whenever the city through any department or division engages in any business activity taxable under Chapter 4.10 BCC, Utility Occupation Tax Code, which if engaged in by any person would require a certificate of registration, the filing of returns and the payment of a registration fee or tax by such person, the city department or division engaging in such business activity shall, at the same time and in the same manner as persons are required hereunder, prepare returns and pay the registration fees or taxes imposed in Chapter 4.10 BCC, unless specifically exempted in the applicable tax code. (Ord. 5436 § 1, 2003.)

4.03.040 When due and payable – Reporting periods – Monthly, quarterly, and annual returns – Threshold provisions or relief from filing requirements – Computing time periods – Failure to file returns.

A. Other than any annual license fee or registration fee assessed under this chapter, the tax imposed by Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14 BCC, Gambling Tax Code, shall be due and payable in quarterly installments. At the director's discretion, businesses may be assigned to a monthly or annual reporting period depending on the tax amount owing or type of tax. Tax payments are due on or before the last day of the next month following the end of the assigned reporting period covered by

the return.

B. Taxes shall be paid as provided in this chapter and accompanied by a return on forms as prescribed by the director. The return shall be signed by the taxpayer personally or by a responsible officer or agent of the taxpayer. The individual signing the return shall swear or affirm that the information in the return is complete and true to the best of their belief and knowledge.

C. Tax returns must be filed and returned by the due date whether or not any tax is owed.

D. Notwithstanding subsection A of this section, the director may relieve any person of the requirement to file returns if the person meets exemption criteria under BCC 4.04.035 (B), 4.04.035(C), 4.09.090(A), 4.14.040(A), or 4.14.040(B).

E. A taxpayer that commences to engage in business activity shall file a return and pay the tax or fee for the portion of the reporting period during which the taxpayer is engaged in business activity subject to the conditions set forth in subsection D of this section.

F. Except as otherwise specifically provided by any other provision of this chapter, in computing any period of days prescribed by this chapter the day of the act or event from which the designated period of time runs shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or city or federal legal holiday, in which case the last day of such period shall be the next succeeding day which is neither a Saturday, Sunday, or city or federal legal holiday.

G. If any taxpayer fails, neglects or refuses to make a return as and when required in this chapter, the director is authorized to determine the amount of the tax or fees payable by obtaining facts and information upon which to base the director's estimate of the tax or fees due. Such assessment shall be deemed prima facie correct and shall be the amount of tax owed to the city by the taxpayer. The director shall notify the taxpayer by mail of the amount of tax so determined, together with any penalty, interest, and fees due; the total of such amounts shall thereupon become immediately due and payable. (Ord. 5436 § 1, 2003.)

4.03.050 Payment methods – Mailing returns or remittances – Time extension – Deposits – Recording payments – Payment must accompany return – NSF checks.

A. Taxes shall be paid to the director in United States currency by bank draft, certified check, cashier's check, personal check, money order, cash, or by wire transfer or electronic payment if such wire transfer or electronic payment is authorized by the director. If payment so received is not paid by the bank on which it is drawn, the taxpayer, by whom such payment is tendered, shall remain liable for payment of the tax and for all legal penalties, the same as if such payment had not been tendered. Acceptance of any sum by the director shall not discharge the tax or fee due unless the amount paid is the full amount due.

B. A return or remittance that is transmitted to the city by United States mail shall be deemed filed or received on the date shown by the cancellation mark stamped by the post office upon the envelope containing it. The director may allow electronic filing of returns or remittances from any taxpayer. A return or remittance which is transmitted to the city electronically shall be deemed filed or received according to procedures set forth by the director.

C. If a written request is received prior to the due date, the director, for good cause, may grant, in writing, additional time within which to make and file returns.

D. The director shall keep full and accurate records of all funds received or refunded. The director shall apply payments first against all penalties and interest owing, and then upon the tax, without regard to any direction of the taxpayer.

E. For any return not accompanied by a remittance of the tax shown to be due thereon, the taxpayer shall be deemed to have failed or refused to file a return and shall be subject to the penalties and interest provided in this chapter.

F. Any payment made that is returned for lack of sufficient funds or for any other reason

will not be considered received until payment by certified check, money order, or cash of the original amount due, plus a "nonsufficient funds" (NSF) charge of $20.00 is received by the director. Any license issued upon payment with an NSF check will be considered void, and shall be returned to the director. No license shall be reissued until payment (including the $20.00 NSF fee) is received.

G. The director is authorized, but not required, to mail tax return forms to taxpayers, but failure of the taxpayer to receive any such forms shall not excuse the taxpayer from filing returns and making payment of the taxes or fees, when and as due under this chapter. (Ord. 5436 § 1, 2003.)

4.03.060 Records to be preserved – Examination – Estoppel to question assessment.

Every person liable for any fee or tax imposed by this chapter shall keep and preserve, for a period of five years after filing a tax return, such records as may be necessary to determine the amount of any fee or tax for which the person may be liable; which records shall include copies of all federal income tax and state tax returns and reports made by the person. All books, records, papers, invoices, vendor lists, inventories, stocks of merchandise, and other data including federal income tax and state tax returns and reports shall be open for examination at any time by the director or its duly authorized agent. Every person's business premises shall be open for inspection or examination by the director or a duly authorized agent.

A. If a person does not keep the necessary books and records within the city, it shall be sufficient if such person (a) produces within the city such books and records as may be required by the director, or (b) bears the cost of examination by the director's agent at the place where such books and records are kept; provided, that the person electing to bear such cost shall pay in advance to the director the estimated amount thereof including round-trip fare, lodging, meals and incidental expenses, subject to adjustment upon completion of the examination.

B. Any person who fails, or refuses a department request, to provide or make available records, or to allow inspection or examination of the business premises, shall be forever barred from questioning in any court action, the correctness of any assessment of taxes made by the city for any period for which such records have not been provided, made available or kept and preserved, or in respect of which inspection or examination of the business premises has been denied. The director is authorized to determine the amount of the tax or fees payable by obtaining facts and information upon which to base the estimate of the tax or fees due. Such fee or tax assessment shall be deemed prima facie correct and shall be the amount of tax owing the city by the taxpayer. The director shall notify the taxpayer by mail the amount of tax so determined, together with any penalty, interest, and fees due; the total of such amounts shall thereupon become immediately due and payable. (Ord. 5436 § 1, 2003.)

4.03.070 Accounting methods.

A. A taxpayer may file tax returns in each reporting period with amounts based upon cash receipts only if the taxpayer's books of account are kept on a cash receipts basis. A taxpayer that does not regularly keep books of account on a cash receipts basis must file returns with amounts based on the accrual method.

B. The taxes imposed and the returns required, hereunder, shall be upon a calendar year basis. (Ord. 5436 § 1, 2003.)

4.03.080 Public work contracts – Payment of fee and tax before final payment for work.

The director may, before issuing any final payment to any person performing any public work contract for the city, require such person to pay in full all license fees or taxes due under this title from such person on account of such contract or otherwise, and may require such taxpayer to file with the director a verified list of all subcontractors supplying labor and/or materials to the person in connection with said public work. (Ord. 5436 § 1, 2003.)

4.03.090 Underpayment of tax, interest, or penalty – Interest.

A. If, upon examination of any returns, or from other information obtained by the director, it appears that a tax or penalty less than that properly due has been paid, the director shall assess the additional amount found to be due and shall add thereto interest on the tax only. The director shall notify the person by mail of the additional amount, which shall become due and shall be paid within 30 days from the date of the notice, or within such time as the director may provide in writing. Interest shall be computed from the last day of the month following the end of the reporting period and will continue to accrue until payment is made. In case of an audit the interest shall be computed from the first day of the month following each calendar year or portion thereof included in the audit period.

1. For the purposes of this section, the rate of interest to be charged to the taxpayer between December, 1995 through December 31, 2004, shall be an average of the federal short-term rate as defined in 26 U.S.C. Section 1274(d) plus two percentage points. The rate shall be computed by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually, for the months of January, April, July, and October of the year immediately preceding the calendar year as published by the United States Secretary of the Treasury. The rate shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

2. For the purposes of this section, the rate of interest to be charged to the taxpayer for filing periods beginning in 2005 shall be an average of the federal short-term rate as defined in 26. U.S.C. Section 1274(d) plus two percentage points. The rate shall be computed by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually. That average shall be calculated using the rates from four months: January, April, and July of the calendar year immediately preceding the new year, and October of the previous preceding year. The rate shall be adjusted on the first day of January of each year for use in computing interest for that calendar year. (Ord. 5605 § 2, 2005; Ord. 5558 § 1, 2004; Ord. 5436 § 1, 2003.)

4.03.095 Time in which assessment may be made.

The director shall not assess, or correct an assessment for, additional taxes, penalties, or interest due more than four years after the close of the calendar year in which they were incurred, except that the director may issue an assessment:

A. Against a person who is not currently registered or licensed or has not filed a tax return as required by this chapter for taxes due within the period commencing 10 years prior to the close of the calendar year in which the person was contacted in writing by the director;

B. Against a person that has committed fraud or who misrepresented a material fact; or

C. Against a person that has executed a written waiver of such limitations. (Ord. 5558 § 2, 2004.)

4.03.100 Overpayment of tax, penalty, or interest – Credit or refund – Interest rate – Statute of limitations.

A. If, upon receipt of an application for a refund, or during an audit or examination of the taxpayer's records and tax returns, the director determines that the amount of tax, penalty, or interest paid is in excess of that properly due, the excess amount shall be credited to the taxpayer's account or shall be refunded to the taxpayer. Except as provided in subsection B of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

B. The execution of a written waiver shall extend the time for applying for, or making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the director discovers that a refund or credit is due.

C. Refunds shall be made by means of vouchers approved by the director and by the

issuance of a city check or warrants drawn upon and payable from such funds as the city may provide.

D. Any final judgment for which a recovery is granted by any court of competent jurisdiction for tax, penalties, interest, or costs paid by any person shall be paid in the same manner, as provided in subsection C of this section, upon the filing with the director a certified copy of the order or judgment of the court.

E. Interest on overpayments of taxes for periods from December 1995, through December 31, 2004, shall be the average federal short-term interest rate as outlined for assessments under BCC 4.03.090(A)(1) plus two percentage points.

F. Interest on overpayments of taxes for periods beginning on or after January 1, 2005, shall be the average federal short-term interest rate as outlined for assessments under BCC 4.03.090(A)(2) plus two percentage points. (Ord. 5605 § 3, 2005; Ord. 5558 § 3, 2004; Ord. 5436 § 1, 2003.)

4.03.110 Late payment – Disregard of written instructions – Evasion – Penalties.

A. If payment of any tax due on a return to be filed by a taxpayer is not received by the director by the due date, the director shall add a penalty equal to five percent of the amount of the tax; and if the tax is not received on or before the last day of the month following the due date, the director shall add a total penalty equal to 15 percent of the amount of the tax; and if the tax is not received on or before the last day of the second month following the due date, the director shall add a total penalty equal to 25 percent of the amount of the tax. No penalty assessed herein shall be less than $5.00.

B. If a tax deficiency is assessed by the director, there shall be added a penalty equal to five percent of the amount of the deficiency. If payment of any tax deficiency assessed by the director is not received by the due date specified in the notice, or any extension thereof, the director shall assess a penalty equal to 15 percent of the amount of the additional tax found due. If payment of any tax deficiency assessed by the director is not received on or before the thirtieth day following the due date specified in the notice, or any extension thereof, the director shall assess a penalty equal to 25 percent of the amount of additional tax found due. No penalty added shall be less than $5.00.

C. If a citation or criminal complaint is issued by the city for the collection of taxes, fees, assessments, interest or penalties, there shall be added thereto a penalty of 10 percent of the amount due, but not less than $10.00.

D. If the director finds that a person has engaged in any business or performed any act upon which a tax is imposed under this title and that person has not obtained from the director a license as required by BCC 4.03.025, the director shall impose a penalty of five percent of the amount of tax due from that person for the period that the person was not licensed. No penalty shall be imposed under this subsection D if the person who has engaged in business without a license obtains a license prior to being notified by the director of the need to be licensed.

E. If the director determines that all or any part of a deficiency resulted from the taxpayer's failure to follow specific written tax reporting instructions, there shall be assessed a penalty of 10 percent of the amount of the additional tax due.

1. A taxpayer fails to follow specific written tax reporting instructions when the director has informed the taxpayer in writing of the taxpayer's tax obligations and the taxpayer fails to act in accordance with those instructions unless the director has not issued final instructions because the matter is under appeal pursuant to this chapter. The director shall not assess the penalty under this subsection upon any taxpayer that has made a good faith effort to comply with the specific written instructions provided by the director to that taxpayer.

2. Specific written instructions may be given as a part of a tax assessment, audit, determination or closing agreement; provided, that such specific written instructions shall apply only to the taxpayer addressed or referenced on such documents.

3. Any specific written instructions by the director shall be clearly identified as such and shall inform the taxpayer that failure to follow the instructions may subject the taxpayer

to the penalties imposed by this subsection.

F. If the director finds that all or any part of the deficiency resulted from an intent to evade the tax payable, the director shall assess a penalty of 50 percent of the additional tax found to be due.

G. The penalties imposed under subsections A through E of this section can each be imposed on the same tax found to be due. This subsection does not prohibit or restrict the application of other penalties authorized by law.

H. The penalties authorized by subsections E and F of this section shall be assessed in accordance with the provisions of this chapter governing assessment of tax deficiencies. The director shall not impose both the evasion penalty and the penalty for disregarding specific written instructions on the same tax found to be due.

I. For the purposes of this section, "return" means any document a person is required by the city to file to satisfy or establish a tax or fee obligation that is administered or collected by the city, and that has a statutorily defined due date. (Ord. 5605 § 4, 2005; Ord. 5558 § 4, 2004; Ord. 5436 § 1, 2003.)

4.03.120 Cancellation of penalties and interest.

A. The director may cancel any penalties and/or interest imposed under BCC 4.03.110 (A) if the taxpayer shows that its failure to timely file or pay the tax was due to reasonable cause and not willful neglect. Willful neglect is presumed unless the taxpayer shows that it exercised ordinary business care and prudence in making arrangements to file the return and pay the tax but was, nevertheless, due to circumstances beyond the taxpayer's control, unable to file or pay by the due date. The director's authority to waive or cancel penalties and/or interest under this subsection shall extend to amounts already paid and also includes any disputes currently pending. The following situations will constitute the only circumstances under which such penalties may be waived or canceled:

1. The return was filed on time, but was inadvertently mailed to another agency or there was a delay or loss related to the postal service. The director may also cancel interest in this situation.

2. The delinquency was due to written erroneous information given the taxpayer by the department. The director may also cancel interest in this situation.

3. The delinquency was caused by the death or serious illness of the taxpayer or his/her immediate family, or by the illness or death of his/her tax preparer or a member of the tax preparer's immediate family, prior to the filing date.

4. The delinquency was caused by the unavoidable absence of the taxpayer, prior to the filing date.

5. The delinquency was caused by the destruction, through no fault of the taxpayer, by fire or other casualty of the taxpayer's place of business or business records.

6. The taxpayer, prior to the time of filing the return, made timely application to the department, in writing, for proper forms and these forms were not furnished in sufficient time to permit the completed return to be filed and the tax paid before the delinquent date.

7. The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, caused by the malfeasance or misconduct of the taxpayer's employee or accountant.

8. The director has reasonably determined that the taxpayer made a good faith effort to comply with the provision of this chapter.

9. The taxpayer inadvertently failed to file a tax return because of a good faith belief that the taxpayer qualified for the filing exemption in BCC 4.03.040(D). The director has no authority to cancel any other penalties or to cancel penalties for any other reason except as provided in subsection C of this section.

B. A request for cancellation of penalties and/or interest must be received by the director within 30 days after the date the department mails the notice that the penalties and/or interest are due. The request must be in writing and contain competent proof of all pertinent facts supporting a reasonable cause determination. In all cases the burden of proving the facts rests upon the taxpayer.

C. The director may cancel the penalties in BCC 4.03.110(A) one time if a person:

1. Was not licensed, and filing returns;

2. Was unaware of his/her responsibility to file and pay tax; and

3. Obtained business licenses and filed past due tax returns within 30 days after being notified by the department.

D. The director shall not cancel any interest charged upon amounts due, except under subsections (A)(1) and (2) of this section. (Ord. 5605 § 5, 2005; Ord. 5558 § 5, 2004; Ord. 5436 § 1, 2003.)

4.03.125 Voluntary registration.

In the case of any unregistered taxpayer doing business in the city of Bellevue that voluntarily registers prior to being contacted by the department, the department shall not assess for back taxes or interest for more than four calendar years prior to the year of registration. In addition, the late payment penalty imposed under BCC 4.03.110(A) shall not apply. (Ord. 5436 § 1, 2003.)

4.03.130 Taxpayer quitting business – Liability of successor.

A. Whenever any taxpayer quits business, sells out, exchanges, or otherwise disposes of his business or his stock of goods, any tax payable hereunder shall become immediately due and payable. Such taxpayer shall, within 10 days thereafter, make a return and pay the tax due.

B. Any person who becomes a successor shall become liable for the full amount of any tax owing. The successor shall withhold from the purchase price a sum sufficient to pay any tax due to the city from the taxpayer until such time as:

1. The taxpayer shall produce a receipt from the city showing payment in full of any tax due or a certificate that no tax is due; or

2. More than six months have passed since the successor notified the director of the acquisition and the director has not issued and notified the successor of an assessment.

C. Payment of the tax by the successor shall, to the extent thereof, be deemed a payment upon the purchase price. If such payment is greater in amount than the purchase price, the amount of the difference shall become a debt due such successor from the taxpayer.

D. Notwithstanding the above, if a successor gives written notice to the director of the acquisition, and the department does not within six months of the date it received the notice issue an assessment against the taxpayer and mail a copy of that assessment to the successor, the successor shall not be liable for the tax. (Ord. 5436 § 1, 2003.)

4.03.140 Correction of tax – Administrative appeal.

A. Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department may, within 30 days after the issuance of such notice or within the period covered by any extension of the due date granted by the department, request a correction of the amount of the assessment and a conference for review of the assessment. Interest and penalties assessed shall continue to accrue during the department's review of a request for a correction, except and to the extent that the department later determines that a tax assessment was too high or the delay in issuing a determination is due to unreasonable delays caused by the department. After the conference, the department will make a final determination regarding the assessment and shall notify the taxpayer of the department's determination within 60 days, unless otherwise notified in writing by the department. Such determination shall be subject to appeal pursuant to subsection B of this section. If no request for correction is filed within the time period provided herein, the assessment covered by such notice shall become final and immediately due and payable.

B. Any person aggrieved by the amount of any fee, tax, interest or penalty determined by the department to be due under the provisions of this chapter or Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter

4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14 BCC, Gambling Tax Code, may appeal such determination pursuant to the following procedures:

1. Form of Appeal. Any appeal must be in writing and must contain the following:

a. The name and address of the taxpayer;

b. A statement identifying the determination of the department from which the appeal is taken;

c. A statement setting forth the grounds upon which the appeal is taken and identifying specific errors the department is alleged to have made in making the determination; and

d. A statement identifying the requested relief from the determination being appealed.

2. Time and Place to Appeal. Any appeal shall be filed with the office of the hearing examiner with a copy to the director no later than 30 days following the date on which the determination of the department was mailed to the taxpayer. Failure to follow the appeal procedures in this section shall preclude the taxpayer's right to appeal.

3. Appeal Hearing. The hearing examiner shall schedule a hearing date, notify the taxpayer and the director of such hearing date and shall then conduct an appeal hearing in accordance with this chapter and procedures developed by the hearing examiner, at which time the appellant taxpayer and the director shall have the opportunity to be heard and to introduce evidence relevant to the subject of the appeal.

4. Burden of Proof. The appellant taxpayer shall have the burden of proving by a preponderance of the evidence that the determination of the department is erroneous.

5. Hearing Record. The hearing examiner shall make an electronic sound recording of each appeal unless the hearing is conducted solely in writing.

6. Decision of the Hearing Examiner. Following the hearing, the hearing examiner shall enter a decision on the appeal, supported by written findings and conclusions in support thereof. A copy of the findings, conclusions and decision shall be mailed to the appellant taxpayer and to the director. The decision shall state the correct amount of the fee, tax, interest or penalty owing.

7. Interest Accrual or Payment. Interest and/or penalties shall continue to accrue on all unpaid amounts, in accordance with BCC 4.03.090 and 4.03.110, notwithstanding the fact that an appeal has been filed. If the hearing examiner determines that the taxpayer is owed a refund, such refund amount shall be paid to the taxpayer in accordance with BCC 4.03.100. (Ord. 5558 § 6, 2004; Ord. 5436 § 1, 2003.)

4.03.150 Judicial review of hearing examiner decision.

The decision of the hearing examiner may be appealed to the superior court of King County by the appellant taxpayer or by the director by filing a proper request for a writ of review with the superior court. A request for a writ of review must be filed within 30 calendar days following the date that the decision of the hearing examiner was mailed to the parties. Review by the superior court shall be on, and shall be limited to, the record on appeal created before the hearing examiner. (Ord. 5436 § 1, 2003.)

4.03.160 Administration – Director to make rules.

The administration of this chapter and Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14 BCC, Gambling Tax Code, shall be accomplished under the direction of the director.

The director may prescribe forms and shall have the power, from time to time, to adopt, publish and enforce rules and regulations necessary for the administration of this chapter and for the administration of Chapters 4.04, 4.09, 4.10, and 4.14 BCC, not inconsistent with these chapters or with law. It shall be unlawful to violate or fail to comply with any such rule or regulation. (Ord. 5436 § 1, 2003.)

4.03.170 Ancillary allocation authority of director.

The director is authorized to enter into agreements with other Washington cities which impose an "eligible gross receipts tax":

A. To conduct an audit or joint audit of a taxpayer by using an auditor employed by the city of Bellevue, another city, or a contract auditor; provided, that such contract auditor's pay is not in any way based upon the amount of tax assessed;

B. To allocate or apportion in a manner that fairly reflects the gross receipts earned from activities conducted within the respective cities the gross proceeds of sales, gross receipts, or gross income of the business, or taxes due from any person that is required to pay an eligible gross receipts tax to more than one Washington city.

C. To apply the city's tax prospectively where a taxpayer has no office or place of business within the city and has paid tax on all gross income to another Washington city where the taxpayer is located; provided, that the other city maintains an eligible gross receipts tax, and the income was not derived from contracts with the city. (Ord. 5558 § 7, 2004; Ord. 5436 § 1, 2003.)

4.03.180 Mailing of notices.

Any notice required by this chapter to be mailed to any taxpayer or licensee shall be sent by ordinary mail, addressed to the address of the taxpayer or licensee as shown by the records of the director. Failure of the taxpayer or licensee to receive any such mailed notice shall not release the taxpayer or licensee from any tax, fee, interest, or any penalties thereon, nor shall such failure operate to extend any time limit set by the provisions of this chapter. It is the responsibility of the taxpayer to inform the director in writing about a change in the taxpayer's address. (Ord. 5436 § 1, 2003.)

4.03.190 Tax declared additional.

The license fee and tax herein levied shall be additional to any license fee or tax imposed or levied under any law or any other ordinance of the city of Bellevue except as herein otherwise expressly provided. (Ord. 5436 § 1, 2003.)

4.03.200 Public disclosure – Confidentiality – Information sharing.

Except as hereinafter provided, it shall be unlawful for the city or any official, employee, agent, or representative thereof to make known or reveal any facts or information contained in any return filed by any taxpayer or disclosed in any investigation or examination of the taxpayer's books and records made in connection with the administration thereof; except where such disclosure or inspection is authorized or required by the Public Disclosure Act, Chapter 42.17 RCW or other state or federal law. The foregoing, however, shall not be construed to prohibit the city or any official, employee, agent or representative thereof from:

A. Giving such facts or information in evidence in any appeal before the hearing examiner or in any court action involving any tax, interest or penalty imposed pursuant to BCC Title 4 or involving a violation of the provisions thereof.

B. Giving such facts and information to the taxpayer or his duly authorized agent.

C. Publishing statistics so classified as to prevent the identification of particular taxpayers or their returns or reports or items thereof.

D. Giving such facts or information, for official purposes only, to any employee of the city, the mayor and city council, or to any subcommittee of the city council dealing with matters of taxation, revenue, trade, commerce, the control of industry or the professions.

E. Permitting the taxpayer's records to be audited and examined by the proper city officer, agent or employee.

F. Giving such facts or information, for official purposes only, to the Federal Internal Revenue Service, State Department of Revenue, and tax or law enforcement officials of any federal or state agency or municipal subdivision of this state for official purposes only, but only if substantially similar privileges are granted to the proper offices of the city.

Any person acquiring knowledge of such facts or information in the course of his/her office, employment, or agency with the city and including any person acquiring knowledge

of such facts and information as provided under subsections D, E and F of this section, who reveals or makes known any such facts or information to any person or entity not entitled to knowledge of such facts or information under the provisions of this section, may be punished by a civil penalty not exceeding $1,000 and, if the person violating this requirement is an officer or employee of the city, he/she may be required to forfeit such office or employment. (Ord. 5436 § 1, 2003.)

4.03.210 Tax constitutes debt.

Any license fee or tax due and unpaid under this chapter, and all interest and penalties thereon, shall constitute a debt to the city of Bellevue and may be collected in the same manner as any other debt in like amount, which remedy shall be in addition to all other existing remedies. (Ord. 5436 § 1, 2003.)

4.03.220 Unlawful actions – Violation – Penalties.

A. It shall be unlawful for any person liable for fees or taxes under this chapter or Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14 BCC, Gambling Tax Code:

1. To violate or fail to comply with any of the provisions of this chapter or Chapters 4.04, 4.09, 4.10 or 4.14 BCC or any lawful rule or regulation adopted by the director;
2. To make any false statement on any license application or tax return;
3. To aid or abet any person in any attempt to evade payment of a license fee or tax;
4. To fail to appear or testify in response to a subpoena issued pursuant to the rules of procedure of the office of the hearing examiner;
5. To testify falsely in any investigation, audit, or proceeding conducted pursuant to this chapter.

B. Violation of any of the provisions of this chapter is a gross misdemeanor. Any person convicted of a violation of this chapter may be punished by a fine not to exceed $5,000, imprisonment not to exceed one year, or both fine and imprisonment. Penalties or punishments provided in this chapter shall be in addition to all other penalties provided by law.

C. Any person, or officer of a corporation, convicted of continuing to engage in business after the revocation of a license shall be guilty of a gross misdemeanor and may be punished by a fine not to exceed $5,000, or imprisonment not to exceed one year, or both fine and imprisonment. (Ord. 5558 § 8, 2004; Ord. 5436 § 1, 2003.)

4.03.230 Suspension or revocation of business registration [license].

A. The director, or designee, shall have the power and authority to suspend or revoke any license issued under the provisions of this chapter or Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14 BCC, Gambling Tax Code, and to such other chapters and sections of the Bellevue City Code in such manner and to such extent as expressly indicated in each such chapter or section. The director, or designee, shall notify such licensee in writing by certified mail of the intended suspension or revocation of his or her license and the grounds therefor. Any license issued under this chapter may be suspended or revoked based on one or more of the following grounds:

1. The license was procured by fraud or false representation of fact.
2. The licensee has failed to comply with any provisions of BCC Title 4.
3. The licensee has failed to comply with any provisions of the Bellevue City Code.
4. The licensee is in default in any payment of any license fee or tax under BCC Title 4.
5. The licensee or employee has been convicted of a crime involving the business.

B. Any licensee may, within 30 days from the date that the suspension or revocation notice was mailed to the licensee, appeal from such suspension or revocation by filing a written notice of appeal ("petition") setting forth the grounds therefor with the hearing

examiner. A copy of the petition must be provided by the licensee to the director and the city attorney on or before the date the petition is filed with the hearing examiner. The hearing examiner shall set a date for hearing said appeal and notify the licensee by mail of the time and place of the hearing. After the hearing thereon the hearing examiner shall, after appropriate findings of fact, and conclusions of law, affirm, modify, or overrule the suspension or revocation and reinstate the license, and may impose any terms upon the continuance of the license.

C. No suspension or revocation of a license issued pursuant to the provisions of this subchapter shall take effect until 30 days after the mailing of the notice thereof by the director, and if appeal is taken as herein prescribed the suspension or revocation shall be stayed pending final action by the hearing examiner. All licenses which are suspended or revoked shall be surrendered to the city on the effective date of such suspension or revocation.

D. The decision of the hearing examiner shall be final. The licensee and/or the director may seek review of the decision by the superior court of Washington in and for King County within 30 days from the date of the decision. If review is sought as herein prescribed the suspension or revocation shall be stayed pending final action by the superior court.

E. Upon revocation of any license as provided in this section no portion of the license fee shall be returned to the licensee. (Ord. 5436 § 1, 2003.)

4.03.240 Closing agreement provisions.

The director may enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the chapters within this title and administered by this chapter for any taxable period(s). Upon approval of such agreement, evidenced by execution thereof by the director and the person so agreeing, the agreement shall be final and conclusive as to the tax liability or tax immunity covered thereby, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact:

A. The case shall not be reopened as to the matters agreed upon, or the agreement modified, by the director or the taxpayer; and

B. In any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. (Ord. 5436 § 1, 2003.)

4.03.250 Charge-off of uncollectible taxes.

The director may charge off any tax, penalty, or interest that is owed by a taxpayer, if the director reasonably ascertains that the cost of collecting such amounts would be greater than the total amount that is owed or likely to be collected from the taxpayer. (Ord. 5436 § 1, 2003.)

4.03.260 Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances shall not be affected. (Ord. 5436 § 1, 2003.)

4.03.270 Collection of tax.

The city may pursue collection of any fee, tax, interest or penalty due and unpaid to the fullest extent and in any manner authorized by law, including but not limited to the filing of a civil action against the taxpayer for the payment of such debt or the use by the city of a collection agency for such purposes. (Ord. 5436 § 1, 2003.)

4.03.280 City subject to tax.

Whenever the city through any department or division engages in any business activity

taxable under Chapter 4.10 BCC, Utility Occupation Tax Code, which if engaged in by any person would require a certificate of registration, the filing of returns and the payment of a registration fee or tax by such person, the city department or division engaging in such business activity shall, at the same time and in the same manner as persons are required hereunder, prepare returns and pay the registration fees or taxes imposed in Chapter 4.10 BCC, unless specifically exempted in the applicable tax code. (Ord. 5436 § 1, 2003.)

4.03.290 Tax amnesty.

The director, with city council approval, may from time to time declare periods of tax amnesty to the extent that the director determines that such periods of tax amnesty are likely to have the effect of increasing revenues to the city. The director may promulgate rules and procedures to implement the provisions of this section. (Ord. 5436 § 1, 2003.)

Chapter

Chapter 4.10
UTILITY OCCUPATION TAX CODE

Sections:

4.10.010 Exercise of revenue license power.
4.10.015 General administrative provisions apply.
4.10.020 Definitions.
4.10.025 Tax imposed.
4.10.030 Utility occupation activities subject to tax.
4.10.035 Cellular telephone service – Income allocation and administration.
4.10.040 Use tax on the privilege of using natural gas or manufactured gas as a consumer.
4.10.045 Exemptions.
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4.10.065 Claim filing procedures for 1995 and prior years.
4.10.068 Claim filing procedures for 1996 and subsequent years.
4.10.070 Consumer Price Index changes.

4.10.010 Exercise of revenue license power.

The provisions of this Chapter 4.10 BCC constitute an exercise of the power of the city to license for revenue. (Ord. 4841 § 3, 1995.)

4.10.015 General administrative provisions apply.

The provisions of Chapter 4.03 BCC, the tax administration code, shall be fully applicable to the provisions of this chapter except as expressly stated to the contrary herein. (Ord. 5436 § 7, 2003; Ord. 4841 § 3, 1995.)

4.10.020 Definitions.

The definitions set forth in Chapter 4.03 BCC shall apply throughout this chapter, unless expressly provided otherwise herein. The following additional definitions shall apply throughout this chapter.

A. "Cable television services" means the one-way transmission of video programming and associated nonvideo signals to subscribers together with subscriber interaction, if any, which is provided in connection with video programming.

B. "Cellular telephone service" means two-way voice and data telephone/telecommunication system based in whole or substantially in part on wireless radio communications and which is not currently subject to regulation by the Washington Utilities and Transportation Commission (WUTC). Cellular telephone service includes cellular mobile service. The definition of cellular mobile service includes other wireless radio communications services such as specialized mobile radio (SMR), personal communications services (PCS) and any other evolving wireless radio communications technology which accomplishes the same purpose as cellular mobile service.

C. "Chapter" shall mean Chapter 4.10 BCC, as it may be amended or replaced from time to time.

D. "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under RCW Title 80 and for which a separate charge is made.

E. "Gas distribution business" means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural.

F. "Gross proceeds of sale" or "gross income of business" means the value proceeding

or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

G. "Light and power business" means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others.

H. "Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, or the providing of broadcast services by radio or television stations.

I. "Recyclable materials" means those solid wastes that are separated for recycling or reuse, such as papers, metals, and glass, that are designated as recyclable materials pursuant to BCC 9.26.030.

J. "Sewerage system business" means and includes:

1. Sanitary sewage disposal sewers and facilities, including without limitation on-site or off-site sanitary sewer facilities consisting of an approved septic tank or septic tank systems, or any other means of sewage treatment and disposal;

2. Combined sanitary sewage disposal and storm or surface water drains and facilities;

3. Storm or surface water drains, channels and facilities;

4. Outfalls for storm drainage or sanitary sewage and works, plants, and facilities for storm drainage or sanitary sewage treatment and disposal;

5. Any combination of or part of any or all of such facilities.

K. "Solid waste" or "wastes" means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction waste, abandoned vehicles or parts thereof, and recyclable materials.

L. "Solid waste collection business" means every person who receives solid waste or recyclable materials for transfer, storage, or disposal including but not limited to all collection services, public or private solid waste disposal sites, transfer stations, and similar operations.

M. "Telecommunications company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state.

N. "Telegraph business" means the business of providing telegraphic communication for hire.

O. "Telephone business" means the business of providing network telephone service, as defined in this section. It includes cooperative or farmer line telephone companies or associations operating an exchange.

P. "Telephone service" means competitive telephone service or network telephone service, or both, as defined in this section.

Q. "Water distribution business" means the business of operating a plant or system for the distribution of water for hire or sale. (Ord. 5436 § 8, 2003; Ord. 4841 § 3, 1995.)

4.10.025 Tax imposed.

There is levied and shall be collected from every person a tax for the act or privilege of

engaging in utility occupation activities. Such tax shall be measured by the application of rates against gross proceeds of sales from customers within the city. (Ord. 4841 § 3, 1995.)

4.10.030 Utility occupation activities subject to tax.

Upon every person engaging within this city in the following activities; as to such persons, the amount of the tax due with respect to such business in the city shall be equal to the gross income of the business, multiplied by the following applicable rates:

	Activity	Tax Rate
A.	Gas Distribution Business	5.0%
B.	Water Distribution Business	5.0%
C.	Light and Power Business	5.0%
D.	Sewerage System Business	5.0%
E.	Cable Television Service	4.8%
F.	Telephone Business	6.0%
G.	Cellular Telephone Service	6.0%
H.	Solid Waste Collection Business	4.5%

(Ord. 5578 § 1, 2004; Ord. 4841 § 3, 1995.)

4.10.035 Cellular telephone service – Income allocation and administration.

A. Allocation of Income.

1. Service Address. Payments by a customer for cellular telephone service from telephones without a fixed location shall be allocated among taxing jurisdictions to the location of the customer's principal service address during the period for which the tax applies.

2. Presumption. There is a presumption that the service address a customer supplies to the taxpayer is current and accurate, unless the taxpayer has actual knowledge to the contrary.

3. Roaming. When the cellular telephone service is provided while a subscriber is roaming outside the subscriber's normal cellular network area, the gross income shall be assigned consistent with the taxpayer's accounting system to the location of the originating cell site of the call, or to the location of the main cellular switching office that switched the call.

B. Dispute Resolution. If there is a dispute between or among the city and another city or cities as to the service address of a customer who is receiving cellular telephone services and the dispute is not resolved by negotiation among the parties, then the dispute shall be resolved by the city and the other city or cities by submitting the issue for settlement to the Association of Washington Cities (AWC). Once taxes on the disputed revenues have been paid to one of the contesting cities, the cellular telephone service company shall have no further liability with respect to additional taxes, penalties, or interest on the disputed revenues, so long as it promptly changes its billing records for future revenues to comport with the settlement facilitated by the AWC.

C. Authority of Administrator. The director is authorized to represent the city in negotiations with other cities for the proper allocation of cellular telephone service taxes imposed pursuant to this chapter.

D. Rate Change. No change in the rate of tax upon persons engaging in providing cellular telephone service shall apply to business activities occurring before the effective date of the change and, except for a change in the tax rate authorized by RCW 35.21.870, no change in the rate of the tax may take effect sooner than 60 days following the enactment of the ordinance establishing the change. The director shall send to each cellular telephone service company at the address of record a copy of any ordinance changing the rate of tax upon cellular telephone service promptly upon its enactment. (Ord.

4841 § 3, 1995.)

4.10.040 Use tax on the privilege of using natural gas or manufactured gas as a consumer.

A. As authorized by RCW 82.14.230, there is hereby fixed and imposed on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer. The tax shall be in an amount equal to the value of the article used by the taxpayer multiplied by the rate of tax on the gas distribution business set forth in BCC 4.10.030(A). The "value of the article used" shall have the meaning set forth in RCW 82.12.010(1), and does not include any amounts that are paid for the hire or use of a natural gas business in transporting the gas subject to tax under this section if those amounts are subject to tax under BCC 4.10.030(A).

B. The tax imposed under this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under BCC 4.10.030(A) with respect to the gas for which exemption is sought under this subsection.

C. There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

1. The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to BCC 4.10.030(A) by another state with respect to the gas for which a credit is sought under this subsection; or

2. The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

D. The use tax hereby imposed shall be paid by the consumer. The administration and collection of the tax hereby imposed shall be by the Washington State Department of Revenue pursuant to RCW 82.14.050, as now or hereafter amended. (Ord. 4841 § 3, 1995.)

4.10.045 Exemptions.

The tax levied pursuant to this chapter is in lieu of any excise, privilege or occupational tax based on gross proceeds under any chapters of BCC Title 4 with respect to activities specifically within the provisions of this chapter. Nothing herein shall be construed to exempt persons taxable under the provisions of this chapter from tax under any other chapters of BCC Title 4 with respect to activities other than those specifically within the provisions of this chapter. (Ord. 4841 § 3, 1995.)

4.10.050 Deductions.

In computing the tax imposed by this chapter, the following items may be deducted from the measure of the tax:

A. The amount of credit losses actually sustained by taxpayers whose regular books are kept upon an accrual basis.

B. Charges by a taxpayer engaging in a telephone business to a telecommunications company for telephone service that the purchaser buys for the purpose of resale.

C. That portion of the gross income derived from charges to another telecommunications company for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services.

D. Adjustments made to a billing or to a customer account or to a telecommunications company accrual account in order to reverse a billing or charge that had been made as a result of third-party fraud or other crime and was not properly a debt of the customer.

E. Amounts derived from business which the city is prohibited from taxing under the Constitution or laws of this state or of the United States. (Ord. 4841 § 3, 1995.)

4.10.053 Cable television utility tax credit.

Every person providing cable television service within this city will receive a credit toward

the utility tax imposed pursuant to BCC 4.10.030 in the amount of the cable television franchise fee paid to the city. Provided, however, in no case shall the credit exceed the dollar amount of the utility tax due on the same revenue by the cable television service provider. (Ord. 5578 § 2, 2004.)

4.10.055 Utility tax relief.

There is granted to persons who meet the qualifications and requirements of BCC 4.10.060 and 4.10.065 relief from the utility occupation tax of the city as follows:

A. For all billings paid directly or indirectly by the person during a calendar year for service charges to any organization which paid the utility occupation tax of the city in 1995, the city shall pay to such person a "reimbursement" in an amount equal to the utility tax which applied to such billings or, in lieu thereof, at the election of the person, a minimum amount determined in accordance with BCC 4.10.055(C).

B. For all billings paid directly or indirectly by the person during a calendar year for service charges to any organization which paid the utility occupation tax of the city in 1996 or subsequent years, the city is authorized to pay to such person a "reimbursement" in a maximum amount determined in accordance with BCC 4.10.055(D); provided, that the total amount of all reimbursements paid pursuant to this subsection shall not exceed the total dollar amount established through the budget process.

C. The amount of minimum relief under BCC 4.10.055(A) for calendar year 1995 is $64.00, prorated for each month of residency in the city.

D. The amount of maximum relief under BCC 4.10.055(B) for a calendar year is $70.00 and shall be adjusted for calendar year 1997 and each subsequent year in accordance with BCC 4.10.070, prorated for each month of residency in the city. (Ord. 4843 § 1, 1995; Ord. 4841 § 3, 1995.)

4.10.060 Utility tax relief – Qualifications.

A. To qualify for the relief set forth in BCC 4.10.055(A), a person must be requesting reimbursement for the effect of city utility occupation taxes imposed in 1995 and must:

1. Meet one of the following criteria:

a. Be 62 years of age or older at all times during any period for which "reimbursement" is requested; or

b. Be permanently disabled under the definitions of subsections (2) or (3)(A), (3)(B) or (3)(C) of 42 U.S.C. Section 1382c(a) and receiving funds from a disability program such as Supplemental Security Income, Social Security Disability Insurance or Disabled Veterans payments; and

2. Have an income during the calendar year, or part thereof, for which a "reimbursement" is requested from all sources whatsoever, not exceeding 50 percent of the median income level for such calendar year for the Seattle-Bellevue-Everett Primary Metropolitan Statistical Area (PMSA) per household as published by the Secretary of Housing and Urban Development. If the annual update of the PMSA is not available, the median income level shall be determined by adjusting the prior year median income level in accordance with BCC 4.10.070. As used in this subsection, "income" means:

a. "Disposable income," as that term is defined in RCW 84.36.383, as it may be amended or replaced from time to time, plus

b. The aggregate value of all gifts received during the calendar year for which a "reimbursement" is requested, excluding the first $5,008.69 thereof.

The aggregate value of gifts excludable from income as provided in this section shall be adjusted for the calendar year 1997 and each subsequent calendar year in accordance with BCC 4.10.070; and

3. Have been a resident of the dwelling unit within the city at all times during any period for which a reimbursement is requested, and have contributed to the payment of city utility charges from his or her income or resources.

B. To qualify for the relief set forth in BCC 4.10.055(B), a person must be requesting reimbursement for the effect of city utility occupation taxes imposed in 1996 or subsequent

tax years and must:

1. Have an income during the calendar year, or part thereof, for which a "reimbursement" is requested from all sources whatsoever, not exceeding 50 percent of the median income level for such calendar year for the Seattle-Bellevue-Everett Primary Metropolitan Statistical Area (PMSA) per household as published by the Secretary of Housing and Urban Development or show satisfactory evidence of the prior year's qualifying income and certify that income in the reimbursement year has not changed. If the annual update of the PMSA is not available, the median income level shall be determined by adjusting the prior year median income level in accordance with BCC 4.10.070. As used in this subsection, "income" means:

a. "Disposable income," as that term is defined in RCW 84.36.383, as it may be amended or replaced from time to time, plus

b. The aggregate value of all gifts received during the calendar year for which a "reimbursement" is requested, excluding the first $5,008.69 thereof.

The aggregate value of gifts excludable from income as provided in this section shall be adjusted for the calendar year 1997 and each subsequent calendar year in accordance with BCC 4.10.070; and

2. Have been a resident of the dwelling unit within the city at all times during any period for which a reimbursement is requested, and have contributed to the payment of city utility charges from his or her income or resources. (Ord. 4923 § 1, 1996; Ord. 4843 § 2, 1995; Ord. 4841 § 3, 1995.)

4.10.065 Claim filing procedures for 1995 and prior years.

A. All claims for relief under BCC 4.10.055(A) and 4.10.060(A) must be made annually and filed at any time during the calendar year following the calendar year, or portion thereof, for which a "reimbursement" is requested.

B. All billings for which claim is made under BCC 4.10.055(A) and 4.10.060(A) shall be submitted to the Bellevue utilities department as part of the claim for relief.

C. All claims or relief shall be submitted in writing on a form provided by the administering department and certified by the claimant that to the best of the claimant's knowledge, all information provided in the claim is true and correct.

D. The administering department shall adopt rules and regulations to implement this section and BCC 4.10.055, 4.10.060 and 4.10.070. (Ord. 4923 § 2, 1996; Ord. 4841 § 3, 1995.)

4.10.068 Claim filing procedures for 1996 and subsequent years.

A. All claims for relief under BCC 4.10.055(B) and 4.10.060(B) must be filed with the city or its agent no later than the date established by the finance director for the calendar year for which a "reimbursement" is requested.

B. The finance director shall adopt rules and procedures for the filing of reimbursement claims for 1996 and subsequent years and for the administration of BCC 4.10.055, 4.10.060 and 4.10.068. (Ord. 4923 § 3, 1996.)

4.10.070 Consumer Price Index changes.

The amount of minimum relief established under BCC 4.10.055(B) and the aggregate value of gifts, subsidies and benefits excludable from income under BCC 4.10.060 and the median income level figure utilized when the Seattle-King County Primary Metropolitan Statistical Area (PMSA) update is not available pursuant to BCC 4.10.060 shall be administratively adjusted on January 1st of each year by the director of the Bellevue utilities department to reflect any change in the cost of living, as defined and calculated pursuant to BCC 4.03.020(B). (Ord. 5436 § 9, 2003; Ord. 4841 § 3, 1995.)

Chapter 4.12

APPENDIX – EXHIBIT 3

NEWTON's TELECOM DICTIONARY

The Official Dictionary of Telecommunications & the Internet

15th Updated, Expanded and Much Improved Edition

) line code. The category 2 specifica-
s of (6.144 Mbps + 640 Kbps) down-
ostream, with crosstalk, over carrier
loops, and to achieve (1.544 Mbps +
id 176 Kbps upstream with crosstalk
ated services digital network (ISDN)
ip is flexible, thereby allowing multi-
multiplexed and demultiplexed. The
data rates up to 8 Mbps downstream
y; however, actual data rates obtained
ent on loop length, impairments, and
DSL and DMT techniques are adap-
ameters based on loop characteristics
ata route."

pression Techniques where the
s not the reverse of the compression
ompression is more computer-inten-
i side so that the decompression of
sily performed at the desktop or in
isticated codecs are not cost effec-
ssion technique that requires a lot of
ression end, but little processing to
Used in CD-ROM creation, where
ncurred on the production end, but
nsive and easy. See ASYN.

lem A type of modem which uses
ndwidth for transmission and only a

dulation A duplex transmission
ie communications channel into one
one slower channel. During a call
lulation, the modem with the greatest
nit is allocated the high speed chan-
ss data is allocated the slow, or back
ynamically reverse the channels dur-
of data transfer changes.

ltiprocessing A relatively simple
iprocessing in which the operating
ne dedicated CPU and assigns tasks
"slave processors." It is also known
ssing.

This terms refers to a PVC (Private
supports simplex, or asymmetrical,
ted information rate in each direction
transmission path is duplex, meaning
mmunications path in each direction
being connected. However with an
network capacity in each direction
ve to be equal.

ining "not."

Asynchronous Transmission.

nced Mode ABM. Used in the IBM
k Control (LLC), ABM operates at the
nd allows devices on a Token Ring to
ds at any time and to initiate respons-

mpletion A Versit definition. A
e request and need not wait for it to
tion waits for this completion, this is
, but if it is sent off to another system
goes on to other activities before the
tes (and the system later sends a mes-
ouncing the service's completion), that
s Asynchronous.

Asynchronous Gateway A routing device used for dial-up services such as modem communications.

Asynchronous Mapping A SONET term. SONET optical fiber transmission systems run at a very high rate of speed, of course. In fact, SONET runs at a minimum of 51.84 Mbps, which is the foundation transmission level known as OC-1 (Optical Carrier Level 1), the OC-1 frame begins as a T-3 electrical signal at 44.736 Mbps. The native format of the incoming signals always is electrical in nature, and originates at various speeds. Examples are 64 Kbps (DS-0), 1.544 Mbps (DS-1 — specifically, T-1), 2.048 Mbps (DS-1 — specifically, E-1), or 44.736 (DS-3 — specifically, T-3). As these incoming signals of various speeds are presented to the SONET facility, they are multiplexed to form a T-3 frame and are converted from the T-3 electrical format to the OC-1 optical format. The OC-1 frames then are mapped into (presented to, accepted by, and fit into) the SONET facility in an asynchronous fashion. While the SONET transmission facility, itself, is highly synchronized, it deals with inputs on an asynchronous (start-stop) fashion. These mappings are defined for clear channel transport of digital signals that meet the standard DSX cross connect requirements, typically DS-1 and DS-3 in most practical applications, although DS-2 is also supported. See also SONET.

Asynchronous Request An SCSA term. A request where the client does not wait for completion of the request, but does intend to accept results later. Contrast with synchronous request.

Asynchronous Teleconferencing. An interactive group communication that allows individuals to communicate as a group without being present together in time or place. Participants to join and exit the conference when it is convenient for them, leaving messages for others and receiving messages left for them. Computer conferencing is an example of asynchronous teleconferencing.

Asynchronous Terminal A terminal which uses asynchronous transmissions. See Asynchronous Transmission.

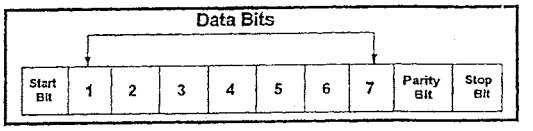
Asynchronous Time Division Multiplexing A multiplexing technique in which a transmission capability is organized in a priori unassigned time slots. The time slots are assigned to cells upon request of each application's instantaneous real need.

Asynchronous Transfer Mode ATM is the technology selected by the Consultative Committee on International Telephone & Telegraph (ITU) International standards organization in 1988 (now called the ITU-T) to realize a Broadband Integrated Services Digital Network (B-ISDN). It is a fast, cell-switched technology based on a fixed-length 53-byte cell. All broadband transmissions (whether audio, data, imaging or video) are divided into a series of cells and routed across an ATM network consisting of links connected by ATM switches. Each ATM link comprises a constant stream of ATM cell slots into which transmissions are placed or left idle, if unused. The most significant benefit of ATM is its uniform handling of services, allowing one network to meet the needs of many broadband services. ATM accomplishes this because its cell-switching technology combines the best advantages of both circuit-switching (for constant bit rate services such as voice and image) and packet-switching (for variable bit rate services such as data and full motion video) technologies. The result is the bandwidth guarantee of circuit switching combined with the high efficiency of packet switching. For a longer explanation, see ATM.

Asynchronous Transmission Literally, not synchronous. A method of data transmission which allows characters to be sent at irregular intervals by preceding each character with a start bit, and following it with a stop bit. It is the method most small computers (especially PCs) use to communicate with each other and with mainframes today. In every form of data transmission, every letter, number or punctuation mark is transmitted digitally as "ons" or "offs." These characters are also represented as "zeros" and "ones" (See ASCII). The problem in data transmission is to define when the letter, the number or the punctuation mark begins. Without knowing when it begins, the receiving computer or terminal won't be able to figure out what the transmission means.

One way to do this is by using some form of clocking signal. At a precise time, the transmission starts, etc. This is called synchronous transmission. In asynchronous transmission there's no clocking signal. The receiving terminal or computer knows what's what because each letter, number or punctuation mark begins with a start bit and ends with a stop bit. Transmission of data is called synchronous if the exact sending or receiving of each bit is determined before it is transmitted or received. It is called asynchronous if the timing of the transmission is not determined by the timing of a previous character.

Asynchronous is used in lower speed transmission and by less expensive computer transmission systems. Large systems and computer networks typically use more sophisticated methods of transmission, such as synchronous or bisynchronous, because of the large overhead penalty of 20% in asynchronous transmission. This is caused by adding one start bit and one stop bit to an eight bit word — thus 2 bits out of ten.



The second problem with large transfers is error checking. The user sitting in front of his own screen checks his asynchronous transmission by looking at the screen and re-typing his mistakes. This is impractical for transferring long files at high speed if there is not a person in attendance.

In synchronous transmission start and stop bits are not used. According to the book Understanding Data Communications, characters are sent in groups called blocks with special synchronization characters placed at the beginning of the block and within it to ensure that enough 0 to 1 or 1 to 0 transitions occur for the receiver clock to remain accurate. Error checking is done automatically on the entire block. If any errors occur, then the entire block is retransmitted. This technique also carries an overhead penalty (nothing is free), but the overhead is far less than 20% for blocks or more than a few dozen characters.

AT 1. Access Tandem.

2. Advanced Technology. Refers to a 16 bit Personal Computer architecture using the 80X86 processor family which formed the basis for the ISA Bus as found in the first IBM PC.

3. AudioTex. See AudioTex.

4. See AT Command Set.

AT Bus The electrical channel used by the IBM AT and compatible computers to connect the computer's motherboard and peripheral devices, such as memory boards, video controllers, PC card modems, bus mouse boards, hard and flop-

RY

the burgeoning long-distance business
lephone Company and its licensees. It
ong-distance company" until Dec. 30,
umed the business and property of
ıecame the parent company of the Bell
the Bell System parent, providing the
cations equipment and services (local,
ıternational) in the United States, until
divested itself of the Bell operating com-
local exchange service. On September
ıounced that it would be splitting into
ıew" AT&T, to provide communications
tching services; Lucent Technologies, to
telecommunications systems and tech-
Corp., to concentrate on transaction-
The strategic restructuring was com-
96. Since then AT&T has made a num-
ns in the wireless, cellular and network-
switching businesses. See also AT&T

'&T history. In the first part of the 20th
gh its Western Electric Company, its
iary, AT&T affiliated and allied compa-
l manufactured equipment to meet the
's telephone companies. By 1914,
Electric Company locations included
Berlin, Milan, Paris, Vienna, St.
Tokyo, Montreal, Buenos Aires, and
ar Gifford, newly elevated to the presi-
l that AT&T and the Bell System should
ed goal of universal telephone service
He therefore sold the International
ıany to the newly formed International
ph Company (ITT) for $33 million in
\T&T's interests in Canada. Although
ternational manufacture, it retained an
hrough its drive to provide global tele-
ners in the U.S.
xperimentally transmitted the human
ic Ocean via radio in 1915. In 1927
nercial transatlantic telephone service
ay radio. Initially, these calls cost $75
e spread to other countries, both via
rect radio links. Radio-telephone ser-
in 1931, and to Tokyo in 1934.
ailable radio technology was far from
ıding and interference, and had strict-
956, service to Europe moved to the
ɔmarine telephone cable, TAT-1.
ɔe began in 1964.
&T started the day a new company. Of
sets it had the day before, it retained
,000 employees it retained 373,000.
ɔus Bell logo and name, given under
onal telephone companies, excepting
Bell Labs. In its place was a stylized
n "AT&T." What AT&T had won, its
elease from former legal shackles,
icts between the way things had been
ion age. AT&T now had the freedom
developed at AT&T Bell Laboratories
ɔompete in the global marketplace.
ee The Telecommunications Act of
s. The term `AT&T Consent Decree'

means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982. See Telecommunications Act of 1996.

AT+V V standards for voice. AT+V is a new ANSI standard for voice modems. It's a superset of the Hayes AT command set which worked so well in modems. AT+V combines pre-fixed Hayes AT commands with a new set of voice-related +V commands. The specification is detailed in ANSI/TIA/EIA IS-101 "Facsimile Digital Interfaces — Voice Control Interim Standard for Asynchronous DCE." The TIA TR-29.2 subcommittee details the specification in their PN-3131. Rockwell's voice modem chipset does not comply with this standard, but uses another called AT#V, which is similar. In Windows 95, the variance between these command sets is ratified by the Win 95 system registry and vendor-supplied INF files. See also WWindows Telephony.

ATA 1. American Telemarketing Association. The professional industry association for telephone sales and marketing.
2. Analog Terminal Adapter. A device for a Northern Telecom Norstar phone system that lets it use analog devices, for example FAX, answering machines, modems and single line phones, behind the Norstar's central telephone unit (its KSU). Before you buy the analog terminal adapter, check that its speed is fast enough for you. In mid-1995, it was constrained to 9,600 bps, or 14,400 bps if the phone line was clear.
3. AT Attachment. Refers to the interface and protocol used to access a hard disk on AT compatible computers. Disk drives adhering to the ATA protocol are commonly referred to as IDE interfaced drives for PC compatible computers. The ATA specification is fully backward compatible with the ST-506 standard it superseded. IDE drives are sometimes referred to as ATA drives or AT bus drives. The newer ATA-2 specification defines the EIDE interface, which improves upon the IDE standard. See ATA2, IDE and Enhanced IDE.

ATA2 The second generation AT attachment specification for IDE devices that defines faster transfer speeds and LBA (Logical Block Address) sector-locating method. See ATA, IDE and Enhanced IDE.

ATA Document The latest draft of the ANSI X3.T9 subcommittee AT Attachment document.

ATA Registers These registers are accessed by a host to implement the ATA protocol for transferring data, control and status information to and from the PC Card. They are defined in the ATA Document. These registers include the Cylinder High, Cylinder Low, Sector Number, Sector Count, DriveHead, Drive Address, Device Control, Error, Feature, Status and Data registers. The I/O and memory address decoding options for these registers are defined within this specification.

ATAPI Attachment Packet Interface specification does for CD-ROM and tape drives why ATA-2 does for hard drives. It defines device-side characteristics for an IDE-connected peripheral. The benefits of having a single interface for the most common non-disk storage device in the desktop world, the CD-ROM are obvious. For the manufacturer, there is no need to add a separate controller card for the CD-ROM. For the end-user it means no more fussing with interrupts, cards and proprietary driver software. ATAPI essentially adapts the established SCSI command set to the IDE interface.

ATB All Trunks Busy. One measure which your phone company or phone systems might give you of telephone traffic in and out of your office. See All Trunks Busy.

ATD 1. Asynchronous Time Division.
2. ATtention Dial the phone. The first three letters in the most frequently-used command in the Hayes command set for asynchronous modems — typically those used with microcomputers.

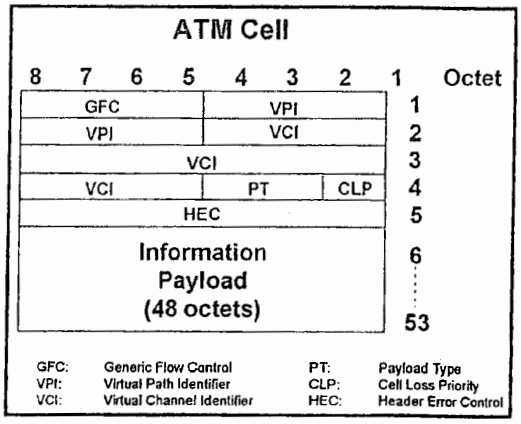
ATDNet Advanced Technology Demonstration Network. A joint research effort of Bellcore, Bell Atlantic, and the U.S. Government, this network is aimed at demonstrating the efficacy of advanced technologies in the network of the future.

ATG Air-To-Ground. Communications services provided from an airplane in flight. These services have been primarily voice telephone calling services in the past, but are being extended to fax and data services with new digital Air-to-Ground (ATG) systems. ATG services in the U.S. operate in the 800-900 MHz region. In 1994, Ground-to Air services were also introduced. Air-To-Ground service is now available from some planes flying outside the United States.

Atheism A non-prophet organization.

ATIS Alliance for Telecommunications Industry Solutions, a trade group based in Washington, D.C. and open to membership of North American and World Zone 1 Caribbean telecommunications carriers, resellers, manufacturers, and providers of enhanced services. Originally called the Exchange Carriers Standards Association (ECSA), the ATIS is heavily involved in standards issues including interconnection and interoperability issues. www.atis.org

ATM 1. Automated Teller Machine. The street corner banking machine which is usually hooked up to a central computer through leased local lines and a multiplexed data network. For the most part, ATM machines traditionally worked over multipoint DDS circuits, although a wide variety of network technologies could be empioyed. In fact, some ATM networks work over ATM. See 2.
2. Asynchronous Transfer Mode. Very high speed transmission technology. ATM is a high bandwidth, low-delay, connection-oriented, packet-like switching and multiplexing technique. Usable capacity is segmented into 53-byte fixed-size cells, consisting of header and information fields, allocated to services on demand. The term "asynchronous" applies, as each cell is presented to the network on a "start-stop" basis—in other words, asynchronously. The access devices, switches and interlinking transmission facilities, of course, are all highly synchronized.
Here's some history on ATM from the Networking Alliance: The ATM method of moving information is not completely new. Like most things it is an evolution of earlier methods. The key difference between ATM and "X.25 packet switching"



and the popular "Frame Relay" technologies is that the packets of the earlier technologies varied in size. Engineers realized that as the speed was dramatically increased to be able to carry "real time" voice and video, the varied length packets would become unmanageable. During the 1980s the ITU, now the ITU-T (International Telecommunications Union-Telecommunications Services Sector), adopted ATM as the transport technology of the future. Ultimately and after a great deal of debate, the ITU-T determined that each cell would be 53 octets long. To meet current and future demands, networking technologies and protocols have evolved to optimize network performance based on traffic characteristics. ATM represents the first world-wide standard to be embraced by the computer, communications and entertainment industries.

Each ATM cell contains a 48-octet payload field, the size of which has an interesting background. Data people prefer to move data in huge blocks or frames, which are more efficient for large file transfers. Voice people, on the other hand prefer tiny blasts of data, which are more effective for moving digitized voice samples (ala PCM in a T-Carrier environment). Since ATM is positioned as the ultimate service offering in support of data , voice data, video data, image data, and multimedia data, the small payload prevailed. With that battle out of the way, the European and U.S. camps clashed, with the European Telecommunications Standards Institute (ETSI) proposed a 32-octet cell and the U.S. Exchange Carriers Standards Association (ECSA) proposed a 64-octet cell—the issue was the difference in standard PCM voice encoding techniques. After lengthy wrangling, it was decided that a 48-octet cell would be the perfect mathematical compromise. Although neither camp was perfectly pleased (such tends to be the nature of a compromise, I am told), it was a solution that all could accept.

In any event, each cell also is prepended with a 5-octet Header which identifies the Virtual Path (Virtual Circuit), Virtual Channel, payload type, and cell loss priority; as well as providing for flow control, and header error control.

The small, fixed-length cells require lower processing overhead and allow higher transmission speeds than traditional packet switching methods. ATM allocates bandwidth on demand, making it suitable for high-speed connection of voice, data, and video services. ATM services will be available at access speeds up to 622 Mbps, with the backbone carrier networks operating at speeds currently as high as 2.5 Gbps. The ATM edge and core backbone switches operate at very high speeds, and typically contain multiple busses providing aggregate bandwidth of as much as 200+ Gbps. ATM core switches currently are available with capacities of as much as one terabit per second, although none have been deployed at this level.

Here's a full explanation: Conventional networks carry data in a synchronous manner. Because empty slots are circulating even when the link is not needed, network capacity is wasted. The ATM concept which has been developed for use in broadband networks and optical fiber based systems is supported by both ITU-T (nee ITU) and ANSI standards, can also be interfaced to SONET (Synchronous Optical Network). ATM automatically adjusts the network capacity to meet the system needs and can handle data, voice, video and television signals. These are transferred in a sequence of fixed length data units called cells. Common standards definitions are provided for both private and public networks so that ATM systems can be interfaced to either or both. ATM is therefore a wide-band, low delay, packet-like switching and multiplexing concept that allows flexible use of the transmission bandwidth and capable of working at data rates as high as 622.08 Mbps, with even higher rates planned. Each data packet consists of five octets of header field plus 48 octets for user data. The header contains data that identifies the related cell, a logical address that identifies the routing, header error correction bits, plus bits for priority handling and network management functions. Error correction applies only to the header as it is assumed that the network medium will not degrade the error rate below an acceptable level. All the cells of a Virtual Path (VP) follow the same path through the network that was determined during call set-up. (Note that ATM is a connection-oriented network service.) As there are no fixed time slots in the system, any user can access the transmission medium whenever an empty cell is available. ATM is capable of operating at bit rates of 155.52 and 622.08 Mbps; the cell stream is continuous and without gaps. The position of the cells associated with a particular VC is random, and depends upon the activity of the network. Cells produced by different streams to the ATM multiplexer are stored in queues awaiting cell assignment. Since a call is accepted only when the necessary bandwidth is available, there is a probability of queue overflow. Cell loss due to this forms one ATM impairment. However, this can be minimized through the use of statistical multiplexers. Bit errors in the header which are beyond the FEC capability can lead to misrouting.

While ATM was developed as a backbone WAN technology, a 25.6 Mbps version of ATM was reluctantly approved by the ATM Forum for use in a LAN workgroup environment. The Desktop ATM25 Alliance, which promoted the standard, disbanded in 1996 due to lack of interest. ATM has continued to march to the desktop, however slowly and at the higher speeds. ATM also has found its way into the LAN world through the development of cost-effective, high-performance ATM LAN backbone switches. PBX manufacturers also are working diligently to determine how best to incorporate ATM switching fabrics into voice/data/video/multimedia PBX systems, resulting in an ATM-based communications controller for premise application. See also ATM Forum, ATM Access Switch and ATM Forum UNI V3.0.

ATM Access Switch A specialized ATM switch which sits on the end user premise, providing access into a carrier ATM network. The ATM Access Switch is used for such applications as distance learning and telemedicine. It is a high-capacity, cell-based switch designed to support broadband networking. Its fully integrated access, multiplexing and switching functions provide the capability for a variety of combined data, video, imaging and voice services on a single platform. See ATM.

ATM Address Defined in the UNI Specification as three formats, each having 20 bytes in length including country, area and end-system identifiers. See ATM.

ATM Backbone Switch A specialized ATM switch which sits in the carrier backbone network. The ATM Backbone Switch is claimed to be ideal for backbone networks supporting multiple services in corporations, telcos, cellular and internet public service providers. Network operators can aggregate all of their traffic over a single backbone of ATM. It is ideal for service provider backbones supporting multiple services such as cell relay, permanent virtual circuits (PVCs), switched virtual circuits (SVCs) circuit emulation, LAN interconnectivity and frame relay. The Backbone Switch has throughput traffic and traffic management features needed for large-scale ATM deployment and service offerings. ATM backbone switches include internal busses providing bandwidth of as much as 200+ Gbps, and a

SONET fiber optic transmission facilitie
at speeds of as much as 2.5 Gbps. See
ATM Edge Switch An ATM cell swi
edge of the carrier network, providing
users' world to the carriers' ATM backbo
ogous to a Central Office providing acc
work in the traditional, circuit-switched
ATM Edge Switches also are known a
Service Nodes.
ATM Ethernet LAN Service Unit
vides 12 independent virtual Ethernet bri
ATM networks. ELSUs are designed for
either local to an ATM switch or at a re
designed for LAN internetworking service
ATM Forum, The An industry organi
members, co-founded by N.E.T. and thr
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The ATM Forum is based in Mountain V
number is 415-949-6700. See ATM. ww
ATM Forum UNI V3.0 The ATM Fo
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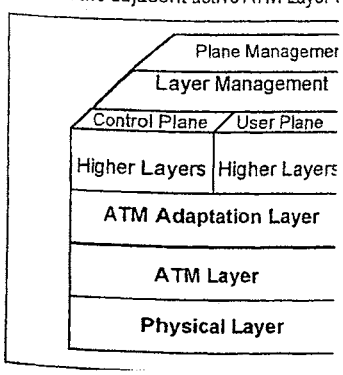
deployment and interoperability of ATM
cedures and protocol defined in the agr
public and private UNIs. Moreover, sinc
metrical, it also applies in the configurat
ATM-end-point. See ATM and ATM For
ATM Inverse Multiplexing AIM
combined multiple T-1 or E-1 links int
facility, over which ATM cells can then
ATM-25 Workgroup ATM running at 2
ond. ATM-25 is mainly used on interna
networks. For a much fuller explanation
ATMARP ATM Address Resolution Pr
mapping IETF classical IP addresse
addresses. The process works in much
ventional ARP, which maps network-l
MAC (Media Access Control) layer in a
ATM Adaptation Layer SEE AAL
ATM Layer ATM. The second layer
Reference Model. At this layer are inclu
cell multiplexing, creation of headers, fl
tion of VPIs (Virtual Path Identifiers
Channel Identifiers). See ATM Layer Li
ATM Layer Link A section of an A
between two adjacent active ATM Layer



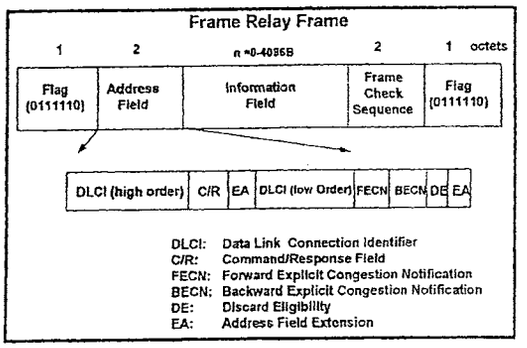
of multiplexing traffic from a lower-speed connection into a higher speed connection based on a specific time duration for each low-speed channel, frame multiplexing using the length of a given frame as the measurement.

Frame Rate The number of images displayed per second in a video or animation file. The Frame Rate is highly significant is determining the quality of the image, with a high frame rate creating the illusion of full fluidity of motion. 30 frames per second (30 fps) is considered to be full-motion, broadcast quality. On the other end of the scale, 2fps is most annoying. At 30 fps, the brain processes the images, filling in the blanks due to the "Phi Phenomenon." See PHI Phenomenon.

Frame Relay Frame relay, technically speaking, is an access standard defined by the ITU-T in the I.122 recommendation, "Framework for Providing Additional Packet Mode Bearer Services." Frame relay services, as delivered by the telecommunications carriers, employ a form of packet switching analogous to a streamlined version of X.25 networks. The packets are in the form of "frames," which are variable in length, with the payload being anywhere between 0 and 4,096 octets. The key advantage to this approach is that a frame relay network can accommodate data packets of various sizes associated with virtually any native data protocol. In other words, a X.25 packet of 128 bytes or 256 bytes can be switched and transported over the network just as can an Ethernet frame of 1,500 bytes. The native Protocol Data Unit (PDU) is encapsulated in a Frame Relay frame, which involves header and trailer information specific to the operation of the Frame Relay network.

Further, a Frame Relay network is completely protocol independent. Not only can any set of data be accepted, switched and transported across the network, but the specific control data associated with the payload is undisturbed in the process of encapsulation. Additionally, and unlike a X.25 network, a Frame Relay network assumes no responsibility for protocol conversion; rather, such conversions are the responsibility of the user. While this may seem like a step down from X.25, the data neither requires segmentation into fixed length packets nor does the network have to undertake processor-intensive and time-consuming protocol conversion. The yield is faster and less expensive switching.

A Frame Relay network also assumes no responsibility for errors created in the processes of transport and switching. Rather, the user also must accept full responsibility for the detection and correction of such errors. The user also must accept responsibility for the detection of lost packets (frames), as well for the recovery of them through retransmission. Again, this may seem like a step down from X.25 networks, which correct for errors at each network node, and which detect and recover from lost packets. Once again, however, the yield is faster and less expensive switching. In fact, it is unlikely that frames will be damaged, as the switches and transmission facilities are fully digital and offer excellent error performance. Much like X.25, Frame Relay employs the concept of a shared network. In other words, the network switches accept frames of data, buffer them as required, read the target address and forward them one-by-one as the next transmission link becomes available. In this fashion, the efficiency of transmission bandwidth is maximized, yielding much improved cost of service. The downside is that some level of congestion is ensured during times of peak usage. The level of congestion will vary from time-to-time and frame-to-frame, resulting in latency (delay) which is unpredictable and variable in length. This is especially true in a Frame Relay network (as opposed



to X.25), as the length of the frames is variable—the switches never quite know what to expect.

Access to a Frame Relay is over a dedicated, digital circuit which typically is 56/64 Kbps, Nx56/64 Kbps, T-1 or T-3. The device which interfaces the user to the network is in the form of a Frame Relay Access Device (FRAD) which serves to encapsulate the native PDU before presenting it to the network. The FRAD at the destination address unframes the data before presenting it to the target device, with the two FRADs working together much as do PADs in a X.25 environment. Further, it generally is the responsibility of the FRAD to accomplish the error detection and correction process, although this responsibility may be that of the eventual target device. Across the digital local loop, the FRADs connect functionally to Frame Relay Network Devices (FRNDs, pronounced "friends"), proving once again that the carriers want to be your friends (especially as Frame Relay users tend to be large organizations with lots of $$$ to spend).

Frame Relay is intended for data communications applications, most especially LAN-to-LAN internetworking, which is bursty in nature. Frame Relay is very good at efficiently handling high-speed, bursty data over wide area networks. It offers lower costs and higher performance for those applications in contrast to the traditional point-to-point services (leased lines). Additionally, Frame Relay offers a highly cost-effective alternative to meshed private line networks. As the Frame Relay network is a shared, switched network, there is no need for dedicated private lines, although special-purpose local loops connect each customer location to a frame switch. Transmission of frames between the user sites is on the basis of Permanent Virtual Circuits (PVCs), which are pre-determined paths specifically defined in the Frame Relay routing logic. All frames transmitted between any two sites always follow the same PVC path, ensuring that the frames will not arrive out of sequence. Backup PVCs, generally offered by the carrier at trivial cost, provide redundancy and, therefore, network resiliency in the event of a catastrophic network failure. With frame relay, a pool of bandwidth is made instantly available to any of the concurrent data sessions sharing the access circuit whenever a burst of data occurs. An addressed frame is sent into the network, which in turn interprets the address and sends the information to its destination over broadband facilities. Those facilities may be as "slow" as 45 Mbps, but more often are SONET fiber optics in nature and operating at much higher speeds. Like traditional X.25 packet networks, frame relay networks use bandwidth only when there is traffic to send. Frame Relay, while intended for data communications, also supports compressed and packetized voice and video. While such isochronous data is highly sensitive to the variable latency characteristic of packet networks, improved voice

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A Frame Relay frame consists of
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frame, as well as for purposes of
Information Field is of variable le
The trailer consists of a Frame
detection and correction of errors
ending Flag denoting the end of t
The American National Standard
frame relay service in the followi
ANSI T1.602 — Telecommunica
Layer Signaling Specification f
Network Interface.
ANSI T1.606 — Frame Rel
Architectural Framework and Ser
ANSI T1S1/90 - 175 - Addendur
Bearer Service — Architectur
Description.
T1.607-1990 ISDN Layer 3
Circuit-Switched Bearer Service
T1.618 DSS-1 Core aspects of
frame relay bearer service, ANSI
ANSI T1.617a, Signaling specifi
service for DSS-1, 1994
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Frame Relay Access Dev
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Frame Relay Forum Orga
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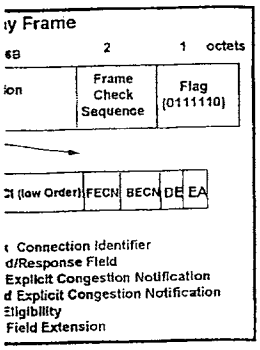

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compression algorithms such as ACELP provide quite acceptable support for voice over Frame Relay, subject to the level of congestion in the network. For voice to be supported satisfactorily in a packet network, the receiving end compensates for delay and delay variation.

In addition to public network services, Frame Relay can also be implemented in a private network environment consisting of unchannelized T-Carrier circuits. Such an implementation offers exceptional data communications performance over an existing leased line network. Additionally, framed voice and video can ride over such a network, essentially for "free" when the circuits are not being used for data communications purposes. Thereby, the usage of the circuits is maximized, with little concern for poor quality due to network congestion.

A Frame Relay frame consists of a header, information field, and trailer. The header comprises a Flag denoting the beginning of the frame, and an Address Field used for routing of the frame, as well as for purposes of congestion notification. The Information Field is of variable length, from 0 to 4,096 Bytes. The trailer consists of a Frame Check Sequence (FCS) for detection and correction of errors in the Address Field, and an ending Flag denoting the end of the frame.

The American National Standards Institute (ANSI) describes frame relay service in the following documents:

ANSI T1.602 — Telecommunications — ISDN — Data Link Layer Signaling Specification for Application at the User Network Interface.

ANSI T1.606 — Frame Relaying Bearer Service — Architectural Framework and Service Description.

ANSI T1S1/90 - 175 - Addendum to T1.606 - Frame Relaying Bearer Service — Architectural Framework and Service Description.

T1.607-1990 ISDN Layer 3 Signaling Specification for Circuit-Switched Bearer Service for DSS-1

T1.618 DSS-1 Core aspects of Frame Protocol for use with frame relay bearer service, ANSI, 1991

ANSI T1.617a, Signaling specification for Frame Relay bearer service for DSS-1, 1994

Frame relay access makes use of the LAP-D signaling protocol developed for ISDN. Frame relay, technically speaking again, does not address the operation of the network switches, multiplexers or other elements. Both the ITU-T and ANSI were highly active in the development of Frame Relay standards, as was ETSI in Europe. See the next three definitions.

Frame Relay Access Device Required for connection into a frame relay network.

Frame Relay Forum Organization of frame-relay equipment vendors, carriers, end users and consultants working to speed the development and deployment of frame relay products, as well as interfaces with other broadband technologies, such as ATM. The Frame Relay Forum is based in Foster City, CA. 415-578-6980. It was formed in May 1991 as a non-profit mutual corporation. It has over 300 members. See also Frame Relay Implementors Forum and ATM. www.frforum.com.

Frame Relay Implementors Forum A group of companies which have announced their support for a common specification for frame relay connections to link customers premises equipment to networking equipment. The common specification was originally announced on September 4, 1990. The common specification is based on the standard frame relay interface proposed by the American National Standards Institute (ANSI). The common specification supports the proposed ANSI standard and defines the extensions to that standard, including a local management interface that allows the exchange of control information between the user device and the frame relay network equipment. The specification is available for review from Cisco Systems, Digital Equipment Corporation, Northern Telecom and StrataCom. See Frame Relay and Frame Relay Forum.

Frame Relay Modem A data communications device which connects to a PC's COM (serial) port and emulates a dial tone while actually establishing a dedicated 56Kbps frame relay connection.

Frame Slip That condition in a TDM network under which a receiver of a digital signal experiences starvation or overflow in its receive buffer due to a small difference in the speeds of clocks and the clock (transmission rate) at the transmitter. The receiver will drop or repeat of a full TDM frame (193 bits on a T-1 line) in order to maintain synchronization.

Frame Store A system capable of storing complete frames of video information in digital form. This system is used for television standards conversion, computer applications incorporating graphics, video walls and video production and editing systems.

Frame Switch A device similar to a bridge that forwards frames based on the frames' layer 2 address. Frame switches are generally of two basic forms, cut-through switch (on-the-fly-switching) or store and forward switch. LAN switches such as Ethernet, Token Ring, and FDDI switches are all examples of frame switches.

Frame Synchronization The process whereby a given digital channel (time slot) at the receiving end is aligned with the corresponding channel (time slot) of the transmitting end as it occurs in the received signal. Usually extra bits (frame synchronization bits) are inserted at regular intervals to indicate the beginning of a frame and for use in frame synchronization.

Frame UNI Frame-based User-Network Interface, a frame format for access to ATM networks. Defined by the Frame Relay Forum, Frame UNI is a derivative of the DXI standard. For low-speed access application, it provides for a router to send frames (much like Frame Relay frames) to an ATM Edge Switch, where the conversion to cell format takes place.

Frames A term used to describe a viewing and layout style of a World Wide Web site, It refers to the simultaneous loading of 2 or more web pages at the same time within the same screen. Originally developed by Netscape and implemented in their Navigator 2.0 browser, today many other popular Web browsers support this feature. Some Web sites come in two versions; a "frames" and "no frames" version. The frames version usually takes a longer to load and may contain other "enhanced" features such as Java and Animation.

Frames Received OK The number of frames received without error. See Frames Received Too Long.

Frames Too Long An Ethernet statistic that indicates the number of frames that are longer than the maximum length of a proper Ethernet frame, but not as long as frames resulting from jabbering.

Framework A Taligent definition. A set of prefabricated software building blocks that programmers can use, extend, or customize for specific computing solutions. With frameworks, software developers don't have to start from scratch each time they write an application. Frameworks are built from a collection of objects, so both the design and code of a framework may be reused.

Framing An error control procedure with multiplexed digital channels, such as T-1, where bits are inserted so that the receiver can identify the time slots that are allocated to each

appears on his/her key set. Privacy can be automatic or selected for each call.

Privacy And Privacy Release All other extensions of a line are unable to enter a conversation in progress unless the initiating telephone releases the feature.

Privacy Enhanced Mail. PEM. An Internet electronic mail capability which provides confidentially and message integrity using various encryption methods.

Privacy Lockout Privacy automatically splits the connection whenever an attendant would otherwise be included on the call, i.e. the attendant can't listen in to a call she's just extended to someone. A tone warning is generated when the attendant bridges into a conversation in progress.

Privacy Override Activation of a special pushbutton allows the phone user to access a given busy line, even though the automatic exclusion facility is being used by the station on that line. This privilege of Privacy Override is usually only given to Big Bosses.

Private ATM Address A twenty-byte address used to identify an ATM connection termination point.

Private Automatic Branch Exchange PABX. A private telephone switch for a business or an organization in which people have to dial "9" to access a local line. In the old days, private branch exchanges were manual, meaning that operators/attendants were needed to manually place calls. Then the systems improved and you were able to dial the outside world from your extension without the help (or hindrance?) of an operator. Thus they became known as private automatic branch exchanges. But then all PBXs became Automatic. So these days, PABXs are all called PBXs, except in some countries outside North America, where they're still called PABXs. See also the next definition and PBX.

Private Branch Exchange PBX. Term used now interchangeably with PABX. PBX is a private telephone switching system, usually located on a customer's premises with an attendant console. It is connected to a common group of lines from one or more central offices to provide service to a number of individual phones, such as in a hotel, business or government office. For the biggest definition, see PBX. See also PABX.

Private Carrier An entity licensed in private services and authorized to provide communications service to others for money.

Private Dial-In Ports A packet network term. For customers who have many calls, the packet network operator provides dedicated, unpublished phone numbers. The idea is to give the preferred user better service.

Private Domain Name A standard attribute of an O/R (Originator/Recipient) Address that identifies a PRMD (Private Management Domain) generally relative to an ADMD (Administrative management Domain). An X.400 term.

Private Exchange PX. A telephone switch serving a particular organization and having no means of connection with a public exchange. In other words, a phone system just for intercom calls.

Private Facility Trunk A telephone company AIN term. A transmission facility that carries non-public switched telephone network (PST) traffic. An example of a private facility trunk is an access arrangement to a switch supporting PBXs, including the switched end of a Foreign Exchange (FX) and an Off Network Access Line (ONAL).

Private Internet eXchange. PIX. It's a Cisco term for a family of their remote access routers with firewall capabilities.

Private Key An encryption technique which requires that the decrypting key be kept secret. Also known as single-key and secret-key. See Public Key and Encryption for more detail.

Private Line 1. A direct channel specifically dedicated to a customer's use between specified points. A line leased from a carrier, local or long distance. A non-switched circuit. One end of the line is directly connected to the other end. Here's the AT&T definition of a private line. "A dedicated, non-switchable link from one or more customer-specified locations to one or more customer-specified locations..."

Private lines offer highly available connectivity, as they are dedicated to the use of a single organization. As private lines are priced solely based on distance, with no usage-sensitive cost element, they can be used constantly and at maximum capacity. Therefore, they offer a highly cost-effective to usage-sensitive, switched services. Private networks comprise numbers of private lines. Originally, private lines were, in fact, dedicated circuits which literally could be physically traced through the network. They also were known as "nailed-up circuits," as telephone company technicians hung the circuits on nails driven into the walls of the central offices. Contemporary private lines actually involve dedicated channel capacity provided over high-capacity, multi-channel transmission facilities. See also Private Network.

2. An outside telephone line, with a separate telephone number, which is separate from the PBX. The line is a standard business line which goes around the PABX. It connects the user directly with the LEC central office, rather than going through the PBX. Private lines connections are considered to be very "private" by virtue of the fact that it is not possible for a third party (e.g., technician or console attendant) to listen to conversations without placing a physical tap on the circuit. Additionally, private lines are not subject to congestion in the PBX. As private lines also are not susceptible to catastrophic PBX failure, they often are used to provide fail-safe communications to key individuals with mission-critical responsibilities in data centers, network operations centers, and the like.

Private Line Service An outside telephone number separate from the PBX, can be set up to appear on one of the buttons of a key telephone. Also called an Auxiliary Line. See also Private Line.

Private Management Domain PRMD. An X.400 electronic mail term: A private domain to which MTAs (Message Transfer Agents) send mail. PRMDs are connected to ADMDs (Administrative Management Domains) for message routing over wide area links. Under X.400 addressing, the PRMD represents a private electronic messaging system that may be connected to a Administrative Management Domain. The PRMD is usually a corporate or government agency E-Mail system connected to an ADMD.

Private Message A message designation which prevents that message from being given to another mailbox.

Private Network 1. A network built and owned by an end user organization. Some very large organizations build their own private microwave networks, rather than rely on circuits leased from carriers. This generally is the case where a number of remote sites must be networked, especially where substantial bandwidth is required. In such situations, the public carriers may be unable to provide the necessary bandwidth and network performance.

2. A network comprising dedicated circuits leased from one or more public carriers. Such circuits make use of private lines over carrier transmission facilities, bypassing the switches. Many large organizations deployed complex, dedicated T-carrier networks in the 1970s and 1980s. While such networks continue to be supplemented and while such networks con-

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Privileges The access
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PRMD PRivate Manage
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2. An empty message that
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tinue to be deployed for data communications, VPNs (Virtual Private Networks) generally are preferred for voice communications. A variety of VPN technology alternatives also exist for data communications. See also Private Line, Private Voiceband Network, and VPN.

Private Network-to-Network Interface See PNNI.

Private Networks Marketing A Northern Telecom term which defines their organization for making and selling all telecom switches, except central offices. These products include the Meridian 1 PBX family, residential and business telephone sets, including Norstar and data communications.

Private Subscriber Network A virtual private network service supported by Public Packet Switched Service (PPSS) and incorporating interLATA transmission facilities owned or leased by the customer for private traffic. A Bellcore definition.

Private Voiceband Network A network that is made up of voice band circuits, and sometimes switching arrangements, for the exclusive use of one customer. These networks can be nationwide in scope and typically serve large corporations or government agencies.

Private Wire A private line. Derives its name from the old telegraph days when messages were carried on wires that strung across the nation.

Privileges The access rights to a directory, file or program over a local area network. Typically read, write, delete, create and execute.

PRMD PRivate Management Domain. An X.400 Message Handling System private organization mail system. Example: NASAmail.

Proactive Taking the initiative. Doing it before someone (most likely your competition) forces you to do it. The word is currently in vogue among those people who believe the telephone companies should do all the positive, forward-looking actions before the competition does them and gets the public kudos. The word has no real meaning, but serves a purpose as a cry to action. The word actually is grammatically incorrect. The real word is "active." It is the opposite of "reactive." The person who told us this is Norm Brust, a wonderful man and one of the more active (not proactive) people in our industry.

Probe 1. A sensing device, typically about the size and shape of a pencil, that is used to sense various physical conditions such as temperature, humidity, current flow, speed. Usually connected to a meter or oscilloscope which displays the condition being monitored.

2. An empty message that is sent to reach a particular address to determine if an address can be reached.

Probe Envelope In X.400, the envelope that encloses a probe in the MTS (Message transfer System). See Probe.

Problem Tracking Report PTR. A report maintained by a manufacturer in its Problem Tracking Database that describes a specific reproducible product defect or anomaly with a product. A PTR is also used to document a request for a feature enhancement. Information includes PTR number, problem description, PTR priority, system configuration and steps for reproducing the problem.

Process A software application. Any activity or systematic sequence of operations that produces a specified result. Typically, a computer function that consists of, or involves, procedure code, data storage and an interface for communicating with other processes.

Process Manufacturing The making of things. This contrasts with flow manufacturing which is working on something — like oil — that flows through a production process.

Processing Gain In a spread spectrum transmission system, the original information signal is combined with a pseudo random correlating, or spreading code. The more random and the greater the length of the code, the more robust the resulting spread spectrum signal is against interference and interception. A measure of this robustness is referred to as processing gain. The FCC requires a minimum of 10 dB processing gain for non-licensed equipment operating in the Part 15 902-928 MHz, 2400-2483 MHz, and 5725-5850 MHz frequency bands. See also CDMA.

Processing, Batch A method of computer operation in which a number of similar input items are accumulated and sorted for processing. Compare with On-Line or Interactive Processing.

Processor The intelligent central element of a computer or other information handling system. Also called the Central Processing Unit (CPU).

Processor Card See Smart Card.

Processor Occupancy The time the telephone system processor is in use. There are two typical demands on the central processor in a telephone system, moving calls around and running self-diagnostics. Be sure you factor in the second when you're trying to figure out how many calls your telephone system processor will handle before it dies.

Processor Power The number of computations that a computer, microprocessor, or digital signal processor can complete in a fixed time interval. May be measured in MIPS (millions of instructions per second) or MFlops. Typical low-end DSP chips provide up to 10 MFlops; high-end chips 30 or more.

Procurement Lead Time The interval in months between the initiation of procurement action and receipt into the supply system of the production model (excludes prototypes) purchased as the result of such actions, and is composed of two elements, production lead time and administrative lead time.

Procr Processor.

Prod A device that resembles a pencil, but containing a metal tip in an insulated handle with a wire to connect it to a piece of test equipment, such as a VOM (volt-ohm-millimeter). the metal tip is touched to various points in an electrical circuit for measurements and trouble-shooting.

Prodigy Formed in 1984 as a joint venture of IBM and Sears Roebuck & Company, Prodigy was originally called TRINTEX. The name was changed to Prodigy in 1988, and the company was acquired by employees with the help of International Wireless in 1996. Prodigy used to offer on-line computer services. The company was one of the first to offer such services for a largely flat monthly fee. Recently, Prodigy decided to terminate the activities of 50 staffers who develop "content" for its information service, and instead to link its users to the content of Excite, a Web directory and search engine. Prodigy will now become more a pure Internet Service Provider, offering connections to the Internet.

Productize This is a stupid word. But it means to make an idea into a product. What this means is to complete the R&D on it, to finish the customer documentation, to finish the packaging design, to assign a name, model number and stocking number, to pass the information onto product support, etc. Everything necessary to make it a product that can be sold. See also BETA.

Profile A set of parameters defining the way a device acts. In the LAN world, a profile is often used by one or more workstations to determine the connections they will have with other devices and those devices they will offer for use by other

APPENDIX – EXHIBIT 4

Frame Relay

Last modified: Monday, November 17, 1997

A packet-switching protocol for connecting devices on a Wide Area Network (WAN). Frame Relay networks in the U.S. support data transfer rates at T-1 (1.544 Mbps) and T-3 (45 Mbps) speeds. In fact, you can think of Frame Relay as a way of utilizing existing T-1 and T-3 lines owned by a service provider. Most telephone companies now provide Frame Relay service for customers who want connections at 56 Kbps to T-1 speeds. (In Europe, Frame Relay speeds vary from 64 Kbps to 2 Mbps.

In the U.S., Frame Relay is quite popular because it is relatively inexpensive. However, it is being replaced in some areas by faster technologies, such as ATM.

APPENDIX – EXHIBIT 5

ATM

Last modified: Wednesday, February 26, 2003

Short for *Asynchronous Transfer Mode*, a network technology based on transferring data in *cells* or *packets* of a fixed size. The cell used with ATM is relatively small compared to units used with older technologies. The small, constant cell size allows ATM equipment to transmit video, audio, and computer data over the same network, and assure that no single type of data hogs the line.

Some people think that ATM holds the answer to the Internet bandwidth problem, but others are

skeptical. ATM creates a fixed channel, or route, between two points whenever data transfer begins. This differs from TCP/IP, in which messages are divided into packets and each packet can take a different route from source to destination. This difference makes it easier to track and bill data usage across an ATM network, but it makes it less adaptable to sudden surges in network traffic.

When purchasing ATM service, you generally have a choice of four different types of service:

- **constant bit rate (CBR)**: specifies a fixed bit rate so that data is sent in a steady stream. This is analogous to a leased line.
- **variable bit rate (VBR)**: provides a specified throughput capacity but data is not sent evenly. This is a popular choice for voice and videoconferencing data.
- **available bit rate (ABR)**: provides a guaranteed minimum capacity but allows data to be *bursted* at higher capacities when the network is free.
- **unspecified bit rate (UBR)**: does not guarantee any throughput levels. This is used for applications, such as file transfer, that can tolerate delays.

•E-mail this definition to a colleague•

*For internet.com pages about **ATM***

Related Categories

Networking Standards

Related Terms

5-4-3 rule

ABR

CBR

DLCI

G.SHDSL

LANE

APPENDIX – EXHIBIT 6

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-93 (26)S
Sales Tax
April 12, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S921123A

On November 23, 1992 a Petition for Advisory Opinion was received from Dunkirk and Fredonia Telephone Company, 40 Temple Street, P.O. Box 209, Fredonia, New York 14063-0209.

The issue raised by Petitioner, Dunkirk and Fredonia Telephone Company, is whether it's receipts from the sale of private line circuits are subject to sales tax under Section 1105(b) of the Tax Law as the sale of an intrastate telephone service or are they excluded from sales tax as an interstate telephone service.

Petitioner is a telephone company which provides telephone service to its customers. Among the types of services which Petitioner offers to its customers is the furnishing of private line circuits.

A private line circuit is a specific circuit dedicated to the sole use of a particular customer. Private line circuits are sometimes referred to as "tie-lines" and may be established between the separate office locations of a single customer. Banks are among Petitioner's customers which use private line circuits to communicate between branch locations. In addition, a private line circuit maybe set up between and automated teller machine (ATM) and the office of a bank.

Each time a customer requests the establishment of a private line circuit that will run, in part, in or through the Dunkirk and Fredonia, New York area, Petitioner receives an Access Service Request (ASR) form from its customer or another telephone carrier. On the ASR, the customer or the other telephone carrier indicates whether the private line circuit requested is for intrastate or interstate use. If the customer or other telephone carrier indicates that the private line circuit is for interstate use, it must also indicate the percentage of interstate use of the private line circuit.

Petitioner establishes and charges a customer for the portion of the customer's private line circuit in the Dunkirk and Fredonia, New York area. An intrastate private line circuit begins and ends within New York State, but may be continued by one or more other telephone companies from the Dunkirk and Fredonia area to another location in the State. An interstate private line circuit will be continued by one or more other telephone companies from the Dunkirk and Fredonia area to a location outside of New York State. If the ASR given to Petitioner indicates that the private line circuit requested is for interstate use, the private line circuit will run through the Dunkirk and Fredonia area and then on to a location outside of New York State.

If a private line circuit is designated as an intrastate circuit, Petitioner is required to charge the customer at the intrastate tariff rate approved by the New York State Public Service Commission. If a private line circuit is designated as an interstate circuit, Petitioner is required to charge the

customer at the interstate tariff rate approved by the Federal Communications Commission.

Section 1105(b) of the Tax Law imposes sales tax upon "The receipts ... from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service."

Section 527.2(d) of the Sales and Use Tax Regulations provides in part that:

Telephone and telegraphy; telephone and telegraph service. (1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephone and telegraphy.

(2) The term telephony and telegraphy includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

* * *

(5) The tax on utility services applies to every charge for any telephone and telegraph service. Among these charges are monthly message rate and intrastate toll charges and charges for special services, such as installation, change of location, conference connections, tie-lines, WATS line and the furnishing of equipment. (Emphasis supplied)

Example 7: A telephone company installs station apparatus, owned by it, on the premises of a customer. The installation is a service taxable under section 1105(b) of the Tax Law.

(6) Where a customer has telephones at a single location connected to exchanges in different localities, and a tie-line to a locality in which he is not located, the tax applicable for each service is the tax rate in effect in the locality to which the exchange is assigned.

Example 8: A business located in Nassau County has two telephone numbers, one with a Nassau exchange and one with a Queens exchange. This enables his Queens customers to phone him toll free. Service on the Queens exchange is considered to be purchased in Queens County even though the telephone is physically located in Nassau County.

(e) Sales for resale. Purchases of utility services by a utility for resale as such may be made without payment of the sales tax. The purchaser must furnish the supplier of the utility to be resold with a resale certificate (Form ST-120). When the utility services are resold by the purchaser he must collect the sales tax on the receipts from his sales as imposed under section 1105(b) of the Tax Law. A purchase

of a utility service which is not resold is subject to tax as a purchase at retail.

Example: A utility company purchases excess power from an industrial organization or through a power pool for resale to its customers. Such purchase may be made without payment of tax upon the presentation of a properly completed resale certificate.

Sales tax on telephone service is imposed upon all telephone service except interstate service and sales for resale in accordance with section 1105(b) of the Tax Law and Section 527.2(d) of the Sales and Use Regulations. Thus, where Petitioner's sales, including sales of private line circuits, occur totally within New York State, they are subject to sales tax unless they are purchased for resale. If Petitioner purchases telephone service from another interstate carrier and couples that service with its own, and then sells the service to its client, such service would be considered interstate and exempt. However, if Petitioner provides a private line circuit totally within New York State in conjunction with an out of state carrier but bills the retail purchaser directly for Petitioner's share of the service, such service is considered as two separate sales and since Petitioner's service is totally within New York State it is subject to tax.

In those cases where the private line circuit used for clearing and sorting ATM transactions originates at an ATM located in New York State and terminates at a bank's central processing center located in New York State or vice versa, then the transmission will be considered to be an intrastate transaction subject to sales tax.

On the other hand, in those cases where the private line circuit used for clearing and sorting ATM transactions originates at an ATM located in New York State and terminates at a bank's central processing center located outside New York State or vice versa, then the transmission will be considered to be an interstate transaction that is not subject to sales tax.

DATED: April 12, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

APPENDIX – EXHIBIT 7

BEFORE THE HEARING EXAMINER FOR THE CITY OF BELLEVUE

In the Matter of the Appeal of **QWEST CORPORATION and QWEST GOVERNMENTAL SERVICES, INC.** From the City of Bellevue's Tax Assessments, Reg. Nos. 17645 and 32597	**ORDER ON MOTIONS** **AAD 05-354**

Qwest is appealing Bellevue's tax assessment which was issued on October 28, 2005 in the amount of $5,809,517.09, including interest and penalties. A prehearing conference was held on March 8, 2006, wherein six issues were identified and a hearing was projected to be held in the last two weeks of September, 2006. On June 5, 2006, Qwest moved for a partial summary judgment, based upon a judgment rendered by Superior Court Douglass North granting summary judgment on some of the issues in the administrative appeal. Qwest argues that a decision to grant its motion at this stage of the proceedings will narrow the issues in the case of discovery and at the hearing. Qwest contends that the Examiner is barred by the doctrine of collateral estoppel from re-litigating the issue decided by Judge North, and that the City's appeal of Judge North's decision does not suspend or negate the collateral estoppel effect of a judgment entered after trial.

On June 16, 2006, the City moved for an Order to Stay Proceedings in the administrative appeal until after determination of the City's appeal of Judge North's decision. The City argues that it would not be more efficient to enter the Order for Partial Summary Judgment to Qwest, because if Judge North is reversed, the parties would have to go back and conduct further discovery, including additional depositions of the same persons on issues that could have been addressed the first time around. In such case, there would be two hearings before the Examiner instead of one. The City would agree not to assess interest or penalties during the stay.

The parties appeared before the Examiner on July 5, 2006, at 10:30 a.m. and argued the motions. David M. Jacobson of Dorsey and Whitney, LLP represented Qwest. Ken Brunetti of

CITY OF BELLEVUE
450 NE 110th Avenue
P. O. Box 90012
Bellevue, WA 98009 9012

Miller & VanEaston and Kate Berens, Deputy City Attorney, represented the City of Bellevue. Prior to the hearing, each party submitted a memorandum in opposition to the other's motion. The oral argument was recorded by the Hearing Examiner's Office Assistant, Mary Lou Andersen. The Examiner took the motions under advisement.

Now, Therefore, being fully advised, it is the Examiner's decision that the Motion for Partial Summary Judgment should be granted, and that the Motion to Stay should be denied. The partial summary judgment will be set aside in the event that the decision of Judge North is reversed.

The issues remaining on appeal should proceed to decision. The Examiner directs the parties to confer as to an agreed hearing date or dates. In the absence of agreement within two weeks from the date of this Order, the Examiner will fix a date for hearing *sua sponte*.

DONE this 10th day of July, 2006.

Gordon F. Crandall
Hearing Examiner

CITY OF BELLEVUE
450 NE 110th Avenue
P. O. Box 90012
Bellevue, WA 98009 9012

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

QWEST CORPORATION, Respondent, v. CITY OF BELLEVUE, Appellant.	NO. 58154-6-1 **CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that on this date, I cause service of the **Brief of Appellant, City of Bellevue** and **Certificate of Service** for the above-referenced case by having the original and one copy filed via messenger service with the Court of Appeals – Division I, Appellate Court Clerk and a copy delivered via messenger to the Respondent's Counsel of Record:

David M. Jacobson
DORSEY & WHITNEY LLP
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101-4010

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 17th of July, 2006.

Sharon L. Taylor