

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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VONAGE HOLDINGS CORPORATION,

Plaintiff - Appellee

MCI WORLDCOM COMMUNICATIONS, INC.; MCIMETRO ACCESS  
TRANSMISSION SERVICES, INC.,

Intervenor Plaintiffs - Appellees

v.

THE MINNESOTA PUBLIC UTILITIES COMMISSION; LEROY KOPPENDRAYER;  
GREGORY SCOTT; PHYLLIS REHA; R. MARSHALL JOHNSON, in their official capacities  
as the Commissioners of the Minnesota Public Utilities Commission and not as individuals,

Defendants - Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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BRIEF FOR THE UNITED STATES AND THE  
FEDERAL COMMUNICATIONS COMMISSION AS *AMICI CURIAE*

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**Intervenor Plaintiffs - Appellees**

**v.**

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MARSHALL JOHNSON, in their official capacities as the Commissioners of  
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**BRIEF FOR THE UNITED STATES AND THE  
FEDERAL COMMUNICATIONS COMMISSION AS *AMICI CURIAE***

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**STATEMENT OF INTEREST**

This appeal involves important and unresolved questions regarding the regulatory status of Internet telephony services under the Communications Act of 1934

(Communications Act) and the Telecommunications Act of 1996 (1996 Act). The Federal Communications Commission (Commission or FCC) has been charged by Congress with responsibility for administering these statutes. As discussed further below, the Commission is currently engaged in administrative proceedings that will address Vonage's regulatory status in particular and the regulatory status of Internet telephony services more generally. There is a significant public interest in ensuring that the FCC's regulatory authority is not impaired by premature judicial resolution of these issues. There is also a significant public interest in ensuring that courts have the benefit of the FCC's considered views regarding federal and state authority over Internet telephony services before the courts undertake to resolve the potentially far-reaching issues presented in this case. For these reasons, the United States and the FCC submit this *amicus* brief to urge the Court to defer its resolution of this appeal until the Commission completes its own consideration of the same issues in pending administrative proceedings. The United States and the FCC are authorized to participate as *amici curiae* by Rule 29(a) of the Federal Rules of Appellate Procedure.

### **STATEMENT OF ISSUES**

In the proceeding below, the district court held that the Communications Act preempts Minnesota's authority to regulate Vonage's Internet telephony service. The question addressed by the United States and the FCC in this brief is whether judicial

consideration of the preemption issue should be deferred, on the basis of the primary jurisdiction doctrine, until the FCC addresses that issue in pending administrative proceedings. *United States v. Western Pacific RR*, 352 U.S. 59 (1956); *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605 (8th Cir.), *cert. denied*, 525 U.S. 962 (1998).

## STATEMENT OF THE CASE

### I. Regulatory Background

#### A. Telecommunications Services and Information Services Under the Communications Act and the 1996 Act

The Communications Act establishes a comprehensive federal regulatory framework governing “all interstate and foreign communication by wire or radio \* \* \* .” 47 U.S.C. §§ 152(a), 153(7), 153(22), 153(33), 153(52). As part of that comprehensive scheme, Title II of the Communications Act, 47 U.S.C. §§ 201-276, vests the FCC with extensive regulatory authority over “common carriers,” a term that encompasses “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio \* \* \* .” *Id.* § 153(10).

In implementing the common carrier requirements of Title II, the FCC has long distinguished between “basic services,” which offer pure transmission capacity for the movement of information, and “enhanced services,” which allow users to engage

in more sophisticated forms of information storage, retrieval, and processing. See FCC, *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501 ¶¶ 23-27 (1998) (*Universal Service Report*) (reviewing history of regulatory distinction between basic services and enhanced services). Basic services traditionally have been offered on a common carrier basis, and providers of basic services therefore have always been subject to regulation under Title II of the Act. In contrast, the FCC determined in the *Computer II* proceeding that enhanced service providers are not common carriers for purposes of the Communications Act and therefore are not subject to regulation under Title II. See FCC, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 209-210 (D.C. Cir. 1982) (*CCIA*), *cert. denied*, 461 U.S. 938 (1983).

When Congress amended the Communications Act by enacting the 1996 Act, it adopted new nomenclature, but otherwise preserved and built on the regulatory distinction between basic services and enhanced services developed by the FCC. See *Universal Service Report* ¶¶ 30, 33, 39-45 (discussing impact of 1996 Act on basic and enhanced services). The Communications Act now uses the terms “telecommunications service” and “information service” to embody that distinction.

The Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public,” while “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications \* \* \* .” *Id.* §§ 153(20), 153(46). Providers of telecommunications services are expressly made subject to common carrier regulation under Title II (see *id.* § 153(44)), while providers of information services are not. See, e.g., *Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir.), *cert. denied*, 531 U.S. 828 (2000).

Whether a particular service is classified as a telecommunications service or an information service has consequences not only for federal regulation under the Communications Act, but also for the regulatory authority of the states. Beginning with its decision in the *Computer II* proceeding, the Commission has pursued a general policy of deregulating information services, and that policy has led to the preemption of various efforts by states to regulate information services. See, e.g., *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995). When Congress enacted the 1996 Act, it reinforced the

preemptive effect of the Commission's deregulatory policy by declaring that “the policy of the United States is \* \* \* to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” 47 U.S.C. § 230(b)(2) (emphasis added).

## **B. Internet Telephony**

Although the regulatory distinction between telecommunications services and information services is well established, the dividing line between the two categories of service is by no means clear, and determining on which side of the line a particular service falls is often difficult. The proper classification of a service requires familiarity not only with the complexities of the underlying federal regulatory scheme, but also with the technical characteristics of the service itself and the network architecture on which it rests. The classification process can be particularly complex when, as now, rapid changes in technology give rise to new services and displace previously settled service models. In these circumstances, attempts to distinguish between information services and telecommunications services can have unforeseen and potentially damaging consequences if they are not informed by a full understanding of the relevant regulatory and technical considerations.

One category of services whose regulatory status has become increasingly important is Internet telephony. Internet telephony, also referred to as “Voice over

IP” (VoIP) service, involves the real-time transmission of voice communications over the Internet. The traditional public switched telephone network (PSTN) employs circuit-mode technology, in which a dedicated circuit is set up for each call and is unavailable for other uses until the call is completed. In contrast, Internet telephony employs packet-mode technology, which allows voice communications to be broken down into packets that can be routed individually to their destination over networks that also carry data traffic.

Packet-mode technology has potentially significant advantages over circuit-mode technology as a means of transmitting voice communications. As a result, within the past decade, a growing number of firms have begun to offer Internet telephony services to the public. Today, Internet telephony services are being offered not only by new entrants, but also by such traditional telephone carriers as AT&T. See, e.g., *AT&T Brings Internet Telephone Service to New Jersey*, New York Times, March 30, 2004 (AT&T plans to offer VoIP service to the 100 largest metropolitan markets by the end of 2004).

The FCC first addressed the regulatory status of Internet telephony in 1998 as part of its *Universal Service Report*. See *Universal Service Report* ¶¶ 83-93. The Commission framed the issue by asking “whether any company offers a[n] [Internet telephony] service that provides users with pure ‘telecommunications.’” *Id.* ¶ 86. In

answering that question, the Commission tentatively distinguished between “computer-to-computer” Internet telephony, which the Commission did not regard as a telecommunications service, and “phone-to-phone” Internet telephony services, which “appear to present a different case.” *Id.* ¶ 87-88. The Commission expressed the tentative view that a provider of phone-to-phone Internet telephony service is providing a telecommunications service, rather than an information service, if: (1) the provider “holds itself out as providing voice telephony or facsimile transmission service”; (2) it “does not require the customer to use CPE [customer premises equipment] different from that CPE necessary to place an ordinary touch-tone call”; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan [NANP]; and (4) it “transmits customer information without net change in form or content.” *Id.* ¶ 88.

However, the Commission deliberately confined itself to a tentative assessment of the regulatory status of Internet telephony services. “[I]n the absence of a more complete record focused on individual service offerings,” the Commission found it inappropriate to make any “definitive pronouncements”:

Because of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be

quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.

*Id.* ¶ 90.

The FCC recently has undertaken a new rulemaking inquiry that is intended to enable the Commission to make more definitive judgments about the regulatory status of Internet telephony services. On March 10, 2004, the Commission released a notice of proposed rulemaking (NPRM) regarding “IP-enabled services” – “services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services.” *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 ¶ 1 (released March 10, 2004) (IP Services NPRM).<sup>1</sup> The NPRM identifies a wide range of legal and technical issues relating to the appropriate regulatory framework for Internet telephony and other IP-enabled services, and invites public comments on each of those issues.

The NPRM specifically invites comments on “the proper legal classification and appropriate regulatory treatment of each specific class of IP-enabled services

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<sup>1</sup> The IP Services NPRM is available online at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-28A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-28A1.pdf). A synopsis of the NPRM has been published at 69 Fed. Reg. 16193 (March 29, 2004).

\* \* \* .” IP Services NPRM ¶ 42. As part of this inquiry, the NPRM seeks comments on “[w]hich classes of IP-enabled services, if any, are ‘telecommunications services’ under the Act” and “[w]hich, if any, are ‘information services.’” *Id.* ¶ 43. The NPRM also seeks comments on “whether new and evolving technologies and services raise the possibility that a single IP-enabled communications might comprise both an ‘information service’ component and a ‘telecommunications service’ component.” *Ibid.*

In connection with this inquiry, the NPRM invites commenters to address “how, if at all, we should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate.” *Id.* ¶ 35. The NPRM offers a non-exhaustive list of “functional and economic factors” that might be used to differentiate among IP-enabled services, and invites commenters to address the relevance of those factors and to suggest additional factors that may be relevant. ¶¶ 36-37. For example, the NPRM asks commenters to address the potential significance of the “functional equivalence” of particular IP-enabled services to traditional telephony; the substitutability of IP-enabled services for traditional telephony; whether a particular service offers interconnection with the PSTN and/or utilizes traditional (NANP) telephone numbers; whether the service relies on peer-to-peer networking or the provider’s own centralized servers; and

whether regulatory requirements should differentiate among different “layers.” *Id.* ¶ 37.

The NPRM also seeks comments on the allocation of jurisdiction between the Commission and the states over IP-enabled services. The NPRM notes that “courts have recognized the preeminence of federal authority in the area of information services, particularly in the area [of] the Internet and other interactive computer services.” *Id.* ¶ 38. The NPRM therefore seeks comments on whether, and on what grounds, particular classes of IP-enabled services “should be deemed subject to *exclusive* federal jurisdiction with regard to traditional common carrier regulation.” *Id.* ¶ 41 (emphasis in original). More generally, the NPRM invites commenters to address the role that states can play in the federal regulatory regime and whether “there [are] categories of IP-enabled services that can be regulated at both the state and federal level without interfering with valid Commission policy.” *Ibid.*

In addition to the ongoing IP Services NPRM, the Commission has recently issued a declaratory order addressing the regulatory status of an Internet telephony service provided by another firm, pulver.com (Pulver). *In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27 (released February 19, 2004). Pulver provides a peer-to-peer service that

allows customers equipped with special CPE or “soft phones” to place calls over the Internet to other Pulver customers, using Pulver-assigned numbers rather than conventional NANP telephone numbers. *Id.* ¶¶ 3-6. Pulver does not itself offer any transmission service or transmission capability. *Id.* ¶ 3. In its declaratory ruling, the Commission determined that Pulver’s service is an unregulated information service and that “any state regulations that seek to treat [the service] as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation” of information services. *Id.* ¶ 15. The Commission expressly limited its ruling to “Pulver’s present \* \* \* offering” and “specifically decline[d] to extend our classification holding” to “communications that originate or terminate on the public switched telephone network \* \* \* .” *Id.* ¶¶ 2 n.3, 15 n.55. In the IP Services NPRM, the Commission has invited comments on whether the findings in the Pulver declaratory ruling should be extended to other IP-enabled services. IP Services NPRM ¶ 40.

## **II. The Present Controversy**

Vonage offers an Internet telephony service called DigitalVoice that enables subscribers with broadband Internet connections to make and receive telephone calls

over the Internet.<sup>2</sup> 290 F. Supp. 2d 993, 994-95. Vonage does not itself provide broadband access; persons who wish to use Vonage's service must obtain broadband connections from Internet access providers, such as their cable company or phone company. *Id.* at 995. A Vonage subscriber may use a conventional telephone, which is connected to a device that converts audio signals into digital packets, or the subscriber may place a call through his or her computer, using "soft phone" software provided by Vonage that performs the same processing function. Appellants' Separate Appendix (SA) 17-18. In either case, the subscriber's outgoing calls are routed over the Internet to Vonage's servers. If the destination is another Vonage customer, the server routes the packets to the called party over the Internet itself; if the destination is a telephone attached to the PSTN, the server converts the packets into appropriate digital audio signals and connects them to the PSTN using the services of telephone common carriers. *Ibid.*

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<sup>2</sup> A broadband Internet connection is one that allows the transfer of data to and from the subscriber at speeds significantly greater than traditional "dial-up" Internet connections. There is no universally accepted definition of how fast a connection must be in order to be denominated as "broadband." The FCC generally uses "broadband" nomenclature to refer to services and facilities that permit data to be transferred at more than 200 kilobits per second. See, e.g., *In the Matter of Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 F.C.C.R. 7717 ¶ 22 n.68 (released March 30, 2000); *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 14 F.C.C.R. 2398 ¶ 20 (released Feb. 2, 1999).

In July 2003, the Minnesota Department of Commerce filed an administrative complaint against Vonage, asserting that Vonage is providing telephone service in Minnesota and is subject to state laws and regulations governing telephone companies and telecommunications carriers. Among other things, the laws and regulations in question require carriers to obtain operating licenses, file tariffs, and provide and fund 911 services. See Minn. Stat. §§ 237.07, 237.16(1)(d), 237.49, 237.74(12); Minn. Rules §§ 7812.0200(1), 7812.0550(1). The Minnesota Department of Commerce sought an administrative order from the Minnesota Public Utilities Commission (MPUC) compelling Vonage to comply with the foregoing state regulatory requirements.

In response to the administrative complaint, Vonage argued that the state laws and regulations in question do not apply to it and that, if they do, they are preempted by the Communications Act. Vonage's preemption argument rests primarily on the contention that Vonage's Internet telephony service constitutes an information service under the Act.

In September 2003, the MPUC issued an order asserting regulatory jurisdiction over Vonage and requiring the company to comply with all state statutes and regulations relating to the offering of telephone service in Minnesota. In so holding,

the MPUC declined to decide whether Vonage's Internet telephony service is a telecommunications service or an information service under the Communications Act.

In response, Vonage filed suit against the MPUC in the District Court for the District of Minnesota. Vonage renewed its argument that, as applied to its service, the Minnesota laws in question are preempted by the Communications Act. Vonage argued that it is providing an information service that is not subject to state regulation and that, even if it were providing a telecommunications service, state regulation would still be preempted because Vonage's service cannot be separated into distinct intrastate and interstate components. At the same time, Vonage also sought relief from the FCC by filing a petition for a declaratory ruling of preemption. See 47 C.F.R. § 1.2 (Commission "may, \* \* \* on motion or on its own motion[,] issue a declaratory ruling terminating a controversy or removing uncertainty"). Vonage's petition currently remains pending before the Commission.

Vonage asked the district court to issue a preliminary injunction against the enforcement of the MPUC's order. Vonage initially suggested that, once the status quo had been preserved through the entry of a preliminary injunction, the district court could refer the preemption controversy to the primary jurisdiction of the FCC. See Memorandum in Support of Vonage Holdings Corporation's Motion for Preliminary Injunction, at 2 (filed Sept. 24, 2003) (after issuing preliminary

injunction, district court “could, thereafter, address the merits of Vonage’s claims, or refer the matter to the FCC”). The MPUC agreed that referral to the FCC was an appropriate disposition of the case. See Response of Minnesota Public Utilities Commission to Vonage Motion for a Preliminary Injunction at 2, 4-6 (filed Oct. 3, 2003). Subsequently, however, Vonage requested a permanent injunction and did not further address whether the matter should be referred to the FCC.

In October 2003, the district court entered a permanent injunction in favor of Vonage. 290 F. Supp. 2d 993. The court determined that Vonage is providing an information service under the Communications Act and that the Act preempts Minnesota's authority to subject Vonage to common carrier regulation. *Id.* at 996-1003. In January 2004, the court denied a motion by the MPUC for reconsideration, and the present appeal followed.

### **SUMMARY OF ARGUMENT**

When a court finds itself presented with legal issues that are within the regulatory authority of a federal agency, the primary jurisdiction doctrine permits the court to postpone its resolution of the issues while the agency addresses them in the first instance. The primary jurisdiction doctrine allows courts to avail themselves of the benefits of an agency’s expertise and knowledge regarding matters within its regulatory jurisdiction. It recognizes the primacy of federal agencies in the

construction and application of the statutes that they are charged with administering, while furthering the goals of uniformity and consistency in federal regulation. The primary jurisdiction doctrine may be invoked by a court *sua sponte* and may be raised on appeal as well as before the district court.

This appeal presents a compelling case for the invocation of the primary jurisdiction doctrine. The ultimate question before this Court on appeal is whether federal law and regulatory policy preempt Minnesota's authority to regulate Vonage's Internet telephony service. That question is now before the FCC in Vonage's pending declaratory ruling petition, and the FCC is simultaneously engaged in a broader inquiry into the general regulatory classification of Internet telephony service providers and other providers of IP-enabled services. Vonage's own regulatory status, and the status of Internet telephony services more generally, present complex questions of law, fact, and policy that are uniquely within the expertise of the FCC. Allowing the Commission to address those questions in the first instance, in the context of a fully developed factual record and a complete airing of the relevant legal considerations, will significantly advance this Court's own understanding of the issues and will promote the uniform development and application of the law in this area. At the same time, allowing the FCC to exercise primary jurisdiction will assist the Court in evaluating the potential impact of the Commission's regulatory

classification scheme in related areas, such as the obligations of providers like Vonage to assist in electronic surveillance under the Communications Assistance for Law Enforcement Act. Finally, waiting for the FCC to act will avoid unnecessarily restricting the FCC's own authority to administer the Communications Act and determine its applicability to entities such as Vonage. For all of these reasons, this Court should postpone its consideration of the merits of this appeal until the FCC has acted.

## **ARGUMENT**

### **Judicial Consideration of Vonage's Federal Preemption Claim Should Be Deferred While the FCC Addresses the Preemption Issue**

The underlying question in this case is whether federal communications law and federal regulatory policy preempt Minnesota's authority to regulate Vonage's Internet telephony service. That question is currently pending not only before this Court, but also before the FCC. As explained above, the Commission is considering a petition by Vonage for a declaratory ruling of preemption, which calls on the Commission to address the same statutory, regulatory, and technical questions that are being presented to this Court in the present appeal. At the same time, the Commission is engaged in a broader rulemaking proceeding that will address fundamental questions about the regulatory status of Internet telephony providers and

the allocation of regulatory authority over Internet telephony between the Commission and the states. The answers to those questions will provide a critical regulatory context for the more specific issues raised by Vonage's preemption claim. Indeed, the issues raised by Vonage's petition are largely incorporated into the industry-wide IP Services NPRM, which expressly notes that "the record developed here could influence [the Commission's] disposition" of Vonage's provider-specific petition. IP Services NPRM ¶ 32.

This Court thus finds itself considering issues that not only are within the regulatory jurisdiction of a federal agency, but that already have been presented to the agency and are under the agency's active consideration. The question that presents itself is whether and how this Court should coordinate its own consideration of those issues with the deliberations of the FCC. The answer to that question is provided by the primary jurisdiction doctrine.

The primary jurisdiction doctrine is a "common law doctrine used to coordinate administrative and judicial decisionmaking." *Red Lake Band of Chippewa Indians*, 846 F.2d 474, 476 (8th Cir. 1989). It "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body \* \* \* ." *United States v. Western Pacific RR*, 352 U.S. 59, 64 (1956); *Reiter v.*

*Cooper*, 507 U.S. 258, 268 (1993). The doctrine permits federal courts to postpone their own consideration of such issues while the litigants present the issues to the administrative agency for its consideration. The court allows the parties to invoke the agency's adjudicatory procedures, while the court itself either holds the judicial proceeding in abeyance or dismisses the suit without prejudice. See *Reiter*, 507 U.S. at 268 n.3; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 222-23 (1966).

The primary jurisdiction doctrine provides a mechanism for federal courts to “obtain the benefit of an agency's expertise and experience” regarding issues within the agency's regulatory jurisdiction. *Access Telecommunications*, 137 F.3d at 608; *Red Lake*, 846 F.2d at 476. The doctrine also promotes “[u]niformity and consistency in the regulation of business entrusted to a particular agency.” *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *Atlantis Express, Inc. v. Standard Transportation Services*, 955 F.2d 529, 532 (8th Cir. 1992) (primary jurisdiction doctrine promotes “uniformity in statutory and regulatory construction”); *DeBruce Grain, Inc. v. Union Pacific RR Co.*, 149 F.3d 787, 789 (8th Cir. 1998) (primary jurisdiction doctrine applies when issue “involves the special expertise of the agency and would impact the uniformity of the regulated field”). The doctrine also provides a mechanism for obtaining an agency's views regarding

issues of statutory interpretation where the agency's views would potentially be entitled to *Chevron* deference. Compare *American Automobile Manufacturers Ass'n v. Massachusetts Dep't of Environmental Protection*, 163 F.3d 74, 81 (1st Cir. 1998), with *Baltimore and Ohio Chicago Terminal RR v. Wisconsin Central Limited*, 154 F.3d 404, 411 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999).

Because the doctrine “exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the parties,” it is not subject to waiver by the parties. *Red Lake*, 846 F.2d at 476; *Atlantis Express*, 955 F.2d at 532. Instead, it may be raised by a court *sua sponte* at any point in the proceeding, even on appeal. See, e.g., *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1117 (1st Cir. 1982) (invoking primary jurisdiction *sua sponte* on appeal).

This litigation presents a quintessential case for invocation of the primary jurisdiction doctrine. Whether Vonage's Internet telephony service constitutes an information service or a telecommunications service under the Communications Act requires close consideration of complex statutory, regulatory, and technical questions. The full range of considerations that may bear on Vonage's regulatory status is suggested by the Commission's IP Services NPRM. As noted above, the NPRM identifies a host of factors that may (or may not) prove germane in classifying and

regulating Vonage and other Internet telephony providers under the Communications Act. See p. 10 *supra*. Evaluating the significance of those factors, and determining how they apply to the specific Internet telephony service being offered by Vonage, is a complex inquiry, one that calls for intimate familiarity with the regulatory and technical aspects of Internet telephony and the potentially far-reaching consequences of the classification process.

The FCC is uniquely situated to provide guidance regarding these issues. Unlike the courts, the Commission has direct and ongoing responsibility for administering the Communications Act and evaluating the often complex interactions between law and technology that the Act's regulatory scheme entails. The Commission is intimately familiar with the existing architecture and ongoing evolution of the Internet. This expertise gives it special insight into how the distinction between information services and telecommunications services can best be applied to Internet telephony services like the one provided by Vonage. The Commission's views in this area are entitled to particular weight, not only under accepted principles of administrative law, see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but also because the statutory divide between information services and telecommunications services derives from the Commission's own longstanding regulatory distinction between basic and enhanced services. See pp. 3-4

*supra*. When a court is called on to determine on which side of the line a particular service falls, the views of the agency that originally drew the line should be heard before the court acts. The Commission is also uniquely situated to address the policy and technical questions raised by Vonage’s alternative argument (see pp. 14-15 *supra*) that the interstate and intrastate components of its service are so intertwined that state regulation is subject to federal preemption even if Vonage is providing a telecommunications service rather than an information service.

Allowing the FCC to address the preemption issues in this case in the first instance will also give this Court a better understanding of the relevant facts regarding Internet telephony in general and Vonage’s service in particular. In the *Universal Service Report*, the Commission declined to take any conclusive position regarding the classification of Internet telephony services because it lacked an adequate record. The Commission reasoned that, “when dealing with emerging services and technologies in environments as dynamic as today’s Internet and telecommunications markets,” it is vital “to have as complete information and input as possible.” *Universal Service Report* ¶ 90.<sup>3</sup> Unlike the *Universal Service Report*

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<sup>3</sup> Although the district court acknowledged that the FCC’s views in the *Universal Service Report* were tentative, the court nevertheless relied heavily on those views in its assessment of Vonage’s service. See, e.g., 290 F. Supp. 2d at 1000-1001. In so doing, the district court appears to have placed greater reliance on the FCC’s tentative views than the FCC itself was prepared to do, without the benefit of

proceeding, and unlike the expedited proceedings before the district court in this case, which produced only a limited record regarding Vonage's service, the Commission's current rulemaking proceeding regarding IP-enabled services appears to provide a suitable mechanism for developing the "information and input" needed to make informed judgments about the regulatory status of Internet telephony services and the distinctions, if any, that should be drawn among different providers of such services. This Court's consideration of Vonage's claim can only benefit from the factual, legal, and policy illumination that the Commission's undertaking will provide.

At the same time, invocation of the primary jurisdiction doctrine will serve the goal of "promot[ing] uniformity and consistency within the particular field of regulation." *Access Telecommunications*, 137 F.3d at 608. Uniformity and consistency are particularly important in the regulatory treatment of Internet services because of the Internet's interstate (and international) architecture and the lack of any necessary correlation between service provider and customer facilities and particular physical locations. Here, for example, Vonage specifically asserts that its customers may use its service "virtually anywhere in the world so long as they have access to a broadband Internet connection," and that it cannot "independently determine the physical location of its customers." 290 F. Supp. 2d at 995. This Court has

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the kind of comprehensive record that the *Universal Service Report* envisioned.

previously invoked the primary jurisdiction doctrine in order to serve “the need for a uniform response to maintain regulatory uniformity.” *DeBruin Grain*, 149 F.3d at 789-90. Here, the interstate and international dimensions of the Internet make regulatory uniformity imperative.

Deferring to the Commission’s pending proceedings will also minimize the risk that this Court’s decision will have unforeseen legal consequences beyond the immediate confines of this litigation. For example, the Communications Assistance for Law Enforcement Act (CALEA), a federal statute that obligates telecommunications carriers to develop technical capabilities to assist in authorized electronic surveillance, employs regulatory distinctions that are similar (although not identical) to the Communications Act’s distinction between information services and telecommunications services. See 47 U.S.C. §§ 1001(6), 1001(8), 1002(a). The Commission is presently entertaining a CALEA rulemaking petition that invites the Commission, *inter alia*, to address the relationship between CALEA and the Communications Act with regard to broadband Internet telephony. The Commission has stated that it “plans to initiate a rulemaking proceeding in the near future to address” those issues and that it “will closely coordinate our efforts in these two dockets.” IP Services NPRM ¶ 50 n.158. The Commission is thus in a unique position to consider how line-drawing exercises under the Communications Act may

affect the ability of federal, state, and local law enforcement agencies to carry out critical surveillance under CALEA. If this Court were to undertake to classify Vonage's Internet telephony service without the benefit of the Commission's views, it could profoundly, albeit inadvertently, upset the separate statutory scheme established by Congress to effectuate federal and state electronic surveillance laws.<sup>4</sup> Staying the present proceedings will ensure that the Commission can make a decision about the classification of Vonage's service with full consideration of the Commission's statutory responsibilities for the implementation of CALEA.

Finally, allowing the Commission to formulate and present its views regarding the preemption issues not only will assist this Court in its own deliberations, but also will protect the regulatory responsibilities entrusted to the Commission by Congress. If this Court were to address Vonage's regulatory status and the scope of Minnesota's regulatory authority before the Commission acts in its pending proceedings, and the Commission's subsequent views proved to be inconsistent with this Court's decision,

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<sup>4</sup> CALEA's assistance obligations apply to "telecommunications carriers." See 47 U.S.C. § 1002(a). CALEA's definition of "telecommunications carrier" "does not include \* \* \* persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i). CALEA's definition of "information services," in turn, is similar to the definition of "information service" in the Communications Act. See *id.* § 1001(6). Accordingly, a holding by this Court that Vonage's service is an information service under the Communications Act could prejudice the outcome of the Commission's inquiry into whether entities such as Vonage are subject to CALEA.

the Commission could find itself deprived of an adequate opportunity to defend the merits of its position in the courts, and the Commission's regulatory role would be correspondingly compromised.<sup>5</sup>

For all of the foregoing reasons, this is an appropriate case – indeed, a compelling one – for invocation of the primary jurisdiction doctrine. If this Court agrees with that assessment, the simplest way for the Court to proceed is to hold the present appeal in abeyance pending the completion of the Commission's proceedings. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S.

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<sup>5</sup> The ongoing *Brand X* litigation in the Ninth Circuit provides an example of the potential procedural consequences that can arise when a court addresses questions within the FCC's regulatory jurisdiction before the agency itself has an opportunity to do so. See *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (*per curiam*), *stay granted pending cert.* (April 9, 2004). In *Brand X*, the FCC issued a declaratory ruling that cable modem service is exclusively an information service for purposes of the Communications Act. Petitions for review were consolidated in the Ninth Circuit, which had itself addressed the regulatory classification of cable modem service previously in *AT&T v. City of Portland*, 216 F.3d 871 (2000). In *City of Portland*, the Ninth Circuit had concluded – without the benefit of the FCC's views – that cable modem service entails both an information service *and* a telecommunications service. When the Ninth Circuit was presented with the Commission's contrary position in *Brand X*, the court concluded that it was bound by its prior decision in *City of Portland*, and therefore refused to consider the grounds for the Commission's decision or the record on which the Commission's determination rested. See 216 F.3d at 1128-32.

248, 254 (1936). The Court therefore is free to stay this appeal until the Commission completes its own deliberations. *Cf. Distringas*, 693 F.2d at 1117-19 (invoking primary jurisdiction but retaining appellate jurisdiction). Once the Commission has acted, the appeal can resume before this Court with the benefit of the Commission's intervening decisions, and the parties can address the impact of those decisions on the appeal.

Alternatively, if the Court prefers not to maintain this appeal on its docket while waiting for the Commission to act, the Court may vacate the decision of the district court and remand with directions for the district court itself to await the Commission's exercise of its primary jurisdiction. See, e.g., *Iowa Beef Processors, Inc. v. Illinois Central Gulf RR Co.*, 685 F.2d 255 (8th Cir. 1982) (vacating district court order and directing the district court on remand to refer the case to the ICC). Under this alternative approach, the district court would hold its own proceedings in abeyance pending completion of the FCC's proceedings, and would then address the consequences of the Commission's action on Vonage's claim in the first instance. If the Court chooses this path, however, it should take care to preserve the status quo by directing the district court to issue appropriate interim injunctive relief prohibiting the imposition of Minnesota's regulatory requirements *pendente lite*. The same legal and technical complexities that justify referring this controversy to the Commission

make it appropriate for the district court to preserve the status quo, rather than permit the unilateral imposition of new state regulatory requirements, while the Commission addresses the controversy.

### CONCLUSION

For the foregoing reasons, this appeal should be held in abeyance pending the FCC's disposition of Vonage's pending petition for declaratory ruling and the IP Services proceeding. Alternatively, the decision below should be vacated and the case remanded to the district court for entry of an appropriate order preserving the status quo and staying the suit pending the FCC's disposition of those proceedings.

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April 21, 2004

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitation in Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Civil Procedure. The brief contains 6,409 words, as determined by Corel WordPerfect 9.

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Scott R. McIntosh

## CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2004, I filed and served the foregoing BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS *AMICI CURIAE* by causing the required number of copies of the brief to be filed with clerk of the court and served on the following counsel by first-class mail:

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