

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NATIONAL ASSOCIATION OF STATE	)	
UTILITY CONSUMER ADVOCATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.
	)	
FEDERAL COMMUNICATIONS	)	
COMMISSION and UNITED STATES OF	)	
AMERICA,	)	
	)	
Respondents.	)	

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344 and Fed. R. App.

P. Rule 15(a), the National Association of State Utility Consumer Advocates

(“NASUCA”), on behalf of its members,¹ hereby petitions this Court for review of the

¹ NASUCA is a voluntary association of 43 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. See Attached Affidavit of Charles Acquard, NASUCA’s Executive Director.

Federal Communications Commission's ("FCC's") Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (rel. November 12, 2004) ("*Vonage Order*"). This Petition is therefore timely brought. 47 C.F.R. §§ 1.4(b), 1.103(b). Venue is proper in this Court pursuant to 28 U.S.C. § 2343.²

NASUCA fully participated in the underlying agency proceedings, filing both initial and reply comments therein.³ In the *Vonage Order*, the FCC found that Vonage Holdings Corporation's ("Vonage") DigitalVoice service, which provides Voice over Internet Protocol ("VoIP") service could not be separated into interstate and intrastate communications for compliance with Minnesota's telephone service regulations without negating federal policies and rules.⁴ Based on its determination, the FCC preempted an order of the Minnesota Public Utilities Commission ("Minnesota PUC") subjecting Vonage to the state's telephone service regulations and made it clear that, for "DigitalVoice and other IP-enabled services having the same capabilities ... comparable regulations of other states must likewise yield...."⁵ NASUCA petitions for review because portions of the FCC's *Vonage Order* exceed FCC jurisdiction and authority, are

² The *Vonage Order* arose from the petition of Vonage Holdings Corporation requesting the FCC to preempt the action of the Minnesota Public Utilities Commission, which had asserted jurisdiction over Vonage's DigitalVoice services.

³ NASUCA's initial comments were filed with the FCC on October 27, 2003 and are available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515287457. NASUCA's reply comments were filed with the FCC on November 24, 2003 and are available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515291240.

⁴ The FCC declined to determine whether Vonage's VoIP service was either "telecommunications service" or "information service" under the Communications Act of 1934, as amended. 47 U.S.C. §§ 151 et seq.

⁵ *Vonage Order*, ¶ 1.

arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. NASUCA respectfully requests that this Court declare unlawful, vacate, enjoin, and set aside the *Vonage Order*.

NASUCA meets the requirements for standing under the associational standing rules set forth in *Warth v. Seldin*, 422 U.S. 490, 511 (1975) and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344-45 (1977). In *Warth*, the United States Supreme Court, addressing the issue of standing for a voluntary membership association, stated:

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. ... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. ... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.⁶

In *Hunt*, which addressed whether a state agency had standing to appeal on behalf of the apple growers whose interests state law directed the state agency to protect, the Supreme Court cited *Warth* with approval, then expressed the rule succinctly:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.⁷

⁶ *Warth*, 422 U.S. at 511.

⁷ *Hunt*, 432 U.S. at 343.

In *Hunt*, the Supreme Court found that a state agency had standing to appeal because its constituents had the characteristics of members.

Here, NASUCA is a voluntary association of state agencies representing the interests of consumers pursuant to state law and satisfies the requirements of *Warth*. As required under *Warth*, NASUCA's members, pursuant to state law, represent the interests of retail consumers in their states who may be harmed because their state commissions -- under the FCC's decision -- are unable, for example, to determine whether a VoIP service is in the public interest or whether a VoIP service provider is managerially, financially or technically capable of providing service in the state.

The FCC's policy is a national policy setting forth a rule that affects all of NASUCA's members' interests. Indeed, the FCC explicitly stated that its decision goes beyond the company and the state involved in the case below:

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.⁸

The individual participation of any single office is not necessary to seek review of the FCC's decision in this Court.

NASUCA satisfies the first prong of *Hunt*. *Hunt* requires that the members of the association would otherwise have standing to sue in their own right. In addition to

⁸ *Vonage Order*, ¶ 46.

having authority to represent the interests of utility consumers in their respective jurisdictions, many NASUCA members also have the authority to represent these consumer interests before federal regulatory agencies and courts.⁹

NASUCA satisfies the second prong of *Hunt* as well. The second prong of *Hunt* requires that the interests the association seeks to represent are germane to the association's purpose. Article II of NASUCA's Articles of Incorporation and Article II of NASUCA's Constitution both provide that the purpose of the association is to "improve communication among members, to enhance their impact on public policy at

⁹*See, e.g.*, 71 P.S. § 309-4(a) (1990), empowering the Pennsylvania Consumer Advocate to represent the interests of consumers before the Pennsylvania Public Utility Commission, before similar federal regulatory commissions and before state and federal courts; W. Va. Code § 24-1-1(f)(2) (1997) and Public Service Commission of West Virginia General Order No. 195.3, Section A(5), Rule Establishing a Consumer Advocate Division, empowering the West Virginia Consumer Advocate to participate in matters affecting West Virginia consumers before federal utility regulatory commissions and federal courts; MD Public Utilities Code Ann. §2-205(b) (1999), empowering the Maryland Office of People's Counsel to participate in state and federal proceedings and in state and federal courts relating to utility rates for Maryland consumers; Minn. Stat. §8.33 (2003), empowering the Minnesota Attorney General to participate in federal proceedings relating to utility rates for Minnesota consumers; N.C. Gen. Stat. §62-20 (2004), N.C. Gen. Stat. §114-2 (2004), N.C. Gen. Stat. §75-9 (2004) empowering the North Carolina Attorney General to initiate proceedings before state and federal agencies and in state and federal courts to protect North Carolina utility consumers; D.C. Code Ann. §34-804 (2004), empowering the Office of the People's Counsel for the District of Columbia to represent the interests of utility consumers in proceedings before the Public Service Commission of the District of Columbia, similar federal agencies and federal courts; 29 Del. C. §8808 (2004), empowering the Delaware Public Advocate to represent the interests of Delaware's utility consumers in proceedings before the Delaware Public Service Commission, similar federal agencies and state and federal courts; Conn. Gen. Stat. §16-2a (2003), empowering the Connecticut Office of Consumer Counsel to appear in and participate in any regulatory or judicial proceedings, federal or state, in which Connecticut consumer interests may be affected; Colo. Rev. Stat. §40-6.5-106(2.5) (2003), authorizing the Colorado Office of Consumer Counsel to petition, initiate or seek to intervene in any proceeding before a federal agency which regulates utility rates or service, or federal court when the matter before such court or agency will affect rates or services for consumers of utility services within the state; Ala. Code §37-1-16 (2003), empowering the Alabama Attorney General to initiate proceedings before federal agencies and courts in matters affecting the interests of its citizens in utility issues; Iowa Code §475A.1-2 (2003), authorizing the Iowa Consumer Advocate to act as an attorney for Iowa consumers in proceedings before federal and state agencies and related judicial review proceedings and appeals related to utility issues; Ind. Code Ann. § 8-1-1.1-9.1(c)) (2004), empowering the Indiana Office of Utility Consumer Counselor to appear on behalf of Indiana ratepayers and the public in hearings before the Federal Energy Regulatory Commission and in appeals from the orders of the Federal Energy Regulatory Commission where consumer interests in utility issues are at stake; Tenn. Code Ann. §65-4-118 (2003) empowering the Tennessee Consumer Advocate Division to represent the interests of Tennessee consumers of public utilities services in any matter or proceeding before the authority or any other administrative, legislative or judicial body; and Ariz. Rev. Stat. §40-461, §40-462, §40-464 (2004), empowering the Arizona Residential Utility Consumer Office to represent the interests of residential utility consumers in regulatory proceedings.

the State and Federal levels, and otherwise to assist them in the representation of utility consumer interests.”¹⁰ Article X of NASUCA’s Constitution provides for the adoption of By-Laws. Article V of NASUCA’s By-Laws authorizes NASUCA to “take positions in regulatory or judicial litigation, by majority vote, in behalf of the organization.”¹¹

The interest here that NASUCA seeks to represent is the interest of its members in representing the consumers in their respective jurisdictions in ensuring that VoIP services are in the public interest. The consumers’ interest is related to a matter of federal policy. This interest is identical to the purpose of NASUCA as set forth in its Article of Incorporation and its Constitution to represent its members’ interests in matters of federal policy. In this appeal and in the proceeding before the FCC below, NASUCA’s members authorized the association, by majority vote, to bring these actions on their behalf.

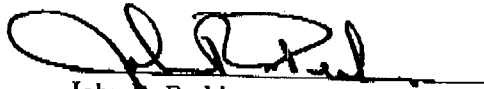
NASUCA also satisfies the third and final prong of the *Hunt* standards. The third prong of *Hunt* requires that neither the claim asserted nor the relief requested requires the participation of individual members in the suit. The issue raised in this appeal by NASUCA involves an issue of federal policy that addresses the ability of consumers, throughout the Nation, who are represented by NASUCA’s members, to be assured that VoIP service providers are capable of providing VoIP service and that the service sought to be provided is in the public interest. The relief sought, i.e., allowing state commissions to certify VoIP service providers and tariff VoIP services, is a national policy issue that does not require the participation of any individual NASUCA member.

¹⁰ Articles of Incorporation, National Association of State Utility Consumer Advocates, Inc., Art. II, Charter Number 752992 (on file with Florida Department of State), 17 Jun. 1980.

¹¹ Article V, Section 3 (b) of the By-Laws of the National Association of State Utility Consumer Advocates, Certified June, 1993.

Pursuit of this appeal by NASUCA on behalf of its members is significantly more efficient than requiring its forty-three members individually to intervene in administrative and judicial proceedings on behalf of consumers affected by the policies at issue in this case.¹² Since NASUCA is authorized to take legal action on behalf of its members and the individual participation of any single member is not necessary to obtain the relief sought, NASUCA satisfies the third prong in *Hunt* and has standing to bring this appeal.

Respectfully submitted,



John R. Perkins
Consumer Advocate
Craig Graziano
Attorney
Iowa Office of Consumer Advocate
310 Maple Street
Des Moines, IA 50319-0063

Telephone: 515-281-5984
Facsimile: 515-242-6564



Janine Migden-Ostrander
Consumers' Counsel
David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
Terry L. Etter
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: 614-466-8574
Facsimile: 614-466-8475

¹² Many NASUCA member offices are small and rely on NASUCA for representation in matters of federal policy.

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

January 11, 2005

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, NASUCA submits the following corporate disclosure statement.

NASUCA is a non-profit corporation incorporated in the State of Florida, with offices at 8380 Colesville Road, Suite 101, Silver Spring, MD 20910. NASUCA is an association of 44 advocate offices in 42 states and the District of Columbia. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA member offices operate independently from the regulatory commissions in their states. Some are separately established utility advocate organizations, while others are divisions of larger departments, such as the Office of Attorney General. NASUCA associate and affiliate member offices also serve utility consumers, but have not been created by state law or do not have statewide authority.

State of Maryland

Montgomery County

AFFIDAVIT

I, Charles A. Acquard, do say and depose that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I am the Executive Director of the National Association of State Utility Consumer Advocates ("NASUCA").
2. NASUCA is a non-profit corporation incorporated in the State of Florida in 1980. NASUCA is a voluntary association of 43 advocate offices in 41 states and the District of Columbia. NASUCA's full Members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before regulatory agencies and in courts. NASUCA member offices operate independently from the regulatory commissions in their states. Some are separately established utility advocate offices, while others are divisions of larger departments, such as their states' Offices of Attorney General. Additionally, NASUCA has several Associate and Affiliate member offices who also serve utility consumers, but who have not been established by state law or do not have statewide authority to represent consumers.
3. In addition to having authority to represent the interests of utility consumers in their respective jurisdictions, many NASUCA members also have the authority to

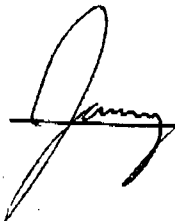
represent these consumer interests before federal regulatory agencies and courts.¹

¹ See, e.g., Pennsylvania, 71 P.S. § 309-4(a) (1990) empowering the Pennsylvania Consumer Advocate to represent the interests of consumers before the Pennsylvania Public Utility Commission, before similar federal regulatory commissions and before state and federal courts; West Virginia, W. Va. Code § 24-1-1(f)(2) (1997) and Public Service Commission of West Virginia General Order No. 195.3, Section A(5), Rule Establishing a Consumer Advocate Division, empowering the West Virginia Consumer Advocate to participate in matters affecting West Virginia consumers before federal utility regulatory commissions and federal courts; Maryland, MD Public Utilities Code Ann. §2-205(b) (1999), empowering the Maryland Office of People's Counsel to participate in state and federal proceedings and in state and federal courts relating to utility rates for Maryland consumers; Minnesota, Minn. Stat. §8.33 (2003), empowering the Minnesota Attorney General to participate in federal proceedings relating to utility rates for Minnesota consumers; North Carolina, N.C. Gen. Stat. §62-20 (2004), N.C. Gen. Stat. §114-2 (2004), N.C. Gen. Stat. §75-9 (2004) empowering the North Carolina Attorney General to initiate proceedings before state and federal agencies and in state and federal courts to protect North Carolina utility consumers; District of Columbia, D.C. Code Ann. §34-804 (2004), empowering the Office of People's Counsel for the District of Columbia to represent the interests of utility consumers in proceedings before the DC Public Service Commission, similar federal agencies and federal courts; Delaware, 29 Del. C. §8808 (2004), empowering the Delaware Public Advocate to represent the interests of Delaware's utility consumers in proceedings before the Delaware Public Service Commission, similar federal agencies and state and federal courts; Connecticut, Conn. Gen. Stat. §16-2a (2003), empowering the Connecticut Office of Consumer Counsel to appear in and participate in any regulatory or judicial proceedings, federal or state, in which Connecticut consumer interests may be affected; Colorado, Colo. Rev. Stat. §40-6.5-106(2.5) (2003), authorizing the Colorado Office of Consumer Counsel to petition, initiate or seek to intervene in any proceeding before a federal agency which regulates utility rates or service, or federal court when the matter before such court or agency will affect rates or services for consumers of utility services within the state; Alabama, Ala. Code §37-1-16 (2003), empowering the Alabama Attorney General to initiate proceedings before federal agencies and courts in matters affecting the interests of its citizens in utility issues; Iowa, Iowa Code §475A.1-2 (2003), authorizing the Iowa Consumer Advocate to act as an attorney for Iowa consumers in proceedings before federal and state agencies and related judicial review proceedings and appeals related to utility issues; Indiana, Ind. Code Ann. § 8-1-1.1-9.1(c) (2004), empowering the Indiana Office of Utility Consumer Counselor to appear on behalf of Indiana ratepayers and the public in hearings before the Federal Energy Regulatory Commission and in appeals from the orders of the Federal Energy Regulatory Commission where consumer interests in utility issues are at stake; Tennessee, Tenn. Code Ann. §65-4-118 (2003) empowering the Tennessee Consumer Advocate Division to represent the interests of Tennessee consumers of public utilities services in any matter or proceeding before the authority or any other administrative, legislative or judicial body; and Arizona, Ariz. Rev. Stat. §40-461, §40-462, §40-464 (2004), empowering the Arizona Residential Utility Consumer Office to represent the interests of residential utility consumers in regulatory proceedings.

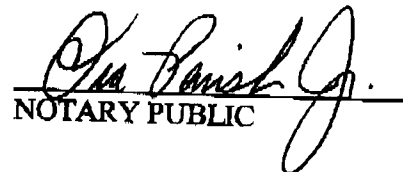
4. By filing this appeal, NASUCA seeks to represent the interests of its members in discharging their responsibilities to protect the interests of utility consumers in their respective jurisdictions.
5. NASUCA, through its Constitution and its Articles of Incorporation, is empowered to act on behalf of its members and does not require the participation of individual member offices to participate in court proceedings. The Articles provide in part that: "The general purpose of this corporation shall be to improve communication among members, to enhance their impact on public policy at the State and Federal level, and otherwise to assist them in the representation of the utility consumer interests."²



CHARLES A. ACQUARD
Executive Director, NASUCA



Taken, sworn, and subscribed before me this 7th day of January, 2005.

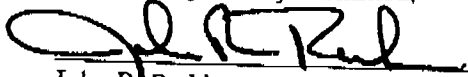


NOTARY PUBLIC

ORA PARISH, JR.
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires November 15, 2008

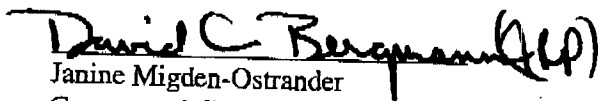
²Articles of Incorporation, National Association of State Utility Consumer Advocates, Inc., Art. II, Charter Number 752992 (on file with Florida Department of State), 17 Jun. 1980.

Respectfully submitted,



John R. Perkins
Consumer Advocate
Craig Graziano
Attorney
Iowa Office of Consumer Advocate
310 Maple Street
Des Moines, IA 50319-0063

Telephone: 515-281-5984
Facsimile: 515-242-6564



Janine Migden-Ostrander
Consumers' Counsel
David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
Terry L. Etter
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
(614) 466-8574
FAX (614) 466-8475

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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CERTIFICATE OF SERVICE

I, John R. Perkins, do hereby certify that I caused a copy of the Petition For Review and Corporate Disclosure Statement of the National Association of State Utility Consumer Advocates to be served by First Class Mail this 11th day of January, 2005, on all parties on the attached service list.



John R. Perkins
Consumer Advocate
Iowa Office of Consumer Advocate
310 Maple Street
Des Moines, IA 50319-0063

SERVICE LIST

Dennis Ahlers
Attorney General's Office
525 Park St., Suite 200
St. Paul, MN 55103

J. Jeffery Oxley
Office of the General Counsel
730 Second Ave. S., Suite 1200
Minneapolis, MN 55402

John Rogovin
FCC
445 12th St. SW, Room 8-A741
Washington, DC 20554

John Ashcroft
Attorney General
10th St. & Constitution Ave. NW
Washington, DC 20530

Catherine G. O'Sullivan
Nancy Garrison
US Department of Justice
Antitrust Division, Appellate Section
Patrick Henry Bldg.
601 D St. NW, Room 10535
Washington, DC 20530

Jeffrey Carlisle
Bureau Chief
FCC
Wireline Competition Bureau
445 12th St., SW
Washington, DC 20554

Inclusive Technologies,
Temper Complex
37 Miriam Drive
Matawan, NJ 07747

Paul Clement
US Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530

Matthew Bennett
Alliance for Public Technology
919 18th St. NW, Suite 900
Washington, DC 20006

Robert Gurss
Association of Public Safety Communications
1725 DeSales St. NW, Suite 808
Washington, DC 20036

Paul Hartman
Beacon Telecommunications Advisors
8801 South Yale Ave., Suite 450
Tulsa, OK 74137

Albert Cinelli
Robert Bye
Cinergy Communications Company
8829 Bond St.
Overland Park, KS 66214

John Jones
CenturyTel Inc.
100 Century Park Dr.
Monroe, LA 71203

Karen Brinkmann
CenturyTel Inc.
Latham & Watkins
555 11th St. NW
Washington, DC 20004

Jeff Campbell
Technology and Communications Policy
Cisco Systems Inc.
601 Pennsylvania Ave NW
Washington, DC 20004

Scott Blake Harris
Maureen Flood
Cisco Systems Inc.
Harris, Wiltshire & Grannis
1200 18th St. NW
Washington, DC 20036

Debbie Goldman
George Kohl
Communications Workers of America
501 Third St. NW
Washington, DC 20001

Donald Elardo
DJE Teleconsulting
9122 Potomac Ridge Rd.
Great Falls, VA 22006

Gregg Sayre
Frontier and Citizens Telephone Companies
180 South Clinton Ave.
Rochester, NY 14646

Ellen LeVine
Public Utilities Commission of California
505 Van Ness Ave.
San Francisco, CA 94102

Jan Reimers
ICORE Inc.
326 S. 2nd St.
Emmaus, PA 18049

David Lynch
Iowa Utilities Board
350 Maple St.
Des Moines, IA 50319

Staci Pies
Federal Regulatory Affairs
Level 3 Communications
8270 Greensboro Dr., Suite 900
McLean, VA 22102

Nancy Pollock
Metropolitan 911 Board
2099 University Ave. West
St. Paul, MN 55104

Edward Garvey
Minnesota Department of Commerce
85 7th Place East, Suite 500
St. Paul, MN 55101

Richard Johnson
Minnesota Independent Coalition
Moss & Barnett
4800 Wells Fargo Center
90 South 7th St.
Minneapolis, MN 55402

Mike Hatch
Steve Alpert
Minnesota Office of the Attorney General
445 Minnesota St., Suite 900
St. Paul, MN 55101

James Beutelspacher
Minnesota Statewide 911 Program
658 Cedar St., Room 510
St. Paul, MN 55155

Michael Strand
Montana Independent Telecommunications
Box 5239
Helena, MT 59604

Geoffrey Feiss
Montana Telecommunications Association
208 North Montana Ave., Suite 207
Helena, MT 59601

Jeanine Poltronieri
Motorola Inc.
1350 I Street NW
Washington, DC 20005

Wilkie Farr & Gallagher
Motorola Inc.
1875 K Street NW
Washington, DC 20006

Qualex International
The Portals, 445 12th St. SW
Room CY-B402
Washington, DC 20554

Richard Askoff
National Exchange Carrier Assoc.
80 South Jefferson Rd.
Whippany, NJ 07981

L. Marie Guillory
Daniel Mitchell
National Telecommunications Cooperative
4121 Wilson Blvd., 10th Floor
Arlington, V A 22203

Dawn Jabloski Ryman
Public Service Commission of New York
Three Empire State Plaza
Albany, NY 12223

Stuart Polikoff
OPASTCO
21 Dupont Circle NW, Suite 700
Washington, DC 20036

Eric Branfman
PAETEC Communications
3000 K Street NW, Suite 300
Washington, DC 20007

Steven Nourse
Matthew Satterwhite
PUCO
180 E. Broad St., 7th Floor
Columbus, OH 43215

Sharon Devine
Qwest Communications
607 14th St. NW, Suite 950
Washington, DC 20005

Thomas Fisher Jr.
Rural Iowa Independent Telephone
Whitfield & Eddy
317 Sixth Ave., Suite 1200
Des Moines, IA 50309

Christopher Heimann
SBC Communications
1401 I Street NW
Washington, DC 20005

LeRoy Koppendrayner
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101

Paul Feldman
SureWest Communications
Fletcher, Heald & Hildreth
1300 North 17th St., 11th Floor
Arlington, VA 22209

John Harwood III
SBC Communications
Wilmer, Cutler & Pickering
2445 M St. NW
Washington, DC 20037

Thomas Jones
Time Warner
Wilkie Farr & Gallagher
1875 K St. NW
Washington, DC 20006

Rupaco Gonzalez, JR.
The Gonzalez Law Firm
PMB #17
8127 Mesa River, B206
Austin, TX 78759

Norina Moy
Richard Johnke
Sprint Corp.
401 9th St., Suite 400
Washington, DC 20004

John Malcolm
Deputy Assistant Attorney General
1875 K St. NW
Washington, DC 20006

Bruce Jacobs
The Voice on the Net Coalition
Shaw Pittman
2300 N. St., NW
Washington, DC 20037

TCA Inc.
1465 Kelly Johnson Blvd.
Suite 200
Colorado Springs, CO 80920

Andrew Lipman
USA DataNet
Swedler Berlin Shereff Friedman
3000 K St. NW, Suite 300
Washington, DC 20007

Patrick Kelly
FBI
J. Edgar Hoover Bldg.
935 Pennsylvania Ave. NW, Room 7427
Washington, DC 20535

William Warinner
Warinner, Gesinger & Assoc.
10561 Barkley St., Suite 550
Overland Park, KS 66212

Indra Sehdev chalk
US Telecom Assoc.
1401 H St. NW, Suite 600
Washington, DC 20005

Christy Kunin
8 X 8 Inc.
Gray Cary Ware & Friedenrich
1625 Massachusetts Ave. NW, Suite 300
Washington, DC 20036

Jonathan Lee
Competitive Telecommunications Assoc.
1900 M St. NW, Suite 800
Washington, DC 20036

Robert Oenning
Vonage
Building 20
Camp Murray, WA 98430

John Goodman
Verizon
1515 North Courthouse Rd., Suite 500
Arlington, VA 22201

Bryan Martin
8 X 8 Inc.
2445 Mission College Blvd.
Santa Clara, CA 95954

Richard Whitt
Worldcom dba MCI
1133 19th St. NW
Washington, DC 20036

Janice Myles
Wireline Competition Bureau
FCC
The Portals, 445 12th St. SW, Room 5-C327
Washington, DC 20554

Great Plains Communications, Inc.
P O Box 500
Blair, NE 68008

General Communication, Inc.
Att: Tina Pidgeon
1133 17th Street, N.W., Ste 410
Washington, DC 20036

Nebraska Public Service Commission
Att: Gerald L. Vap
300 The Atrium
1200 N Street, P.O. Box 94927
Lincoln, NE 68509 -4927

Cox Communications
Dow, Lohnes & Albertson, PLLC
Att: To-Puyen Truong
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036 -6802

National Association of Regulatory
Utility Commissioners
Att: James Bradford Ramsay
1101 Vermont Avenue, NW Suite 200
Washington, DC 20005

National Cable & Telecommunications
Association
1724 Massachusetts Avenue, NW
Washington, DC 20036 -1903

VON Coalition
Harris, Wiltshire and Grannis, LLP
Att: John T. Nakahata
1200 18th Street, NW
Washington, DC 20036

Time Warner Inc.
800 Connecticut Ave. NW
Washington, DC 20006

CTIA
Wilkinson Barker Knauer, LLP
Att: Adam D. Krinsky
2300 N Street, NW
Suite 700
Washington, DC 20037

CTIA - The Wireless Association
Att: Carolyn W. Brandon
1400 16th Street, NW
Suite 600
Washington, DC 20036

Time Warner, Inc.
Lampert & O'Connor, P.C.
Att: Donna N. Lampert
1750 K St., N.W.
Suite 600
Washington, DC 20006

Time Warner Inc.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Att: Henk Brands
1615 L Street, N.W.
Suite 1300
Washington, DC 20036 -5694

AT&T Corp.
Att: Judy Sello
One AT&T Way
Room 3A229
Bedminster, NJ 07921

Verizon
Att: Kathleen Grillo
1300 I Street, NW
Suite 400 West
Washington, DC 20005

AT&T
1120 20th Street, NW
Suite 1000
Washington, DC 20036

BellSouth
1133 21st Street, N.W.
Suite 900
Washington, DC 20036 -3351

National Consumers League
1701 K Street NW
Suite 1200
Washington, DC 20006

National Cable & Telecommunications
Association
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
Att: Howard J. Symons
701 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004

BellSouth Corporation
Att: Richard M. Sbaratta
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, GA 30375 -0001

Microsoft Corporation
Harris, Wiltshire & Grannis LLP
Att: Scott Blake Harris
1200 Eighteenth Street, N.W.
12th Floor
Washington, DC 20036

Public Policy of Cox Enterprise, Inc.
Dow, Lohnes & Albertson
Att: J.G. Harrington
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036 -6802

Teletech Holdings, Inc.
Cole, Raywid & Braverman, L.L.P.
Att: Christopher W. Savage
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006 -3458

City Of Covina
Att: Kevin Stapleton
125 East College Street
Covina, CA 91723 -2199

Cbeyond Communications, LLC
Swidler Berlin Shereff Friedman, LLP
Att: Patrick J. Donovan
3000 K Street, N.W.
Suite 300
Washington, DC, DC 20007 -5116

PointOne
Chadbourne & Parke LLP
Att: Dana Frix
1200 New Hampshire Avenue, NW
Washington, DC 20036

Verizon
Kellogg, Huber, Hansen, Todd & Evans, PLLC
Att: Evan T. Leo
1615 M Street
Suite 400
Washington, DC 20036

PacWest Telecom, Inc. and RCN Corporation
Swidler Berlin Shereff Friedman, LLP
Att: Ulises Pin
3000 K Street NW
Suite 300
Washington, DC 20007

Idaho Public Utilities Commission
Att: Paul Kjellander
472 West Washington Street
Boise, ID 83702

Global Crossing Limited
Brownstein, Hyatt, Farber
Att: Alfred E. Mottur
1350 I Street, N.W.,
Suite 510
Washington, DC 20554

National Taxpayers Union
108 N Alfred St, Ste 300
Alexandria, VA 22314

Focal Communications Corporation
Att: Richard J. Metzger
2230 Vermont Avenue NW
Washington, DC 20005

Wiley Rein & Fielding LLP
Att: Nancy J. Victory
1776 K Street NW
Washington, DC 20006

MCI
Lawler, Metzger & Milkman, LLC
Att: A. Renee Callahan
2001 K Street NW, Suite 802
Washington, DC 20006

U.S. Department of Justice and
Federal Bureau of Investigation
Att: Kevin Minsky
14800 Conference Center Drive, Ste. 300
Chantilly, VA 2015

Telecommunications Industry Association
2500 Wilson Blvd.
Suite 300
Arlington, VA 22201

KMC Telecom Holdings, Inc.
1545 Route 206, Suite 300
Bedminster, NJ 07921

Fred Williamson & Associates, Inc.
2921 East 91st Street
Suite #200
Tulsa, OK 74137-3355

US Datanet
Kelley Drye & Warren LLP
Att: Todd D. Daubert
1200 19th Street, N.W.
Suite 500
Washington, DC 20036 -2423

Cablevision Systems Corp.
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
Att: Cherie R. Kiser
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

WorldCom, Inc. d/b/a MCI et al.
Jenner & Block, LLC
Att: Mark D. Schneider
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005 -3823

Miller & Van Eaton
Att: Nicholas P. Miller
1155 Connecticut Avenue N.W.
Suite 1000
Washington, DC 20036

Allegiance Telecom/Time Warner Telecom
Willkie Farr & Gallagher LLP
Att: Thomas Jones
1875 K Street, NW
Washington, DC 20006

New York State Office of the Attorney General
Att: Keith H. Gordon
Telecommunications & Energy Bureau
120 Broadway
New York, NY 10271

EarthLink, Inc.
Sher & Blackwell
Att: John W. Butler
Suite 900
1850 M. Street, N.W.
Washington, DC 20036

AT&T Corp.
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005

GVNW Consulting, Inc.
8050 SW Warm Springs Street, Suite 200
Tualatin, OR 97062

BellSouth Corporation
Att: Theodore R. Kingsley
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375 -0001

NENA
Miller & Van Eaton, P.L.L.C.
Att: James R. Hobson
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036 -4320

Telecommunications for the Deaf, Inc.
Fletcher, Heald & Hildreth
Att: Lee G. Petro
1300 North 17th Street
11th Floor
Arlington, VA 22209

National Association of Telecommunications
Officers and Advisors - NATOA
Att: Libby Beaty
8405 Greensboro Drive
Suite 800
McLean, VA 22102

Pennsylvania Public Utility Commission
Att: Joseph K. Witmer
P.O. Box 3265
Harrisburg, PA 17102 -3265

Michigan Public Service Commission
Michigan Department of Attorney General,
Public Service Division
Att: Steven D. Hughey
6545 Mercantile Way, Suite 15
Lansing, MI 48813

Jim Tobias
37 Miriam Drive
Matawan, NJ 07747

Texas Coalition of Cities For Utility Issues
Att: Clarence A. West
1201 Rio Grande, Suite 200
Austin, TX 78701

Oregon Telecommunications Association and
Washington Independent Telephone Assoc.
Law Office of Richard A. Finnigan
Att: Richard A. Finnigan
2405 Evergreen Park Drive SW
Suite B-1
Olympia, WA 98502 -6000

Rural Independent Competitive Alliance -- RICA
Kraskin, Lesse & Cosson, LLC
Att: Clifford Rohde
2120 L Street, NW, Ste. 520
Washington, DC 20037

USA DataNet
318 South Clinton Street
Suite 502-503
Syracuse, NY 13202

Independent Telephone and Telecommunications
Alliance
Latham & Watkins
Att: Karen Brinkmann
555 Eleventh Street, N.W., Suite 1000
Washington, DC 20004

The High Tech Broadband Coalition
Harris, Wiltshire & Grannis, LLP
Att: Scott Blake Harris and Maureen K. Flood
1200 18th Street, N.W.
Washington, DC 20036

Minnesota Attorney General's Office
Att: Jeanne Cochran and Mary McKinley
445 Minnesota Street, 900 NCL Tower
St. Paul, MN 55101

Dr. Robert A. Collinge
Department of Economics
University of Texas at San Antonio
San Antonio, TX 78249-0600

Texas Coalition of Cities For Utility Issues
Clarence A. West
1201 Rio Grande, Suite 200
Austin, TX 78701

Vonage Holdings Corporation
Swidler Berlin Shereff Friedman, LLP
Att: William B. Wilhelm, Jr.
Washington Harbour
3000 K Street N.W., Suite 300
Washington, DC 20007 -5116