

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Date: **Wednesday, August 13, 2003** Agenda Item # ****1**

Company: Vonage Holdings Corporation

Docket No. P-6214/C-03-108

In the Matter of the Complaint of the Minnesota Department of
Commerce Against Vonage Holding Corp. Regarding Lack of Authority
to Operate in Minnesota

Issue(s): How shall the Commission proceed?

Staff: Stuart Mitchell 651-296-8662

Karen Hammel 651-297-1852

Relevant Documents

Department Complaint (File #1) Received July 15, 2003
Vonage Answer and Motion to Dismiss (File #6) Received July 30, 2003
Comments of MCI (File #7) Received July 30, 2003
Letter of Level 3 Communications (File #10) Received August 4, 2003

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Statement of the Issue

How shall the Commission proceed?

Background

On July 15, 2003 the Department of Commerce filed a complaint against Vonage Holdings Corporation with the Commission. The Department alleged three violations by the Company:

1. Vonage has offered and continues to offer telephone services in Minnesota, including local exchange service and long distance service, without first obtaining a certificate under Minn. Stats. §§ 237.16 and 237.74.
2. The local telephone service offered by Vonage violates Minnesota law in that it fails to provide adequate 911 service.
3. Vonage has not filed a tariff containing all terms and conditions of its service.

In its filing, the Department requested temporary relief, and an expedited proceeding.

On July 23, 2003 Vonage filed its response to the request for temporary relief.

On July 24, 2003 the Commission deliberated the question of temporary relief and determined it was not necessary. The Commission's Order Denying Temporary Relief was issued on August 1, 2003.

On July 30, 2003 Vonage filed its answer and motion to dismiss. Also on that date MCI and AT&T filed petitions to intervene, and MCI filed comments.

On August 4, 2003 the Commission received a letter from Level 3 Communications, Inc., requesting designation as a "Participant" in these proceedings.

Minn. Rules, part 7829.0800 provides that a petition to intervene in a Commission proceeding may be considered granted if there has been no objection within ten days of the filing of the petition. As of August 13, the date of the Commission meeting, the clock will have run out on the AT&T and MCI petitions; it will have one more day for Level 3. Staff is aware at this time of no objections to any of the petitions.

Party Positions

Department of Commerce

The Department alleged that by not obtaining a certificate of authority from the Commission for providing telephone service, Vonage has violated Minn. Stat. § 237.16, subd. 1(b) and 237.74, subd. 12, and Minn. Rules, part 7812.0200, subp. 1. The essence of the Department's argument

is that Minnesota law requires companies providing telephone service in Minnesota to be certificated by the Commission.

With respect to 911 service, the Department said Vonage's failure to have a Commission-approved 911 plan (or to submit one for review and approval) violates Minn. Rules, part 7812.0550, subp. 1. In addition, the Department said Vonage has failed to pay the 911 fees required to be collected from telephone subscribers and remitted to the Department of Administration. This violates Minn. Stat. § 237.49.

The Department said Vonage has failed to file a tariff for charges and prices of service, nor rules or classifications used by it in the conduct of telephone business. This failure violates Minn. Stat. § 237.07.

The Department asked the Commission to take action to remedy the problem posed by Vonage in the following ways:

- Issue an Order finding that Vonage has knowingly and intentionally violated Minnesota Rules and Statutes.
- Order Vonage to fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of the Commission's Order.
- Order Vonage to remit 911 fees to the Minnesota Department of Administration for the period when it served Minnesota customers but did not pay such fees.
- Assess penalties under Minn. Stat. § 237.461 or .462.
- Grant such other and further relief as the Commission may deem just and reasonable.

Vonage Holdings Corporation

Vonage asked that the complaint be dismissed. Vonage said it is an "information services" provider, not a "telecommunications services" provider, and is not subject to the jurisdiction of the Commission. Because it does not provide telephone services or telecommunications services, it hasn't violated any Minnesota statutes or rules.

Vonage admitted it has no certificate of authority from the Commission, but said as an information service provider, it is not required to obtain a certificate before offering services in Minnesota.

Similarly, Vonage admitted that it has not submitted a 911 plan, but denied that it is required to do so. It denied that it is required to collect 911 fees, but said as an information service provider that purchases telecommunications services, it has paid 911 fees to telecommunications carriers.

Vonage admitted that it has not filed any tariffs in Minnesota, but said it is not subject to tariff requirements applicable to telephone companies.

Vonage asked the Commission to dismiss the complaint in its entirety, and to open a Voice over IP workshop. At a minimum, it said, the Commission should stay this proceeding until it conducts a VoIP workshop. Other states are doing this now.

MCImetro Access Transmission Services, LLC

MCI said the issue of VoIP regulation is extremely complex and has far-reaching implications. A determination by the Commission to regulate VoIP service will likely affect Universal Service Fund issues, intercarrier compensation issues, and carrier obligations under § 251 of the Federal Telecommunications Act of 1996, and will affect parties other than those that are the subject of this complaint.

MCI said the Commission must make a threshold finding that it has jurisdiction over the complaint, if it is to move forward. In this case, it said, the finding is not simple, as no state or federal entity has made a finding as to whether the VoIP services constitute a “telecommunications service” or an “information service.” MCI said the Commission may only assert regulatory jurisdiction if it determines that the Vonage service meets the Act’s definition of a “telecommunications service.”

MCI suggested that the Commission:

1. Dismiss the Vonage complaint on the basis that the Department failed to state a claim upon which relief can be granted.
2. Open an investigation on the Commission’s own motion to determine the threshold issue of whether the VoIP service offered by Vonage constitutes either a telecommunications service or an information/enhanced service as defined by the Act.
3. Refer this question to the Office of Administrative Hearings for record development and proposed findings on the proper classification of the Vonage service.
4. Provide notice of this proceeding to all parties currently listed on the Commission’s general telecommunications list.

Staff Analysis

There are two broad types of action the Commission may take today to act upon this complaint and response. First, the Commission may determine it needs a more extensive record to resolve the case. If so, it can order a contested case hearing, or an expedited case hearing, or it could take the suggestion of Vonage and MCI and convene a VoIP workshop.

The expansion of the record afforded by these types of proceedings is especially useful when there are facts material to the disposition of the complaint which are in dispute. If, on the other hand, the facts are undisputed, then really only policy and law need resolution, and there are less expensive means of doing so.

The second type of action is to deal directly with the matter, on the basis of the record as it stands. If the facts are undisputed, and the law or policy is clear, then the Commission may proceed to put this matter to rest immediately. As will be shown, staff thinks this is the appropriate approach to take.

Imagine the following conversation between the Department and Vonage:

Department: "You don't have a certificate of authority from the Commission."

Vonage: "That's correct."

Department: "You have no approved 911 plan."

Vonage: "That's correct."

Department: "You have no Commission-approved tariff on file."

Vonage: "That's correct."

Department: "You're providing telephone service."

Vonage: "No, I'm not."

That little conversation (in deathless prose) sums up the record in this case. The dispute is not over the facts, but over whether Vonage is providing telephone service. That question, it turns out, is a matter of law.

Minn. Stat. § 237.01, subd. 7 states:

"Telephone company," means and applies to any person, firm, association or any corporation, private or municipal, owning or operating any telephone line or telephone exchange for hire, wholly or partly within this state, or furnishing any telephone service to the public.

Minn. Stat. § 237.16, subd. 1 (b) reads as follows:

No person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules.

The term "telephone service" is not defined in Minnesota statutes.

In Minnesota Microwave, Inc. v. Public Service Commission, 291 Minn. 241, 190 N.W.2d 661 (1971), the Minnesota Supreme Court considered whether a private company providing unidirectional, closed-circuit, microwave facilities was subject to the jurisdiction of the Commission as a "telephone company" or a supplier of "telephone service." The Court stated:

[W]hether appellant is supplying “telephone service” is a question of law to be determined on the basis of the operative facts determined by the commission.

Id. at 245, 190 N.W. 2d at 664.

The Court continued (admonishing the Commission):

While it is undoubtedly true that administrative interpretations may in certain instances be entitled to great weight, it is clear that such is not here the case. **The statutory language here under consideration is not exceedingly technical in nature, such that only specialized agencies may be thought able to understand it. Instead, the statute is phrased in common terms**, and thus affords no good reason for deferring to administrative expertise for its interpretation. Moreover, the fact that the question now before this court is one which the agency has not had occasion to consider prior to the instant case weighs against placing much weight on the commission’s interpretation. (Emphasis added.)

Id., 190 N.W. 2d at 665.

The Court noted:

It appears that for the most part the term “telephone service” refers to the supplying of facilities for two-way communications.

Id. at 247, 190 N.W.2d at 665.

What the Supreme Court was saying, in other words, is that it is up to the Commission to decide what constitutes “telephone service,” and that making such a determination is not rocket science.

What is it that Vonage offers? Let’s look first at what Vonage says it offers (taken from Vonage’s web site at http://www.vonage.com/learn_tour.php, Exhibit 1 of the Department’s complaint):

Vonage DigitalVoice is an all-inclusive home phone service that replaces your current phone company.

This is like the home phone service you have today – only better!

Vonage combines domestic US local, long distance, and Canada calls for one flat price because it runs over your high speed Internet connection. Say goodbye to confusing bills and surprising charges. With Vonage DigitalVoice you get unlimited local and long distance calling, Canadian calling, plus great features like Caller ID, Call Waiting and Voicemail. Best of all you only pay one low price.

To use Vonage, a subscriber must have either a cable modem or a DSL modem and Internet service. The subscriber’s ordinary touch-tone phone plugs into a “black box” (an MTA or a router) which itself is plugged into the modem.

In order to determine whether Vonage offers “telephone service,” lets compare Plain Old Telephone Service (POTS) and the service offered by Vonage:

Action	Result, POTS	Result, Vonage Service
Subscriber picks up ordinary telephone handset.	Subscriber hears dial tone.	Subscriber hears dial tone.
Subscriber dials an assigned telephone number.	Gets connected or hears busy signal.	Gets connected or hears busy signal.
Subscriber speaks.	Call recipient hears voice.	Call recipient hears voice.
Call recipient speaks.	Subscriber hears voice.	Subscriber hears voice.
Caller dials subscriber’s phone.	Ordinary telephone rings.	Ordinary telephone rings.
Subscriber responds to the call, picking up the handset.	Conversation ensues.	Conversation ensues.

Are there any differences between the service offered by Vonage and POTS? Yes. For example, a Vonage subscriber can connect his or her telephone and black box to another similar high-speed Internet connection in another North American location. It will work just fine. Not so with POTS. Here are some other differences:

Action	Result, POTS	Result, Vonage Service
Subscriber dials 911	Call is routed to the nearest 911 center	a. If subscriber hasn’t set up the service, there is no connection. b. If subscriber has set up the service, call is routed to an administrative number at a fire or police station near the location given by the subscriber when setting up the service.
Subscriber disputes a portion of the bill.	Subscriber may pay the disputed amount into an escrow account.	Subscriber must pay Vonage the disputed amount.

This list could go on. It demonstrates that in the areas identified by the Department, Vonage is not complying with Minnesota regulation of telephone companies that provide telephone service.

So what should the Commission do about the Department’s complaint? Here is what is known: Under Minnesota law, any company providing “telephone service” is regulated by the Commission. The Commission is to interpret the term “telephone service,” and the Minnesota

Supreme Court said that “for the most part” telephone service is not a technical term, but has a common meaning which, among other things, refers to two-way communication. Vonage tells anyone visiting its web site that it offers “home phone service that replaces your current phone company.” In the ordinary course of phone usage there is no difference in functionality to the subscriber whether he or she uses POTS or Vonage. And in unusual circumstances, i.e., 911 calls or disputes with the provider, subscribers will find that Vonage departs from expectations because the Company does not comply with Minnesota protections found in statutes, rules, and Commission-authorized tariffs.

Staff maintains that the Commission can decide whether Vonage is supplying “telephone service” within the meaning of Minnesota statutes on the basis of the record before it right now.

But what about the Telecommunications Act of 1996? What about the distinction, under the Act, between “telecommunications service” and “information service?” What about the apparent “special status” of the VoIP technology?

As the parties have pointed out, these questions are being addressed in many proceedings, both at the FCC and in various states. None of these proceedings has yet reached a conclusion, let alone one that has been tested through the courts.

Staff maintains the Commission need not reach these questions now. Staff notes that it agrees absolutely with MCI in framing the Commission’s jurisdiction as a “threshold issue.” However, MCI was mistaken when it said that issue must be resolved by determining whether the VoIP product Vonage offers is a “telecommunications service” or an “information/enhanced service.” No, instead jurisdiction is reached through application of the facts of the case to Minnesota law. The Commission is not here regulating a VoIP technology, but, if it fits the Commission’s definition, a telephone service. This is squarely what it has been charged to do by the legislature.

It may come to pass, some time in the future, that a court or other competent body finds that Minnesota regulation in this area is pre-empted by federal action. We know that, if and when it happens, interstate regulation trumps intrastate regulation. That can be addressed then. It need not be now.

If the Commission finds that Vonage is providing “telephone service” under Minnesota law, it then would need to determine whether the violation is knowing and intentional. Because the dispute centers around which law is applicable, staff’s view is that any violation is unintentional. Should the Commission reach the opposite conclusion, staff recommends the Commission establish a sequence of briefs or comments and replies, and then meet in further hearing to determine penalties under Minn. Stat. § 237.461 or .462.

Staff has listed six mutually exclusive alternatives below. Numbers one through three imply that the current record is sufficient for the Commission’s decision. Numbers four through six imply that the Commission needs more information to determine this matter.

Alternatives

The threshold question whether the Commission has jurisdiction to address the complaint is determined by answering the question whether Vonage provides “telephone service” pursuant to Minnesota law. If the answer to the latter is yes, then the Commission has jurisdiction to address the complaint under Minnesota statutes unless state law is preempted by federal law. In this case there appears to be no clear preemption of state law.

1. Find that Vonage is offering “telephone service” within the meaning of Minn. Stat. §§ 237.01, subd. 7, and 237.16, subd. 1 (b). Conclude that the complaint is justified and
 - a. Order Vonage to fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of the Commission’s Order.
 - b. Order Vonage to remit 911 fees to the Minnesota Department of Administration for the period when it served Minnesota customers but did not pay such fees.
 - c. Grant such other and further relief as the Commission may deem just and reasonable.
2. Find that Vonage is offering “telephone service” within the meaning of Minn. Stat. §§ 237.01, subd. 7, and 237.16, subd. 1 (b). Conclude that the complaint is justified and
 - a. Issue an Order finding that Vonage has knowingly and intentionally violated Minnesota Rules and Statutes.
 - b. Order Vonage to fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of the Commission’s Order.
 - c. Order Vonage to remit 911 fees to the Minnesota Department of Administration for the period when it served Minnesota customers but did not pay such fees.
 - d. Establish a sequence of briefs or comments and replies, followed by a further hearing to assess penalties under Minn. Stat. § 237.461 or .462.
 - e. Grant such other and further relief as the Commission may deem just and reasonable.
3. Find that Vonage is not offering “telephone service” within the meaning of Minn. Stat. §§ 237.01, subd. 7, and 237.16, subd. 1 (b). Dismiss the complaint.
4. Order a contested case hearing to examine the issues raised by the Department’s complaint.
5. Schedule an expedited hearing to examine the issues raised by the Department’s complaint.
6. Table the complaint until after holding a workshop on the VoIP technology.

Recommendation

Staff recommends Alternative 1.