
Eighth Circuit Upholds FCC Order Preempting State Regulation of VoIP

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Vonage Order, issued in late 2004, the FCC broadly preempted state regulation of “nomadic” voice-over-Internet-protocol (VoIP) services—applications-layer voice services that consumers can purchase independently of their own broadband Internet connections and can use anywhere in the world.[1] On March 21, 2007—a year and two months after the case was argued—the US Court of Appeals for the Eighth Circuit finally upheld that order.[2] The Eighth Circuit decision represents a major victory for providers of nomadic VoIP services, but leaves a number of important questions unanswered.

The Underlying FCC Order

The dispute underlying the appeal arose initially when the Minnesota Department of Commerce (MDOC) sought to regulate Vonage’s Digital Voice VoIP offering as a “telephone service” under Minnesota law. Such regulation would have required Vonage to comply with Minnesota regulations applicable to conventional telephone services, such as an obligation to obtain a service permit and to file tariffs.

In response, Vonage filed a petition with the FCC seeking preemption of state regulation of its VoIP service under the so-called “impossibility exception” to section 2(b) of the Communications Act. The impossibility exception allows the FCC to preempt state regulation of a service that would otherwise be subject to dual federal and state regulation where it is impractical to separate the service’s intrastate and interstate components and where state regulation would interfere with valid federal policies. The FCC ruled for Vonage and broadly preempted state regulation of VoIP services. It reasoned (1) that it would be impractical for a provider of nomadic VoIP services to identify both endpoints of a given VoIP call, given that its own customer could be connected to the Internet from anywhere in the world; (2) that it is thus impractical to determine whether any given VoIP call is “interstate” or “intrastate”; and (3) that state regulation of VoIP services would frustrate the federal objective of keeping Internet-based services free from unnecessary regulation.

The Court’s Decision

Several state commissions separately appealed the *Vonage Order* in the Second, Sixth, Eighth and

Ninth Circuits. After some jockeying, the case ended up in the Eighth Circuit.

Granting considerable deference to the FCC's expertise in the telecommunications field, the Eighth Circuit upheld the Commission's core finding that it would be impractical to segregate nomadic VoIP services into interstate and intrastate components. And it found that the FCC had properly considered the economic burden of identifying the geographic endpoints of VoIP calls in deciding whether separating the service into intra- and interstate components was impractical. The court agreed with the FCC that VoIP providers should not be required to develop a mechanism of distinguishing between the inter- and intrastate components of a call solely to enable state commissions to regulate. Finally, the court upheld the FCC's ultimate decision to preempt state regulation of nomadic VoIP services, finding that preservation or advancement of competition and deregulation are valid federal interests that may justify preemption of state regulation.

The court devoted considerable attention to an apparent tension between the *Vonage Order* and the Commission's *VoIP E911 Order*. In the *E911 Order*, issued shortly after the *Vonage Order*, the FCC required VoIP providers to take steps to locate their users for emergency E911 purposes. The challengers to the *Vonage Order* claimed that this E911 location information would allow providers to determine a user's location for jurisdictional purposes as well. But the Eighth Circuit rejected this theory as a basis for attacking the *Vonage Order*. First, the court found that, under basic administrative law principles, parties generally may not challenge an agency order on the basis of an administrative record developed in a subsequent proceeding. The court added that, in any event, the *VoIP E911 Order* itself recognized the practical difficulties of determining the actual geographic location of VoIP customers. As the court noted, moreover, the FCC itself had observed that technology might develop that enables identification of the geographic location of nomadic VoIP communications in the future—and that such technology might affect the scope of the Commission's preemption ruling.[3]

Potential Future Issues

In two respects, the Eighth Circuit's decision raises as many questions as it answers. First, the court's discussion of the *VoIP E911 Order* foreshadows future litigation about whether, and to what extent, states may seek to reassert regulatory authority over nomadic VoIP services as technology develops to identify the locations of their customers. As the court emphasized, preemption might no longer be justified where such technology exists. Accordingly, as VoIP service providers continue to develop their services, some may innovate their way out from under the protective umbrella of the *Vonage Order* (or so state commissions will likely argue).

Second, the court's decision covers FCC preemption only of **nomadic** VoIP services; it does not address whether the FCC may likewise preempt **fixed** VoIP services, such as those offered by many cable companies. Unlike a nomadic service, a fixed VoIP service is tied to an individual broadband connection, and thus there is generally no uncertainty about the geographic location of the customer using such a service. In the underlying *Vonage Order*, however, the FCC stated that it "would" preempt state regulation of cable companies and other VoIP services as it had done for *Vonage's* nomadic service.[4]

The New York Public Service Commission challenged this portion of the *Vonage Order* on the ground that the Commission's preemption rationale cannot logically apply to fixed VoIP services because it presupposes that a VoIP customer's location is indeterminate. But the Eighth Circuit dismissed that challenge on ripeness grounds and thus withheld any ruling on the validity of this portion of the FCC's *Vonage Order*. Accordingly, state regulation of fixed VoIP services could become a major issue for the FCC, the states, and the courts as consumers increasingly adopt such services in lieu of traditional circuit-switched telephony. Indeed, this dispute has already arisen in some states, and is likely to snowball over time.

For more information on this or other communications and e-commerce matters, please contact the authors listed above.

[1] *In re Vonage Holdings Corp.*, 19 FCC Rcd 22,404 (2004) (*Vonage Order*).

[2] *Minnesota Public Utilities Commission et al. v. FCC et al.*, No. 05-1069 (8th Cir. Mar. 21, 2007). WilmerHale filed an intervenors' brief for the Bell Operating Companies—AT&T, BellSouth (now merged with AT&T), Qwest, and Verizon—in this appeal.

[3] *Id.*, slip. op. 10.

[4] *Vonage Order*, para. 32.