Case No. 08-1764

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VONAGE HOLDINGS CORP. and VONAGE NETWORK INC.,
Plaintiffs-Appellees,
v.
NEBRASKA PUBLIC SERVICE COMMISSION, and ROD JOHNSON, FRANK E. LANDIS, JR., ANNE C. BOYLE, TIM SCHRAM, and GERALD L. VAP, in their official capacities as Commissioners of the Nebraska Public Service Commission, and JEFFREY L. PURSLEY, in his official capacity as Director of the Nebraska Telecommunications Infrastructure and Public Safety Department of the Nebraska Public Service Commission,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
The Honorable Laurie Smith Camp, United States District Judge

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APPELLEES' RESPONSE TO FCC COUNSEL AMICUS BRIEF

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SUMMARY OF ARGUMENT

In 2004, the Federal Communications Commission ("FCC") expressly preempted Minnesota's application of "traditional 'telephone company' regulations" to Vonage's "DigitalVoice" service. *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Preemption Order*" or "*Order*"). The district court enjoined Nebraska's assertion of regulatory jurisdiction over Vonage's VoIP service on the seemingly clear authority of that *Order*. The FCC's *amicus* brief, however, claims that the *Vonage Preemption Order* just does not apply to this case. The FCC apparently does not think *that* is a difficult issue; it makes the point in a single sentence—two, if one counts generously—without providing any analysis of the *Order* or even a citation to any part of it.

The FCC's novel interpretation of the *Vonage Preemption Order*, however, is as wrong as it could be. There is a reason the district court thought this was an easy case, and that is because the breadth of the FCC's language and the logic of its reasoning in the *Vonage Preemption Order* make it entirely implausible to suggest that it somehow left state power to collect universal service surcharges untouched. The *Order* specifically

preempted the Minnesota statute that would have compelled Vonage to pay state universal service obligations. And just in case there had been any doubt, the FCC's brief to this Court back in 2004 took the position that the *Vonage Preemption Order* was jurisdictional in nature, coextensive in scope with an injunction from the District of Minnesota that prohibited Minnesota from asserting *any* regulatory jurisdiction over Vonage's innovative services. This was the unambiguous meaning of the *Vonage Preemption Order* when the FCC adopted it; it was the unambiguous meaning when the FCC asked this Court to affirm the district court's injunction against Minnesota in 2004; and it is the unambiguous meaning today.

The FCC's *amicus* brief in the instant case does not change the case at all. For one thing, the interpretation set forth in the brief is not entitled to any deference from the Court. The brief does not purport to represent the views of a majority of the Commissioners, and it cannot be said to reflect their fair and considered judgment. Moreover, the *Vonage Preemption Order* is unambiguous—in such circumstances, deference is not appropriate. The FCC clearly has the authority to *modify* the *Vonage Preemption Order* if it wishes, but it must do so through formal, reviewable action—not by filing a brief.

Notwithstanding the confusion sown by the FCC's counsel's late entry into the case, the correct result remains straightforward. The *Vonage Preemption Order* preempted traditional state "telephone company" regulations with respect to Vonage's DigitalVoice service, including the imposition of state universal service charges.

ARGUMENT

I. THE FCC'S BRIEF IS NOT ENTITLED TO DEFERENCE.

The most decisive argument against the FCC's novel interpretation of the *Vonage Preemption Order* is that it is wrong—at odds with the text of the *Order,* at odds with the contemporaneous statements of the commissioners who decided the *Order,* and at odds with the FCC's own brief to this Court when the scope of the *Order* was the dispositive issue in another appeal. We discuss these fatal infirmities in the FCC's argument in sections II, III, and IV, below. We note as a threshold matter, however, that the contrary view taken by the FCC's general counsel as *amicus curiae* in this Court is entitled to no deference whatsoever. Indeed, the FCC does not claim that any deference is due, and for good reason. While courts sometimes defer to the legal judgments agencies express in their litigation positions, such deference is appropriate only where there is "'no reason to suspect that the interpretation does not reflect the agency's fair and

considered judgment on the matter in question.'" *Drake v. FAA,* 291 F.3d 59, 68 (D.C. Cir. 2002) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). Here, there are at least four reasons to doubt that the FCC's brief expresses the agency's "fair and considered judgment."

First, the FCC, unlike agencies headed by a single Secretary, takes official action by a majority vote of the five Commissioners. No vote, however, is required for the FCC's General Counsel to file an *amicus* brief. There is not even a hint that the FCC's brief was even shown to the Commissioners, much less that a majority of them voted to endorse it. Without a vote, the Commission simply has not—and *could not have*—exercised any judgment to which a court should defer.[1]

Second, while the FCC undoubtedly has the power to clarify or to modify the *Vonage Preemption Order* through formal action, it cannot change the scope of the *Order* simply by filing a brief. Even if a majority of the commissioners now oppose the preemption announced in 2004, the appropriate way to narrow the existing *Order* is to initiate a rulemaking or issue a declaratory ruling—something the Commission can do at any time,

[1] *See Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971) (deference is granted to administrative officials, not appellate counsel); *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 735 (D.C. Cir. 2001) ("The Federal Communications Commission is a collegial body …; it speaks through its orders, not through counsel's filings.").

without waiting for anyone to request it and without having to convince this Court of the merits of its position. Until such a change in law, the *Vonage Preemption Order* still means what it says—no more and no less.

Third, while the FCC's brief certainly addresses the same question that the Commission addressed in the *Vonage Preemption Order,* it barely pretends to be an "interpretation" of that *Order* in any meaningful sense. As we show in part II below, the FCC's brief devotes only a sentence or two to what the 2004 *Order* actually said, and offers no response to the textual arguments Vonage made in its brief. Instead, the FCC's brief makes a policy-based argument for a result that differs from the 2004 result, and simply asserts that the two results can be reconciled without addressing the naked inconsistencies. Say-so is not the same as, nor a substitute for, "fair and considered judgment." Because the brief does not reflect a "fair and considered judgment" of the agency, the FCC's brief should not be accorded deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000), (noting that "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade'").

Fourth, deference is also inappropriate in this case because (as we show below) the FCC's brief is inconsistent both with the *Vonage Preemption Order* and with the FCC's own earlier brief to this Court explaining the *Order*'s scope. As the Supreme Court explained in *Christensen*, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* at 588. To defer to the FCC's brief, when the *Order* is not ambiguous, "would be to permit the agency, under the guise of interpreting [the *Order*], to create *de facto* a new regulation." *Id.* And the fact that the FCC's current brief contradicts its 2004 brief to this Court on the scope of the *Vonage Preemption Order*, without *any* explanation of its change of heart provides yet another reason the Court cannot simply defer to the agency's interpretation, but must reject it. *See Motor Vehicles Mfg. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (an agency must provide a reasoned analysis for a change in policy); *see also United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 n.15 (D.C. Cir. 2002) (explaining that *Auer* deference is inappropriate when an agency position taken in a brief differs from a previous position taken by the agency).

The FCC's 2008 brief about the meaning of the *Order* is thus akin to statements about the meaning of legislation passed years before, offered by congressional staff who currently work with some of the same legislators

who were in Congress when the legislation was actually passed.[2] It is entitled to no greater respect from the Court.

The district court granted injunctive relief not because Nebraska's regulations *ought to be* preempted, but because they *had been* preempted. The crucial question, therefore, is what the *Vonage Preemption Order* meant in 2004, because that is what it still means today. It is beyond the power of the FCC General Counsel to modify it in an *amicus* brief.

II. THE FCC'S BRIEF IS WRONG ABOUT THE SCOPE OF THE *VONAGE PREEMPTION ORDER*.

The FCC devotes very little attention to whether the *Vonage Preemption Order* preempted state-level universal service obligations—so little that we can quote it in its entirety:

> In the *Vonage Preemption Order*, the FCC found that Minnesota's entry and tariff regulations of Vonage's service conflicted with the FCC's deregulatory policies applicable to the interstate component of Vonage's service. The FCC did not

[2] *Cf. Exxon Mobil Corp. v. Allapatah Servs.*, 545 U.S. 546, 568 (2005) (noting the danger that relying on legislative history "may give unrepresentative committee members—or, worse yet, unelected staffers …—both the power and the incentive to … secure results they were unable to achieve" by legitimate means); *United States v. Pullman*, 187 F.3d 816, 823 (8th Cir. 1999) (the views of a later Congress are a poor basis from which to guess the views of an earlier Congress) (citation omitted); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history … should not be taken seriously ….").

> address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional "economic regulation." *See*, *e.g.*, *Embarq Forbearance Order*, 22 FCC Rcd 19478, 19481 ¶ 5 (2007).

FCC Brief at 14. The only citation the FCC provides is not to support its novel interpretation of the *Vonage Preemption Order*, but rather to support its argument that economic regulation (such as rate-of-return regulation of monopolies) can be distinguished from universal service regulation, a point that does not seem terribly controversial. The FCC's otherwise unsupported interpretation of the *Vonage Preemption Order*, on the other hand, is wrong.

Vonage will not repeat at length the arguments it made in its Brief of Appellees at 17-22, which discussed the "three enormous textual problems" with the Nebraska Public Service Commission's ("NPSC") narrow reading of the *Vonage Preemption Order*—and which, significantly, the FCC never discusses in its brief. Nor will Vonage repeat arguments made by *amici* in its support. *See* Brief for Amici Curiae the Voice on the Net Coalition, Inc., *et al*., at 7-12. But one point must be emphasized: Among the "traditional 'telephone company' regulations" that the FCC preempted in the *Vonage Preemption Order* was Minnesota Statute § 237.16 subd. 9,[3] the statute that would have required Vonage to contribute to Minnesota's universal service

[3] In its Brief of Appellees, Vonage erroneously cited this provision as Minn. Stat. § 237.16(g).

program. *See Vonage Preemption Order*, 19 FCC Rcd at 22409 ¶ 10 & n.28. The FCC simply ignores this fact. Indeed, the FCC would have this Court believe that the *Vonage Preemption Order* requires judges to comb through it looking for insight on which regulations are "traditional telephone company regulations" and are therefore preempted, but *not* to look at the *Order*'s own specific reference to Minnesota's traditional telephone company regulations.

Even if the Court were inclined to go beyond the text of the *Vonage Preemption Order* itself to try to discern its meaning, the statements of the Commissioners issued along with the *Order*, shed far more light than the conflicting view now submitted by FCC counsel. In his statement accompanying the *Vonage Preemption Order*, then-Chairman Powell disparaged the notion of allowing 51 different jurisdictions to regulate Internet services, saying that doing so would "destroy the very qualities that embody the technological marvel that is the Internet." *Vonage Preemption Order*, 19 FCC Rcd at 22437 (Powell statement). Chairman Powell explained that while the Commission was "merely affirming the obvious" in making its "jurisdictional decision" to preempt state regulation of VoIP, the *Order* did not reach states' "general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general

commercial dealings; marketing and advertising." *Id*. at 22437-38. In addition, he explained, the *Vonage Preemption Order* "[did] not alter … state authority pursuant to Section 252 of the Act," which deals with interconnection. *Id*. at 22438. Chairman Powell's comprehensive list of what was not preempted by the *Order* makes no mention of "universal service" or "Section 254" (which provides states with authority to impose universal service obligations).

Commissioner Abernathy likewise believed that the *Vonage Preemption Order* was an "assertion of exclusive federal jurisdiction" over Vonage's service. *Id*. at 22439 (Abernathy statement). In her view, states had a role to play in the regulation of services like Vonage's, but their role was to assist the Commission in an area where it "alone possesses the ultimate decisionmaking authority." *Id*. The question of how best to further policy goals like universal service was one she urged the Commission to tackle, not one she ever indicated was left to the states. *See id*. at 22440.

Commissioner Adelstein went even further. He worried that the *Vonage Preemption Order* "could increase pressure on the *federal* universal service mechanisms and could potentially lead to rate increases for rural and low income consumers…. I've called for the Commission to quickly convene a universal service solutions summit." *Id*. at 22443 (Adelstein

statement) (emphasis added). Had Commissioner Adelstein perceived any state authority to impose state universal service obligations, he presumably would have noted the potential pressure on those state funds. His silence confirms that he understood the *Vonage Preemption Order* to preempt state universal service charges.

These statements of the Commissioners, issued together with the *Vonage Preemption Order*, simply confirm the most natural reading of it. In contrast, the FCC's brief would rewrite the *Order* to say far less than it actually does, and would mean that the Commissioners who voted for it did not understand what they had voted for.

III. THE FCC HAS PREVIOUSLY URGED THIS COURT TO READ THE *VONAGE PREEMPTION ORDER* AS A COMPLETE PREEMPTION OF STATE REGULATORY JURISDICTION.

This is not the first time the FCC has been called upon to explain the scope of its *Vonage Preemption Order*; it is not even the first time the FCC has been called upon to explain it to this Court. In 2004, the FCC told this Court that it should *affirm* a district court injunction that prohibited Minnesota from asserting *any* regulatory jurisdiction over Vonage, and it expressly told this Court that it was not necessary to make any special provision for Minnesota's universal service policies.

Some procedural background about the 2003-2004 litigation is in order on this point: Back in 2003, the Minnesota Public Utilities Commission ("MPUC") ordered Vonage to comply with Minnesota statutes and rules governing telephone carriers. *Complaint of the Minn. Dept. of Commerce against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (issued Sept. 11, 2003), 2003 Minn. PUC LEXIS 94. The key premise in the Minnesota PUC's order was that the state PUC had "jurisdiction over Vonage," and the MPUC exercised that jurisdiction to require Vonage to "comply with Minnesota Statutes and Rules." *Id*. at *17. The Minnesota requirement that Vonage contribute to its universal service fund, is, of course, found in "Minnesota Statutes and Rules."

Vonage sought relief simultaneously in federal court and at the FCC. The federal district court acted first, and granted Vonage an injunction barring Minnesota from enforcing its order—that is, from asserting jurisdiction. *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1004 (D. Minn. 2003). There is only one reasonable interpretation of that injunction. An injunction prohibiting Minnesota from enforcing its order asserting jurisdiction to regulate Vonage and compelling

compliance with "Minnesota Statutes" could *only* mean that the district court held that Minnesota did not have jurisdiction to regulate Vonage for *any* purpose, including state universal service obligations.

The district court's injunction was on appeal to this Court when the FCC issued the *Vonage Preemption Order*. This Court ordered supplemental briefing on the effect of the *Vonage Preemption Order*, and the FCC responded with a brief. *See* Supplemental Brief for the United States and the Federal Communications Commission as Amici Curiae, *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (No. 04-1434). In its 2004 brief, the FCC told this Court that the *Vonage Preemption Order* "places the same limitations on the MPUC's regulatory authority as does the injunction sought by Vonage and granted by the district court." *Id*. at 2. The FCC agreed fully with Vonage's interpretation of the scope of the district court's injunction, explaining at the time, "Vonage moved to enjoin the MPUC from enforcing its jurisdictional order, and the district court granted that relief." *Id*. The FCC urged the Court to affirm the injunction on the basis of the *Vonage Preemption Order*, because it "supports the precise relief ordered by the district court—an injunction prohibiting the MPUC from enforcing its jurisdictional order against Vonage." *Id*. at 9.

Even more telling, the FCC argued *against* any exception from this Court that would have left Minnesota free to collect universal service charges from Vonage and other VoIP providers:

> The Court also can and should affirm without addressing other issues, such as E911 and universal service. These issues are currently before the FCC in the IP-enabled services proceeding…. If the FCC adopts rules regarding E911 or universal service that are inconsistent with the existing terms of the district court's injunction, the MPUC will be entitled to corresponding modifications of the injunction under Rule 60(b).

Id. at 10. The FCC thus took the position that *if* the Commission issued an order that would permit states to impose universal service obligations on Vonage, Minnesota would be able to get relief from the injunction to that limited extent. But, of course, the FCC has never issued such an order, and neither the NPSC nor the FCC has suggested it has. The FCC's 2004 brief was right: The *Vonage Preemption Order* preempted state authority to impose state universal service charges on Vonage, and unless and until the FCC adopts rules allowing states to impose such charges, they remain preempted.

Notably, this Court has *already* agreed with this argument. When this Court affirmed the district court in 2004, it held simply that "the FCC's order preempting MPUC's order dispositively supports the District Court's injunction." *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d

568, 569 (8th Cir. 2004). That injunction, as Minnesota, the FCC, and Vonage all understood, prohibited Minnesota from imposing state universal service charges on Vonage. As Vonage has said before, the substitution of Nebraska for Minnesota cannot make a difference.

IV. THE POLICY VIEWS EXPRESSED IN THE FCC'S BRIEF CANNOT ALTER THE TERMS OF THE *VONAGE PREEMPTION ORDER.*

In place of any credible textual analysis of the *Vonage Preemption Order*, the FCC's brief argues that the *Order* does not preempt state universal service surcharges because those surcharges are consistent with federal policy. There are at least two independently fatal flaws in this argument.

First, it is tantamount to pretending that the *Vonage Preemption Order* has never existed. The FCC faults the district court for "fail[ing] to consider the critical question of whether preemption is necessary to prevent the state regulation at issue from frustrating a valid federal policy objective." FCC Brief at 14. But if the FCC has already resolved the policy question in the *Vonage Preemption Order*, then this sort of policy analysis is the *last* thing the district court—or this Court—should do. The FCC—which can rebalance these policies anytime it wants to if a majority of the commissioners agree—is essentially arguing that the federal courts should

ignore the *Vonage Preemption Order* and start the policy analysis from scratch for each new obligation a state might wish to impose.

Second, at the risk of becoming tedious, the FCC's appellate counsel cannot substitute his own views of federal communications policy for the authoritative statement of policy in the Commission's own *Vonage Preemption Order*. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Investment Co. Inst.*, 401 U.S. at 628 (deference is granted to administrative officials, not appellate counsel); *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1003 (7th Cir. 1993) ("Only the agency, and not its lawyers, exercises delegated power." (citing *SEC v. Chenery Corp*., 318 U.S. 80, 88 (1943))), *aff'd*, 513 U.S. 414 (1995); *MD/DC/DE Broadcasters Ass'n*, 253 F.3d at 735 ("The Federal Communications Commission is a collegial body …; it speaks through its orders, not through counsel's filings."). Indeed, counsel may not even supply reasons to support agency action if the agency has not done so, *see, e.g., Motor Vehicle Mfg. Ass'n*, 463 U.S. at 50; *a fortiori* counsel cannot supply both the action *and* the reasons.

When it adopted a "single national policy" for services like Vonage's, the FCC explained that it was acting to prevent inconsistent regulation. Vonage explained in its Brief of Appellees that allowing multiple states to

impose universal service charges on Vonage creates a significant risk of inconsistent regulation, as each state would be free to devise its own proxy for the amount of Vonage revenue subject to the state's authority. Brief of Appellees at 28-29; *see also AT&T Corp. v. Pub. Util. Comm'n*, 373 F.3d 641, 645-47 (5th Cir. 2004) (rejecting state universal service program that would have subjected revenues to multiple universal service fund assessments). These potential state conflicts can be resolved, but only by implementing a "single national policy" as the FCC promised.

All this is not to say that the FCC could not, in a proper setting, come to a new conclusion about the propriety of subjecting Vonage to certain state regulations as a matter of federal policy. But that determination must be made by the Commission in an order issued according to law and subject to the usual review; it is not a determination that FCC counsel can make in an *amicus* filing. Until the Commission makes such a determination, the policies identified in the *Vonage Preemption Order*, not the FCC's brief, must control.

V. THE COURT NEED NOT AND SHOULD NOT ADDRESS THE FCC'S OTHER ARGUMENTS.

Finally, the FCC's brief addresses two other matters, each rather complicated, which this Court need not and should not address: the effect of 47 U.S.C. § 254(f) on the preemption question, and the question whether

VoIP services are properly considered "information services" or "telecommunications services" under federal law. Both questions are related, both questions are complicated, and neither question is necessary to the resolution of this case.

First, the FCC attempts to bolster its irrelevant policy analysis by arguing that section 254(f) of the Telecom Act specifically contemplates state universal service programs. FCC Brief at 15. This is true as far as it goes, but the FCC fails to mention that section 254(f) imposes limitations on the states' authority. For example, states cannot impose universal service obligations that conflict with federal law in any respect, and they cannot impose universal service obligations on Vonage unless Vonage is a "telecommunications carrier that provides intrastate telecommunications services." 47 U.S.C. § 254(f). The district court did not need to reach this argument because it gave controlling effect to the *Vonage Preemption Order*. This Court should find it unnecessary to address section 254(f) for precisely the same reasons. If, however, the Court concludes that the *Vonage Preemption Order* said nothing on the subject of state universal service surcharges on VoIP services, then the statutory issues arising from section 254(f) (and specifically, from the way in which that limited grant of state authority differs from the more expansive grant of federal authority in

section 254(d)) will need to be resolved.[4] Vonage believes this Court should allow the district court to address this question in the first instance.

Similarly, Vonage agrees with every other party that this Court need not address the district court's alternative holding that Vonage's service is an "information service" rather than a "telecommunications service" under the Communications Act. *See* Appellants' Addendum at 10-11; *see also Vonage Holdings Corp. v. Minn Pub. Utils. Comm'n*, 290 F. Supp. 2d, 993, 999 (D. Minn 2003) (concluding that Vonage's service is an information service), *aff'd*, 394 F.3d 568 (8th Cir. 2004). The FCC goes too far, however, in arguing that "[t]he regulatory classification of interconnected VoIP service" as a telecommunications service or an information service "simply has no bearing on the conflict analysis at issue in this case." FCC Brief at 20. The

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[4] In determining that interconnected VoIP providers must contribute to the federal universal service fund, the FCC found that interconnected VoIP providers were "providers of interstate telecommunications." *See Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538 ¶ 37 (2006). Under section 254(d), the FCC has authority to require providers of interstate telecommunications to contribute to the federal universal service program. *See* 47 U.S.C. § 254(d). States do not have similar authority to assess providers of telecommunications to support state universal service programs. *See* 47 U.S.C. § 254(f). The FCC Brief fails to provide an explanation for how allowing states to assess an entity that the Commission found was a provider of telecommunicationssquares with the Commission's claim that applying state universal service to interconnected VoIP providers is consistent with section 254(f). *See* FCC Brief at 18. Such a major inconsistency only reinforces the implausibility of the position taken by the Commission's General Counsel in the FCC Brief.

district court can be *affirmed* without classifying VoIP as one or the other; the district court's preliminary relief can even be vacated and *remanded* without classifying VoIP as one or the other. But because states only have authority to impose state universal service surcharges on telecommunications services, no state universal service surcharge can be imposed on Vonage without a finding that interconnected VoIP services are telecommunications services, not information services. This is, of course, precisely the question that the FCC has consistently and deliberately refused to answer, choosing instead to devise a federal policy for interconnected VoIP that does not depend on its classification as either a telecommunications or an information service. The FCC's repeated policy decision to regulate interconnected VoIP without resolving its regulatory classification cannot simply be discarded at the FCC's counsel's behest, as even the FCC's counsel apparently concedes.

CONCLUSION

The Court should affirm the district court's injunction.

Dated this 10th day of September, 2008.

Respectfully submitted,

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The undersigned certifies that on September 10, 2008, I served via first-class United States Mail two copies of the Appellees' Response to FCC Counsel Amicus Brief and a CD-ROM containing an electronic copy of the same on the parties listed below:

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CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the CD-ROM containing the Appellees' Response to FCC Counsel Amicus Brief was created using Microsoft Office Word 2003, was scanned for viruses using Version 8.0 of the Trend Micro OfficeScan Client for Windows and was found to be virus free.

Dated this 10th day of September, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's order of August 20, 2008, because it contains a total of 4,473 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman type style, font size 14.

Dated this 10th day of September, 2008.

_____/s/____________________
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