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May 9, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 864 and House Bill 1379

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, Senate Bill 864 and House Bill 1379, identical bills entitled "Voice Over Internet Protocol Service." In reviewing the bills, we have concluded that they are consistent with federal law and regulations.

Senate Bill 864 and House Bill 1379 define "voice over Internet protocol service," ("VOIP"), and provide that the Public Service Commission does not have jurisdiction over VOIP, including the imposition of regulatory fees, certification requirements, and the filing or approval of tariffs. The bill further provides that it does not either require or prohibit the assessment of 911 fees in accordance with the Public Safety Article, require or prohibit the assessment of fees for telecommunications relay service under the State Finance and Procurement Article, require or prohibit the payment of any switched network access rates or other intercarrier compensation rates that may be determined to apply, relieve a company of an otherwise existing obligation to provide telephone lifeline service, or exempt VOIP from generally applicable State and federal laws relating to public safety, or unfair and deceptive trade practices, or exempt VOIP service from the authority of the Division of Consumer Protection in the Office of the Attorney General.

The FCC has held that State regulation of "digital voice" VOIP is preempted. *In Re Vonage Holdings Corp.*, 19 FCCR 22404, 2004 WL 2601194 (2004), and that order was upheld in *Minnesota Public Utilities Commission v. FCC*, ___ F.3d ___, 2007 WL

838938 (8th Cir. March 21, 2007). The FCC declined to determine whether VOIP was an information service or a communications service. An information service is not subject to State regulation, as Congress has stated the policy “to provide the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by federal or State regulation.” 47 U.S.C. § 230(b)(2). Communications services are subject to State regulation unless preempted by federal regulation or subject to the “impossibility exception,” which applies when it is not possible to separate the interstate and intrastate aspects of the service, and federal regulation is necessary to further a valid federal regulatory objective. The FCC determined that the VOIP services in question in the *Vonage Holdings* case were covered by the impossibility doctrine and that it was, therefore, unnecessary to determine whether they were an information service or a communications service. They suggested that this ruling would apply to fixed VOIP as well, at least so long as the technological block to separating out intrastate calls continues.

Subsequent rulings have subjected at least some VOIP service to universal service payment requirements, *Universal Service Contribution Methodology*, 21 FCCR 7518, 2006 WL 1765838 (2006), 911 responsibilities, 47 C.F.R. § 9.5 (Interconnected VOIP), and access fees, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004) (Phone to Phone IP telephony is a telecommunications service).

The *Access Charge* ruling would probably permit the State to regulate some facets of VOIP, by some providers, but certainly does not require that it do so. Moreover, the above rulings, taken together, provide grounds for the decision to be neutral as to the assessment of 911 fees and relay fees, and to permit certain access fees and application of lifeline service requirements. *See also Comcast IP Phone of Missouri v. Missouri Public Service Commission*, __ F.Supp.2d __, 2007 WL 172359 (W.D.Mo. January 18, 2007) (VOIP regulation not completely preempted).

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr

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cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Thomas Mac Middleton
The Honorable Dereck E. Davis