

**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,<sup>1</sup> hereby petitions this Court for review of the

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<sup>1</sup> 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.<sup>2</sup>

NASUCA fully participated in the underlying agency proceedings, filing both initial and reply comments therein.<sup>3</sup> 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.<sup>4</sup> 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...."<sup>5</sup> NASUCA petitions for review because portions of the FCC's *Vonage Order* exceed FCC jurisdiction and authority, are

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<sup>2</sup> 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.

<sup>3</sup> 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](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](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515291240).

<sup>4</sup> 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.

<sup>5</sup> *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.<sup>6</sup>

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.<sup>7</sup>

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<sup>6</sup> *Warth*, 422 U.S. at 511.

<sup>7</sup> *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.<sup>8</sup>

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

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<sup>8</sup> *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.<sup>9</sup>

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

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<sup>9</sup>*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. § 8-1-1-9.1(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.”<sup>10</sup> 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.”<sup>11</sup>

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.

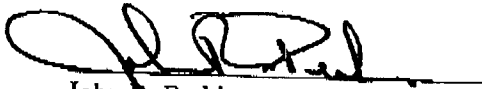
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<sup>10</sup> Articles of Incorporation, National Association of State Utility Consumer Advocates, Inc., Art. II, Charter Number 752992 (on file with Florida Department of State), 17 Jun. 1980.

<sup>11</sup> 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.<sup>12</sup> 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.



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

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January 11, 2005



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v.	)	No.
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FEDERAL COMMUNICATIONS	)	
COMMISSION and UNITED STATES OF	)	
AMERICA,	)	
	)	
Respondents.	)	

**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

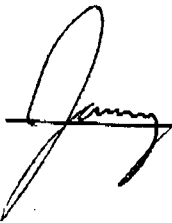
represent these consumer interests before federal regulatory agencies and courts.<sup>1</sup>

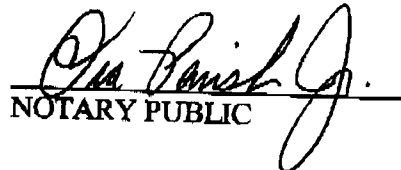
<sup>1</sup> See, e.g., Pennsylvania, 71 P.S. § 309-4(a) (1990) empowering the Pennsylvania Consumer Advocate to represent the interests of consumers before the Pennsylvania Public Utility Commission, before similar federal regulatory commissions and before state and federal courts; West Virginia, W. 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."<sup>2</sup>



CHARLES A. ACQUARD  
Executive Director, NASUCA

 Taken, sworn, and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

  
NOTARY PUBLIC

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

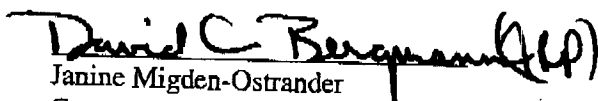
<sup>2</sup>Articles of Incorporation, National Association of State Utility Consumer Advocates, Inc., Art. II, Charter Number 752992 (on file with Florida Department of State), 17 Jun. 1980.

Respectfully submitted,



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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 11<sup>th</sup> day of January, 2005, on all parties on the attached service list.

  
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