

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

Petition Of Nebraska Public Service Commission )  
and Kansas Corporation Commission for )  
Declaratory Ruling or, in the Alternative, )  
Adoption of Rules Allowing State Universal )      WC Docket No. 06-122  
Service Funds To Assess Charges on Nomadic )  
VoIP Intrastate Revenues )  
)

**COMMENTS of the**

**NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. (NECA)  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION (NTCA)  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL  
TELECOMMUNICATIONS COMPANIES (OPASTCO)  
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE (ITTA)  
EASTERN RURAL TELECOM ASSOCIATION (ERTA)  
WESTERN TELECOMMUNICATIONS ALLIANCE (WTA)  
And the  
ARIZONA LOCAL EXCHANGE CARRIERS ASSOCIATION  
GEORGIA TELEPHONE ASSOCIATION  
NEW HAMPSHIRE TELEPHONE ASSOCIATION  
RURAL ARKANSAS TELEPHONE SYSTEMS  
TENNESSEE TELECOMMUNICATIONS ASSOCIATION  
WISCONSIN STATE TELECOMMUNICATIONS ASSOCIATION**

By Public Notice dated August 10, 2009, the Commission has asked for comment on a petition for declaratory ruling filed by the Nebraska Public Service Commission (NPSC) and the Kansas Corporation Commission (KCC) (Petitioners).<sup>1</sup> Petitioners primarily seek a declaration

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<sup>1</sup> *Comment Sought on Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rules Allowing State Universal Service Funds to Assess Charges on Nomadic Voice Over Internet Protocol Intrastate*

that the Commission's 2004 *Vonage Preemption Order*<sup>2</sup> did not prohibit states from imposing state-level USF assessments on providers of "nomadic" interconnected VoIP services.<sup>3</sup>

The Associations listed above<sup>4</sup> support Petitioners' request.<sup>5</sup> Prompt issuance of a declaratory ruling will help preserve the integrity of state universal service funding mechanisms and help assure competitive fairness among all providers of local and intrastate voice calling services.

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*Revenues*, WC Docket No. 06-122, Public Notice, DA 09- 1774 (rel. Aug. 10, 2009). (*Public Notice*).

<sup>2</sup> *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*); *aff'd Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8<sup>th</sup> Cir. 2007) (*MPUC*)

<sup>3</sup> Voice over Internet Protocol ("VoIP") is a technology that allows end users to engage in voice communications over a broadband Internet connection. *MPUC* at 574. VoIP services which permit end users to make and receive calls from any broadband connection are referred to as "nomadic". An "interconnected" VoIP service permits customers to place calls to, and receive calls from, customers with telephones connected to the traditional public switched telephone network (PSTN).

<sup>4</sup> NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission's Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. OPASTCO is a national trade association representing approximately 520 small ILECs serving rural areas of the United States. ERTA is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River. WTA is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. ITTA is an alliance of mid-size telephone companies who primarily serve rural and small markets with low population densities. The Arizona, Georgia, New Hampshire, Rural Arkansas, Tennessee and Wisconsin associations similarly represent ILECs in their respective States. The Associations understand a number of other state associations also support issuance of a declaratory ruling in this matter, and will be filing comments separately.

<sup>5</sup> *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122 (filed July 16, 2009). (*Petition*).

## I. BACKGROUND

In its 2006 *VoIP Contribution Order*,<sup>6</sup> the Commission required interconnected Voice over Internet Protocol (VoIP) service providers to contribute to federal universal service funding mechanisms based on their interstate end user revenues.<sup>7</sup> Interconnected VoIP providers were permitted to determine the interstate proportion of revenues by using a “safe harbor” (*i.e.*, 64.9%); by submitting traffic studies, or by reporting actual revenue allocations.<sup>8</sup>

Following issuance of the VoIP Contribution Order, various states, including Nebraska and Kansas, developed rules to require interconnected VoIP providers to contribute to state USF funding mechanisms.<sup>9</sup> But when Nebraska sought to compel Vonage Holdings, Inc. (Vonage), a provider of nomadic VoIP services, to contribute to its USF fund, Vonage obtained a preliminary injunction from federal district court in Nebraska barring the state from collecting USF contributions.<sup>10</sup> In issuing its injunction, the district court found Vonage was likely to prevail on its claim that the Commission had preempted all state “regulation” of nomadic VoIP

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<sup>6</sup> *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), at ¶ 34 (*VoIP Contribution Order*), *aff'd. in part and rev'd. in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

<sup>7</sup> *Id.* at ¶ 52.

<sup>8</sup> *Id.* at ¶¶ 53, 57.

<sup>9</sup> See 291 Neb. Admin. Code, Chapter 10, §§ 001-007. See *Investigation to Address Obligations of VoIP Providers with Respect to the KUSF*, Order Making Interim Findings and Conclusions Relative to Questions Posed for Investigation, Docket No. 07-GIMT-432-GIT (Kansas Corp. Comm., Jan. 9, 2008). See also, Kansas Statutes Annotated (K.S.A.) 66-2008(a).

<sup>10</sup> *Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission*, 543 F.Supp. 2d 1062 (D. Ne. 2008).

services, including the ability of states to impose state-level USF assessments on providers of nomadic interconnected VoIP services.<sup>11</sup>

The Nebraska PUC sought review of the district court's preliminary injunction before the Eighth Circuit Court of Appeals.<sup>12</sup> During the course of that proceeding, the Commission's General Counsel took the extraordinary step of filing an *amici curiae* brief with the court, agreeing with NPUC's position that the *Vonage Preemption Order* did not prohibit states from assessing nomadic VoIP providers.<sup>13</sup> The Eighth Circuit nevertheless upheld the district court's preliminary injunction, finding the lower court "did not abuse its discretion" in granting injunctive relief.<sup>14</sup>

Petitioners now ask the Commission itself to declare what its *amici* brief clearly explained – namely, the *Vonage Preemption Order* did not prohibit states from requiring nomadic VoIP providers to contribute to state-level USF mechanisms.<sup>15</sup> Petitioners also ask the Commission to declare individual states have discretion to adopt their own methods for assessing nomadic VoIP service providers, so long as such methods do not require providers to pay

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<sup>11</sup> *Id.* at 1067-1068.

<sup>12</sup> *Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission*, Notice of Appeal, No. 08-1764 (8<sup>th</sup> Cir., filed Apr. 4, 2008).

<sup>13</sup> *Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal*, No. 08-1764 (8<sup>th</sup> Cir., filed Aug. 5, 2008). (*Amici Brief*).

<sup>14</sup> *Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission*, 564 F.3d 900, 905 (8<sup>th</sup> Cir. 2009). In reviewing the district court's decision, the Court of Appeals gave substantial deference to the district court's discretion, stating it would not disturb a grant of injunctive relief so long as the lower court's decision "remains within the range of choices available, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment." *Id.* at 904, citing *Walser v. Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8<sup>th</sup> Cir. 1994).

<sup>15</sup> *Petition* at 1-2.

duplicative assessments to more than one state.<sup>16</sup> Finally, if the Commission does not issue the requested declaratory ruling, Petitioners request that it promptly initiate and conclude a proceeding to establish rules governing state-level USF assessments for nomadic VoIP providers.<sup>17</sup>

## II. DISCUSSION

The Associations support Petitioner’s request for a declaratory ruling. As the Commission’s General Counsel explained to the Eight Circuit, the 2004 *Vonage Preemption Order* did not prohibit states from requiring nomadic VoIP providers to contribute to state USF mechanisms. In fact, that order “did not even address, let alone preempt, state-level universal service obligations of interconnected VoIP providers . . . .”<sup>18</sup>

In reaching the opposite conclusion, the district court (as well as the Eighth Circuit) relied on broad language in the *Vonage Preemption Order* that implied the Commission intended to preempt “all regulation” of nomadic VoIP.<sup>19</sup> But as the Commission’s *amici* brief correctly explains, there is a clear distinction between the economic regulation addressed by the *Vonage Preemption Order* (e.g., market entry and exit limitations, tariffing requirements, etc.) and imposition of state-level USF assessments.<sup>20</sup> Such assessments do not in any way “frustrate” the

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<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Amici Brief* at 14. The Commission’s *VoIP Contribution Order* was issued in 2006, nearly two years *after* the Commission issued the *Vonage Preemption Order*. Presumably, if the Commission had contemplated that its earlier preemption order prevented states from imposing state-level USF assessments on nomadic interconnected VoIP providers, it would have made this clear when specifying federal USF assessment methods for these providers. Yet, as the Commission’s *amici* brief points out, the 2006 order is silent on this key point.

<sup>19</sup> *Vonage v. Nebraska PSC*, 564 F.3d at 905.

<sup>20</sup> *Amici Brief* at 14, quoting *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title*

federal regulatory scheme covering nomadic VoIP services, and thus do not fall within the “impossibility exception” relied on by the Commission’s preemption analysis.<sup>21</sup>

Petitioners also correctly point out the Commission is free to issue the requested declaratory ruling, notwithstanding the Eight Circuit’s decision upholding the district court’s preliminary injunction.<sup>22</sup> The appellate court was merely considering the reasonableness of the district court’s grant of injunctive relief – it did *not* find, for example, that the federal Telecommunications Act “unambiguously requires” preemption of state USF assessments on nomadic VoIP providers.<sup>23</sup> Under the circumstances, the fact the Eight Circuit upheld the lower court’s decision is no bar to the Commission’s issuance of a declaratory ruling.<sup>24</sup>

Even Vonage apparently agrees nomadic VoIP providers can reasonably be subject to state USF assessments.<sup>25</sup> It apparently opposes issuance of a declaratory ruling, however, and suggests instead the Commission conduct a rulemaking to determine specific contribution methodologies *before* states can begin requiring contributions from these providers.<sup>26</sup>

There is no need for such a rulemaking. Petitioners explain it is highly unlikely that states will actually impose duplicative assessments or fail to provide appropriate credits when such conflicts occur. State regulators frequently resolve similar accounting issues (for example,

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*II Common-Carriage Requirements*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007), at ¶ 5.

<sup>21</sup> *See Amici Brief* at 13-14.

<sup>22</sup> *Petition* at 21.

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* at 21-23.

<sup>25</sup> *See* Letter from Brita D. Strandberg, Wiltshire & Grannis, Counsel for Vonage, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (Aug. 7, 2009) (*Vonage August 7<sup>th</sup> Letter*). *See also* Letter from Brita D. Strandberg, Wiltshire & Grannis, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (Aug. 25, 2009) (*Vonage August 25<sup>th</sup> Letter*).

<sup>26</sup> *Id.* at 2-3.

in calculating income and sales revenues of multi-state taxpayers) without need for federal rules.<sup>27</sup> Similar procedures can easily be put in place to assure nomadic VoIP revenues are not subject to duplicative assessments.<sup>28</sup>

To the extent potential double counting is a concern, however, the Commission can simply state that its ruling does not protect states imposing duplicative assessments on nomadic VoIP providers.<sup>29</sup> Or, the Commission may wish to indicate it will act promptly to resolve any instances of alleged double counting in the unlikely event such problems actually arise. It may also indicate a preference for particular methods by stating, for example, the use of billing addresses for determining subscriber counts is presumptively lawful.<sup>30</sup> But at this point there certainly appears to be no need to delay resolution of this issue or expend administrative resources conducting a rulemaking proceeding, when it appears such conflicts, if they occur at all, can be resolved easily by the involved states.

Finally, delays associated with a rulemaking proceeding would only serve to destabilize state USF programs and preserve an unfair competitive advantage for Vonage and other nomadic VoIP providers. Petitioners explain that the courts' actions in this case have created a situation where traditional telephone companies, as well as "fixed" interconnected VoIP service providers, are required to contribute to state USF programs, while nomadic VoIP providers (who compete

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<sup>27</sup> *Petition* at 28.

<sup>28</sup> Vonage makes much of the fact that Kansas and Nebraska employ different methods for counting nomadic VoIP subscribers in their respective jurisdictions. *See e.g., Vonage August 7<sup>th</sup> Letter* at 2, and *Vonage August 25<sup>th</sup> Letter* at 2-3. But Nebraska and Kansas have already committed to address this situation. *See Petition* at 28-31. It is unclear why the Commission should conduct a rulemaking proceeding to resolve problems that have already been addressed.

<sup>29</sup> *See Letter from James Bradford Ramsay, NARUC to Marlene H. Dortch, FCC, WC Docket No. 06-122 (Aug. 24, 2009), at 3.*

<sup>30</sup> This is similar to the approach taken in the Commission's Part 54 rules governing USF high cost fund distributions for mobile service providers. *See 47 C.F.R. § 54.307(b).*

directly with these providers) escape such obligations.<sup>31</sup> Issuing a declaratory ruling clarifying that the *Vonage Preemption Order* did not, in fact, prohibit states from imposing USF assessments on nomadic VoIP providers is the simplest and most direct way to create a “level playing field” among all providers of voice telephony services, at least with respect to state USF assessments.<sup>32</sup>

### III. CONCLUSION

The Commission should promptly issue a declaratory ruling affirming the 2004 *Vonage Preemption Order* does not preclude states from imposing USF assessments on providers of nomadic interconnected VoIP services. The Commission may reasonably wish to include in such a declaratory ruling a statement to the effect its ruling does not protect states imposing duplicative assessments. Or, it may provide more specific guidance to states on contribution methods as part of its declaratory ruling. There is, however, no need for the Commission to conduct a rulemaking or other proceedings on this issue, as doing so is unnecessary and will only

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<sup>31</sup> *See Petition* at 19-20.

<sup>32</sup> Competitive imbalances are also created by continuing uncertainty about the intercarrier compensation obligations of interconnected VoIP providers. *See, e.g.*, Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (May 15, 2009); Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (July 9, 2009).



serve to extend the current unfair situation caused by the Nebraska district court's preliminary injunction.

September 9, 2009

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 9<sup>th</sup> day of September, 2009 by electronic filing and e-mail to the persons listed below.

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