

**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,) WC Docket No. 06-122
Adoption of Rules Allowing State Universal)
Service Funds to Assess Charges on Nomadic)
VoIP Intrastate Revenues)
)

**REPLY 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)
WESTERN TELECOMMUNICATIONS ALLIANCE (WTA)
EASTERN RURAL TELECOM ASSOCIATION (ERTA)
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE (ITTA)**

**And the
ARIZONA LOCAL EXCHANGE CARRIERS ASSOCIATION
GEORGIA TELEPHONE ASSOCIATION
NEW HAMPSHIRE TELEPHONE ASSOCIATION
RURAL ARKANSAS TELEPHONE SYSTEMS**

The Associations¹ listed above reply to comments filed by AT&T, 8X8, Inc. (8X8), Google Inc. (Google), the Voice on the Net Coalition (VON), and Vonage Holding Corporation (Vonage) in the above-captioned matter.

¹ 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

The Nebraska Public Service and the Kansas Corporation Commissions have asked the FCC to declare its 2004 *Vonage Preemption Order* did not preempt states from imposing state-level USF assessments on providers of “nomadic” VoIP services.² AT&T, 8x8, Google, VON Coalition, and Vonage oppose the Joint Petition.

These commenters offer a variety of arguments to the effect the *Vonage Preemption Order* did, in fact, preempt states’ ability to impose universal service funding obligations on nomadic VoIP services, and therefore the Commission cannot issue the requested declaratory ruling.³ Some opposing commenters also claim nomadic VoIP services should be protected from state-level USF assessments because of the allegedly special nature of these services.⁴ Finally, while some appear to accept states’ potential authority to impose state-level USF

association representing approximately 520 small ILECs serving rural areas of the United States. WTA is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. ERTA is a trade association representing approximately 68 rural telephone companies operating in states east 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, and Rural Arkansas associations similarly represent ILECs in their respective States.

² *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122 (July 16, 2009) (*Petition*). Petitioners primarily seek a declaration that the Commission’s 2004 *Vonage Preemption Order* did not prohibit states from imposing state-level USF assessments on providers of “nomadic” interconnected VoIP services. *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 (8th Cir. 2007).

³ *See e.g.*, Google, at 4-9; 8X8, at 4-6.

⁴ *E.g.*, 8X8 at 4; Google at 5; VON Coalition at 4.

assessments on nomadic VoIP services,⁵ they argue the Commission must first conduct a rulemaking proceeding to resolve potential conflicts in assessment methods.

None of these arguments has merit. First, the record makes clear the *Vonage Preemption Order* did not preempt all state authority over VoIP services. Rather, the Commission merely preempted Minnesota from enforcing its “certification, tariffing or other related requirements” as conditions to the provision of nomadic VoIP in that state.⁶ There was no mention of preempting intrastate universal service programs, which do not constitute the type of economic or market entry regulation at issue in the Minnesota case.⁷ Indeed, AT&T notes this is not dissimilar from how the Commission treated CMRS providers when it found that state imposition of universal service contribution obligation on wireless carriers was “neither a rate nor an entry regulation.”⁸

Preemption of a state regulation may not be presumed “without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress.”⁹ In the *Vonage*

⁵ *E.g.*, *Vonage* at 3; AT&T at 9.

⁶ *Vonage Preemption Order*, at ¶46.

⁷ The Commission’s narrow preemption in the *Vonage Preemption Order* is consistent with its obligation to respect the role of the states in promoting universal service. *See, e.g.*, 47 U.S.C. § 254(f) (specifically authorizing states to adopt intrastate universal service plans that are consistent with those of the FCC).

⁸ AT&T at 8, citing *Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, WTB/POL 96-2, Declaratory Ruling, 13 FCC Rcd 1735, ¶25 (1997).

⁹ *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies; Petition for Declaratory Ruling on Question of Federal Preemption Involving Order of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions under Section 220 of the Communications Act and (ii) Established FCC Policies*, Memorandum Opinion & Order, 92 FCC 2d 864, at ¶ 12 (1983).

Preemption Order,¹⁰ the Commission narrowly preempted only a few, specific state regulations where it found it impossible to separate state and interstate components of Vonage's service, and where those specific state market-entry and pricing regulations would interfere with the important federal policies related to such services. The Commission's own General Counsel has explained that this preemption did not extend to state-level USF assessments on nomadic VoIP services.¹¹ The Commission is therefore free to issue the requested declaratory ruling without fear of contradicting prior precedent.¹²

Several opposing commenters rely on the myth VoIP service is an "information service" and as such cannot be subject to state-level USF assessments.¹³ But VoIP itself is merely a technology, not a service.¹⁴ The bare fact interconnected VoIP services utilize IP technology to transmit telecommunications traffic does not mean these services cannot be regulated as

¹⁰ Google, at 5, appears to claim the mere mention, in a footnote in the *Vonage Preemption Order*, of a section of Minnesota's statutes that imposes state universal service fees, necessarily operates to preempt that statute and any implementing regulations. The simple reference to a state statute in a footnote is insufficient analysis to constitute preemption of that statute. Google, n. 12, citing Minn. Stat §§ 237.07, 237.16, 237.49, 237.74(12); Minn. Rules §§ 7812.0200(1), 7812.0550(1).

¹¹ *Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal*, No. 08-1764 (8th Cir., filed Aug. 5, 2008), at 14 (*Amici Brief*). Google, at 2, incorrectly asserts that Joint Petitioners improperly rely on the Commission's *amici* brief as "authority" for issuing the requested declaratory ruling. The Joint Petition does not, however, confuse the Commission's legal brief with a Commission order. Rather, the Commission's brief is cited for persuasively arguing the same legal position taken by Petitioners.

¹² Comments by Google, at 2, to the effect that Joint Petitioners belatedly seek "reconsideration" of the *Vonage Preemption Order* simply beg (*i.e.*, assume the answer to) the question presented. If, as Joint Petitioners correctly argue, the *Vonage Preemption Order* did not extend to state-level USF assessments, then the Joint Petition does not seek reconsideration but rather *confirmation* of the *Vonage Preemption Order's* findings.

¹³ *E.g.*, VON Coalition, at 4.

¹⁴ *See e.g.*, NECA Comments, WC Docket No. 05-337, at 11-12 (Nov. 26, 2008); NECA Reply Comments, WC Docket No. 05-337, at 10-13 (Dec. 22, 2008).

traditional telecommunications services,¹⁵ and certainly does not justify exempting such services from contributing to state-level USF programs as their competitors are required to do.¹⁶

Finally, as NARUC's comments explain, the Commission is free to issue the requested declaratory ruling without the need to conduct further notice and comment proceedings.¹⁷ The main justification offered for an additional proceeding is that states might impose inconsistent methods for assessing nomadic VoIP providers.¹⁸ But there is no evidence that nomadic VoIP providers have actually been burdened by such inconsistent regulation, and petitioning states (Nebraska and Kansas) have committed to making sure such overlapping assessments do not occur.¹⁹ Thus, the Commission could avoid any such problems by clarifying in the context of its

¹⁵ See *American Tel. & Tel. Co. (Television Transmission Services)*, Memorandum Opinion & Order, 67 FCC 2d 1134, at ¶87 (1977), *aff'd sub nom. American Broadcasting Cos. v. FCC*, 663 F.2d 133 (D.C. Cir. 1980). (it is "the character of the communications services carried over the facilities in question, and not the technology associated with the facilities themselves, that is important in determining whether two or more services are 'like services'" for regulatory classification purposes.)

¹⁶ The Commission has repeatedly found interconnected VoIP services to be substitutes for traditional circuit-switched voice services. See, e.g., *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 (2009). More critically, it has found such services to be "indistinguishable" from traditional circuit-switched services *from a customer perspective*. *Id.* at ¶ 12. See also, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *IP-Enabled Services*, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007), at ¶ 56; *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712 (2007), at ¶ 18. Since the question of whether one service (e.g., interconnected VoIP) is "like" another service (e.g., circuit-switched local and long distance) for regulatory purposes depends on customer perception, see, e.g., *American Tel. & Tel. Co. (DDS)*, Final Decision & Order, 62 FCC 2d 774, at ¶ 75a (1977), these findings preclude arguments that interconnected VoIP services are entitled to special regulatory treatment.

¹⁷ NARUC at 6.

¹⁸ E.g., Google at 9-10; 8X8 at 7-8; Vonage at 3; VON Coalition at 8; AT&T at 9-10.

¹⁹ NARUC at 9. See also *Petition* at 28.

declaratory ruling that use of a particular method (*e.g.*, billing addresses) to determine nomadic VoIP customer locations is presumptively lawful.²⁰

In any event, there is no need for the Commission to expend time and resources on a rulemaking proceeding to resolve these issues, particularly as the current unfair situation permits nomadic VoIP to escape state-level USF assessments while their fixed network competitors must pay.

CONCLUSION

For the reasons set forth herein and in the Associations' initial comments, the Commission should grant the *Petition*, stating clearly that states are not precluded from imposing

²⁰ *E.g.*, NECA, *et al.* at 7; NASUCA at 3; D.C. PSC at 5.

USF assessments on providers of nomadic interconnected VoIP services.

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Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.



By:
Richard A. Askoff
Its Attorney
80 South Jefferson Road
Whippany, NJ 07981
(973) 884-8000

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Karlen Reed
Karlen Reed
Regulatory Counsel
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

WESTERN TELECOMMUNICAITONS
ALLIANCE

By: /s/ Derrick Owens
Derrick Owens
Director of Government Affairs
317 Massachusetts Avenue, NE
Ste. 300 C
Washington, DC 20002

ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT OF
SMALL TELECOMMUNICATIONS
COMPANIES

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations
21 Dupont Circle NW, Ste. 700
Washington, DC 20036
(202) 659-5990

EASTERN RURAL TELECOM
ASSOCIATION

By: /s/ Jerry Weikle
Jerry Weikle
Regulatory Consultant
5910 Clyde Rhyne Drive
Sanford, NC 27330
(919) 708-7404

INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE

By: /s/ Joshua Seidemann

Joshua Seidemann

Vice President, Regulatory Affairs

1101 Vermont Avenue NW, Suite 501

Washington, DC 20005

(202) 898-1520

GEORGIA TELEPHONE ASSOCIATION

By: /s/ John Silk

John Silk

Executive Vice President

1900 Century Blvd.

Suite 8

Atlanta, GA 30345

(404) 321-5368

NEW HAMPSHIRE TELEPHONE
ASSOCIATION

By: /s/ Michael C. Reed

Michael C. Reed

President

PO Box 87

Weare, NH 03281

RURAL ARKANSAS TELEPHONE
SYSTEMS

By: /s/ David Wells

David Wells

President

PO Box 778

Hampton, AR 71744

870-798-2201

ARIZONA LOCAL EXCHANGE
CARRIERS ASSOCIATION

By: /s/ Curt Huttzell

Curt Huttzell

President

P.O. Box 816

Sells, AZ 85634

(801) 256-9560

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Reply Comments was served this 24th day of September, 2009 by electronic filing and e-mail to the persons listed below.

By: /s/ Shawn O'Brien
Shawn O'Brien

The following parties were served:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554

Cindy Spiers
Federal Communications Commission
TAPD
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554
Cindy.Spiers@fcc.gov

Antoinette Stevens
Federal Communications Commission
TAPD
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554
Antoinette.Stevens@fcc.gov

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, SW
Washington, DC 20554
fcc@bcpiweb.com