

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

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

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (VON Coalition) ¹ hereby submits these comments in response to the Petition of the Nebraska Public Service Commission and Kansas Corporation Commission (the “Petitioners”) requesting either a declaratory ruling or the adoption of a rule that state universal service funds assessment may be applied to nomadic, interconnected VoIP intrastate revenues (the “Petition”).² The VON Coalition opposes the grant of a declaratory ruling and the adoption of a rule absent a rulemaking pursuant to the Administrative Procedure Act.

In 2004, the FCC preempted state regulation of interconnected VoIP, a decision that has been repeatedly upheld by federal courts as recently as May 2009.³ Nothing has changed to warrant a change in policy. The FCC should deny the Petition and maintain

¹ The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of VoIP. VON Coalition members are developing and delivering voice innovations over the Internet. VON Coalition members include Cisco, Covad, Google, iBasis, Intel, Microsoft, New Global Telecom, PointOne, Skype, T-Mobile and Yahoo.

² The Petition was placed on Public Notice on August 10, 2009, with comments requested by September 9, 2009. See Public Notice, DA 09-1774, WC Docket No. 06-122 (August 10, 2009).

³ See *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900, (8th Cir. May 1, 2009) (“*Vonage Nebraska Decision*”).

its long standing policy of setting forth a national standard for regulation of VoIP services which has led to a vibrant marketplace and provided a variety of VoIP offerings to consumers.

I. NOMADIC INTERCONNECTED VOIP SERVICE IS EXEMPT FROM STATE PUBLIC UTILITY REGULATION INCLUDING THE APPLICATION OF STATE UNIVERSAL SERVICE FEES.

The Petition requests a declaratory ruling that the Commission's 2004 decision preempting state regulation of interconnected VoIP did not preempt states from applying state Universal Service Fund assessments to the intrastate revenues of nomadic VoIP providers. Petition at 3. The Petition also requests a second declaratory ruling or a rule addressing the mechanisms for calculating state-specific intrastate revenue for purposes of assessment, suggesting that states can use any mechanism that does not assess interstate revenues or would result in the VoIP provider paying an assessment to more than one state for the same revenue.⁴ Petition at 3.

Both Congress and the FCC have made it clear that the FCC has the authority to determine the regulatory scheme for information services. The Telecommunications Act of 1996 ("1996 Act") creates a distinction between "telecommunications services" and "information services." The first consist of pure transmission services offered to end

⁴ The Petition states that nomadic service VoIP service allows a customer "to travel and place calls to persons on the PSTN and receive calls from persons on the PSTN anywhere where the customers can find a broadband Internet connection." Petition at 8. As an initial matter, the definition of nomadic VoIP proposed by the Petitioners fails to recognize that, in many cases, the decision whether an interconnected VoIP service can be used from any broadband connection is made by the VoIP service provider or the end user, and is generally not based on technical limitations of the equipment or the service. In addition, because VoIP providers generally offer a single, monthly rate for local, intrastate, and interstate usage, and do not bill based on the length or geographic endpoints of the communication, Petitioners fail to explain how state USF can be assessed when the service is actually used from multiple locations in different states. For example, which state USF assessment applies to a customer who normally lives or works in Nebraska, but spends the month of August on vacation in Bermuda, Oklahoma and Kansas? This example highlights that assessment based on usage or revenues are arbitrary and easily subject to multiple interpretations. The VON Coalition supports federal universal service contributions based on the use of telephone numbers or connections to public telephone network.

users without change in form or content, and subject to common-carrier regulation.⁵ The second, in contrast, offers the ability, for example, to store, retrieve, utilize and/or manipulate “information.”⁶ Under federal law, these “information services” are exempt from common-carrier regulation, which includes state common-carrier regulations (e.g., annual reporting requirements, telecommunications regulatory fees). The FCC’s long standing policy of exempting information services from state public utility regulation has proven to be one of the great successes in implementing the 1996 Act’s pro-competitive objectives.

While the FCC has asserted limited jurisdiction over interconnected VoIP services on a case-by-case basis, it has not treated interconnected VoIP as a traditional telecommunications service.⁷ VoIP service takes full advantage of the flexibility and efficiency of IP-based transmissions by enabling the user to manipulate, generate, store, transform, and make information services available to others.⁸ Further, the FCC has held that a service will be treated as a single, integrated information service, rather than as an information service with a separate telecommunications service component, when the telecommunications features are not “separated from the data-processing capabilities of the service” but are instead “part and parcel of [the overall information] service and . . . integral to its other capabilities.”⁹ VoIP services are offered as an integrated service that intertwines both data-processing and certain telecommunications transmission processes,

⁵ 47 U.S.C. § 153(43).

⁶ 47 U.S.C. § 153(20).

⁷ See, e.g., *IP-Enabled Services*, WC Docket No. 04-36, 47 CR 1080 (released May 13, 2009), at ¶8, fn. 21.

⁸ The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” See 47 U.S.C. § 153(20).

⁹ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶¶ 36, 38.

which provides end users with one streamlined service. Thus, interconnected VoIP falls squarely within the definition of an “information service” and is subject to exclusive federal jurisdiction unless otherwise provided by Congress or the FCC.

The FCC has decided that retail nomadic VoIP services are exempt from state public utility regulation.¹⁰ This rationale was based on the unique features and functionalities of nomadic VoIP (all of which are still available today), including that the service is fully portable, may be accessed through a broadband connection located anywhere in the world, and users can communicate through traditional handsets attached to a terminal adaptor, IP phones or the user’s computer if equipped with a microphone and software to perform the protocol conversion.¹¹ Further, multiple federal courts have enjoined state commissions from regulating interconnected VoIP services on the grounds that they were information services, exempt from state utility regulation.¹²

The Minnesota federal district court has even held that “[state] regulations that have the *effect* of regulating information services are in conflict with federal law and must be pre-empted.¹³ Additionally, a federal district court in Missouri held that existing laws mandate that states classify VoIP services that perform IP to TDM conversions as an information service. The Missouri District Court recognized that IP-PSTN traffic is an information service because it offers the “capability for generating, acquiring, storing

¹⁰ See *Petition for Declaratory Ruling that Pulver.Com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (“*Pulver Declaratory Ruling*”); see also *Vonage Holdings Corp. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*FCC Vonage Preemption Order*”).

¹¹ *FCC Vonage Preemption Order*, at ¶¶ 5-6. In addition, the Commission noted that though service providers may use traditional telephone numbers, those numbers are not necessarily tied to the user’s physical location. *Id.* at ¶ 9.

¹² See e.g., *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (summarizing federal policy of preempting state attempts to regulate information services); *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-1083 (E.D. Mo. 2006) (classifying services as information services when it transforms or processes “information,” even if the content is the same).

¹³ See *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003).

transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁴ The court further noted that IP-PSTN traffic “alters the form and content of the information sent and received because it involves a net protocol conversion from the digitized packets of the IP-protocol to the TDM technology used on the PSTN.”¹⁵ While the court recognized that the Commission may be willing to revisit the classification and regulatory status of interconnected VoIP at some point, “existing rules and orders establish how VoIP and other IP services should be treated in the interim.”¹⁶

While the FCC has imposed some public safety and consumer protection obligations on VoIP providers, it has *not* granted the states authority to impose state fees on VoIP services, including universal service fees. And, although interconnected VoIP providers are subject to “general laws governing entities conducting business within the state,”¹⁷ state universal service fees, such as those collected by the Petitioners, are “not general obligations applicable to entities conducting business within” Kansas and Nebraska. Such fees are targeted at a specific class of entities, and as a result fall within the scope of regulations preempted under the *FCC Vonage Preemption Order*.¹⁸

The Petition repeatedly notes that the FCC filed an amicus brief with the 8th Circuit in 2008 stating that it did not preempt states from imposing universal service contributions on nomadic interconnected VoIP service providers.¹⁹ However, this amicus brief not only is in direct conflict with the *FCC Vonage Preemption Order*, which was voted by the full Commission, but was issued by the Commission’s General Counsels,

¹⁴ See *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-1083, citing 47 U.S.C. ¶ 153(20).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *FCC Vonage Preemption Order* at 22405.

¹⁸ *Id.*

¹⁹ See, Petition at 1, 3, 14, 20, 21, 22, 23, 24, 25 and 26

not a bureau or the by the full Commission.²⁰ Just as the 8th Circuit did not find the amicus brief determinative or even relevant in the *Vonage Nebraska Decision*, it is not be determinative or persuasive now.

II. NOMADIC INTERCONNECTED VOIP IS SUBJECT TO THE FCC’S EXCLUSIVE JURISDCITION BASED ON THE REASONING OF THE FCC VONAGE PREEMPTION ORDER AND VONAGE NEBRASKA ORDER

In the *FCC Vonage Preemption Order*, the FCC held that Vonage’s “Digital Voice” service is subject to FCC exclusive jurisdiction and preempted the Minnesota PUC from imposing traditional telecommunications regulations on that service. The same principles that applied in the *FCC Vonage Preemption Order* apply here. The FCC concluded that Vonage’s service is “jurisdictionally mixed” meaning that it includes both interstate and intrastate services.²¹ The FCC stated that Vonage’s service could, in theory, be subject to state regulation, *provided that* the state regulation could coexist with the FCC’s pro-competitive deregulatory framework for information services. However, the FCC held that there were no “practical means” to separate the interstate and intrastate components of Vonage’s service to “enable[e] dual federal and state regulations to exist.”²² The Commission concluded that the state regulations at issue were not compatible with the FCC’s generally deregulatory framework for information services.

In its *Vonage Preemption Order*, the FCC also noted that nomadic VoIP service is an integrated offering whose functionalities include interactive computer services, along with voice-calling capabilities.²³ The Commission recognized that VoIP users can “utilize multiple service features that access different websites or IP addresses during the

²⁰ Furthermore, the makeup of the FCC has changed substantially from when the FCC General Counsel’s Office filed the amicus brief.

²¹ See *FCC Vonage Preemption Order* at 22414, ¶ 18 & n. 63.

²² *Id.* at 22418, ¶ 23.

²³ *Id.* at ¶ 7.

same communication session and perform different types of communications simultaneously, none of which the provider has a means to separately track or record.”²⁴ Indeed, the Commission asserted that it was the total lack of dependence on any geographically defined location that distinguished nomadic VoIP services, that providers had no service-driven reason to know a users’ location, and that to require the incorporation of geographic endpoints would serve no legitimate policy purpose and discourage the development of innovative, competitive, advanced service offerings.²⁵

The *Vonage Nebraska Decision* affirmed the FCC’s analysis of preempting state regulatory utility regulations, holding that “VoIP services cannot be separated into interstate and intrastate usage” and the impossibility exception is determinative.²⁶ The 8th Circuit Court relied on the *Vonage Preemption Order* noting that “[the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [Vonage’s DigitalVoice service] and other IP-enabled services having the same capabilities.”²⁷

The FCC has made clear it, and not state commissions, has the responsibility to decide if regulations will be applied to VoIP services. And, federal courts have agreed and upheld the FCC’s preemptory role regarding VoIP in recent decisions. Accordingly, the Commission should deny the Petition.

III. IF THE COMMISSION WANTS TO ADDRESS THE ISSUE AT HAND, IT SHOULD INITIATE A RULEMAKING TO DEVELOP A MORE COMPREHENSIVE RECORD

²⁴ *Id.* at 22419, ¶ 25.

²⁵ *Id.*

²⁶ See *Vonage Nebraska Decision*, at page 8, citing *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 578-79 (8th Cir. 2007).

²⁷ *Id.* at pages 8-9.

As discussed above, the Commission should deny the declaratory relief requested in the Petition. However, should the Commission find it necessary to explore the application of state Universal Service Fund fees to VoIP further, it may choose to initiate a rulemaking that can better determine that the unique factors that resulted in federal preemption of nomadic VoIP in 2004 have not changed, including the fact that nomadic VoIP is jurisdictionally mixed and that separation of intrastate and interstate revenues is nearly impossible. The VON Coalition would caution, however, that application of state USF fees to nomadic VoIP could be the precursor to more comprehensive state regulation, including burdensome, costly, and time consuming certification, tariffing, and reporting requirements that will likely lead to increased costs for end users, have an adverse impact on the emergence of VoIP technology and result in smaller VoIP providers exiting the market.

In addition, the Commission is considering changes to the contribution methodology for USF, including proposals to abolish the current revenue-based system in favor of a number- or connections-based system.²⁸ Once revenues are no longer used to calculate federal USF contributions, maintenance of a revenue-based state USF collection system, as Petitioners require, would become a significant, if not impossible, burden for VoIP service providers.

Accordingly, should the FCC want to look further at the issue, a broader rulemaking is a more appropriate forum than a declaratory ruling petition proceeding for consideration of these important policy issues to ensure that the result does not slow innovation of and demand for VoIP services.

²⁸ See, e.g., AT&T Petition for Immediate Commission Action to Reform Its Universal Service Contribution Methodology, WC Docket 06-122, filed July 10, 2009.

III. CONCLUSION

For the foregoing reasons, VON respectfully requests that the Commission deny the Petitioner's request for declaratory relief. If the Commission deems it necessary to address the issue of the application of Universal Service fees to VoIP, it should initiate a rulemaking that will examine the impact of this decision within other pending proceedings that will affect nomadic, interconnected VoIP.

Respectfully submitted,

VOICE ON THE NET COALITION

/s/

Glenn S. Richards
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington D.C. 20037
(202) 663-8215

Its Attorney

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