

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	
)	
Petition for Declaratory Ruling of the)	WC Docket No. 06-122
Nebraska Public Service Commission and the)	RM Docket No. _____
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)	

**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**

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I. SUMMARY

The Nebraska Public Service Commission (“NPSC”) and the Kansas Corporation Commission (“KCC”) (collectively “State Petitioners”) hereby petition the Federal Communications Commission (“FCC”) under 47 C.F.R. § 1.2 for a declaratory ruling that the FCC has not preempted states from assessing universal service charges on the intrastate revenues of providers of nomadic Voice Over the Internet Protocol (“VoIP”) service. The FCC has already interpreted the law this way in an *Amicus Curiae* brief that it filed with the Eighth Circuit Court of Appeals last year. However, the Eighth Circuit suggests that the FCC must issue a formal order before states may assess universal service contributions on intrastate nomadic VoIP revenue. *See Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission*, 564 F.3d 900 (8th Cir. May 1, 2009) (“*Vonage v. NPSC*”). The FCC should now issue a Declaratory Ruling, or in the alternative a Rule, expressing the principles stated in its *Amicus Curiae* brief.

Specifically, the FCC should declare that states are not preempted from imposing requirements on nomadic interconnected VoIP providers to contribute to state universal service funds under Section 254 of the Federal Communications Act (“FCA”) where they provide voice service within a state. Section 254(b)(5) requires a partnership by which the federal government and the states work together to generate sufficient funding to support universal service objectives as mandated by Section 254. 47 U.S.C. § 254(b)(5).

As the FCC stated in its *Amicus Curiae* brief, which is attached as Exhibit A to this Petition, there is no conflict between federal assessments of universal service contributions on the interstate portion of a provider’s revenue and state assessment of universal service contributions on the remaining intrastate portion. Accordingly, the second element necessary for “impossibility” preemption, that the challenged state regulation conflicts with federal regulatory

objectives, is not met. Therefore preemption is inappropriate. Assessment of intrastate revenue does not burden the federal USF, which assesses only interstate revenue. State Petitioners allow nomadic VoIP providers to designate 35.1% of their revenue as intrastate, conforming with the FCC's decision to establish a safe-harbor under which a nomadic VoIP provider may deem the other 64.9% of its revenue as interstate. State Petitioners also allow nomadic VoIP providers to utilize the other two FCC-approved mechanisms for determining the percentage of overall revenues that are interstate and intrastate (traffic studies and actual traffic measurements).

While the NPSC (and KCC, which was not a party to the litigation) strongly disagree with the Eighth Circuit's reading of the 2004 *Vonage Preemption Order*,¹ the Eighth Circuit recognized the authority of the *FCC* to decline to preempt state universal service assessments on nomadic VoIP providers: “[A] universal service fund surcharge could be assessed” on intrastate revenues, but “the FCC... and not the state commissions, has the responsibility to decide if such regulations will be applied.”² Thus, there will be no conflict between the Eighth Circuit's decision and a FCC order granting this Petition and declining to preempt state USF assessments.

However, the FCC need not and should not limit the requested declaratory ruling to prospective-only effect. Under the Supreme Court's *Brand X* opinion, the FCC, as the agency charged with administering the FCA, is required to follow prior court rulings interpreting the FCA only in the narrow situation in which the court declares that the FCA unambiguously requires a particular result.³ The Eighth Circuit did not declare that the FCA unambiguously requires any result here -- rather that Court explained that it arrived at “a reasonable

¹ *Vonage Holdings Corp. Pet. for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC.Rcd. 22404 (2004) (“*Vonage Preemption Order*”), *aff'd. Minnesota Public Utility Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007)

² *Vonage v NPSC*, 564 F.3d at 905.

³ *Nat. Cable and Telecom. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

interpretation” of the FCC’s 2004 *Vonage Preemption Order* – not necessarily the only reasonable interpretation. The FCC is in the best position to interpret its own prior orders, and such interpretation is entitled to substantial deference.⁴ Vonage’s apparently successful argument to the Eighth Circuit that an *Amicus Curiae* brief does not constitute an agency decision is no longer relevant because this Petition seeks an FCC order that will be due deference on judicial review. The FCC should enter an order confirming what its *Amicus Curiae* brief said -- that its *Vonage Preemption Order* did not preempt state USF assessments of intrastate nomadic VoIP revenues.

In addition, State Petitioners request a second declaratory ruling or a rule addressing the mechanisms for calculating *state-specific* intrastate revenues for purposes of assessment. State Petitioners request that the FCC declare that states have discretion to adopt any mechanisms that do not assess interstate revenues and that contain procedures designed to ensure that no provider pays assessments to more than one state on the same intrastate revenues. Further, the FCC should designate a “safe harbor” mechanism that states may elect to use to calculate assessable revenues without fear of preemption litigation. Preparing this second order regarding mechanics should not hold up issuing a first order declaring the basic principle that state USF assessments of intrastate nomadic VoIP revenues are not preempted, as State Petitioners will exclude from assessable revenue any intrastate revenue actually assessed by another state USF.

There is no need to adopt federal rules to declare the absence of federal preemption of state rules and state statutes, so the FCC should proceed by issuing a declaratory ruling. However, should the FCC determine that proceeding via rulemaking procedures (47 CFR 1.401)

⁴ See, *AT&T Corp. v. FCC*, 488 F.3d 426, 431 (D.C. Cir. 2006); *accord NetworkIP v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008).

is preferable, it should propose and adopt rules with the same content as the declaratory rulings requested above. Whatever procedure it utilizes, the FCC should act swiftly to protect universal service and limit the unfair advantage now claimed by nomadic VoIP providers over all other providers.

II. BACKGROUND

A. FCC VoIP Contribution Order.

In 2006, the FCC adopted its *VoIP Contribution Order* requiring interconnected VoIP providers to contribute to the federal USF.⁵ The FCC stated that interconnected VoIP providers “benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the [Public Switched Telephone Network]” and that requiring them to contribute would promote Section 254’s “principle of competitive neutrality” by “reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations.” *VoIP Contribution Order*, ¶¶ 43, 44. The FCC required interconnected VoIP providers contribute on their interstate revenues and gave them three options to determine the percentage of their revenues that were interstate as opposed to intrastate: (1) use a safe-harbor under which 64.9% of revenues are deemed to be interstate, (2) submit a traffic study estimating the interstate percentage, or (3) report an actual interstate percentage based on actual revenue allocations. *Id.* ¶¶ 53, 57.

⁵ *Report and Order and Notice of Proposed Rulemaking, Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 ¶ 34 (2006) (“*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).

B. Nebraska Fund.

The NPSC established the Nebraska Universal Service Fund (“NUSF”)⁶ based on state law⁷ which directed it, to the extent not prohibited by federal law, to require every telecommunications company to contribute to a funding mechanism to support universal service.⁸ After the FCC issued its *VoIP Contribution Order*, the NPSC opened an investigation, developed a record, and determined that it should extend contribution requirements to interconnected VoIP providers serving in Nebraska. Copies of the pertinent NPSC Orders are supplied as Exhibit B.⁹ To avoid imposing a burden on the federal USF, it permitted providers to identify intrastate revenues by applying the inverse of the FCC’s safe harbor percentage, using a traffic study submitted to the FCC, or reporting actual revenues.¹⁰

The Director of the Department that oversees the NUSF filed a Complaint with the NPSC to compel Vonage to pay a contribution. Vonage filed a Complaint for Declaratory and Injunctive Relief and a Motion for Preliminary Injunction in the U.S. District Court for the District of Nebraska. On March 3, 2008, the Court granted Vonage’s motion for a preliminary

⁶ 291 Neb. Admin. Code, Chapter 10, §§ 001-007 (“the NUSF rules”).

⁷ Neb. Rev. Stat. §§ 86-316 to 86-329.

⁸ *Id.* § 86-324(2)(d). The Act defines “telecommunications company” as “any... company... providing telecommunications or telecommunications service for hire in Nebraska without regard to whether such company holds a certificate as a telecommunications common carrier.” *Id.* § 86-322.

⁹ *In the Matter of Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund*, Opinion and Findings, Application No. NUSF-1, Progression Order No. 18 (April 17, 2007) (“*NPSC Opinion and Findings*”); *see also*, *In the Matter of the Nebraska Public Service Commission, on its own motion, to determine the extent to which Voice Over Internet Protocol Services should be subject to the Nebraska Universal Service Fund requirements*, Findings and Conclusions, Application No. NUSF-40/PI-86 (March 22, 2005) (“*NPSC Findings and Conclusions*”).

¹⁰ *NPSC Opinion and Findings*, at pp. 13-20.

injunction.¹¹ It found that Vonage was a nomadic VoIP provider whose customers can place and receive calls from anywhere they can find a broadband Internet connection, making it impossible for Vonage to determine whether particular calls were interstate or intrastate. It found Vonage was likely to succeed on the merits, based primarily on the “impossibility exception” relied on by the FCC in the *Vonage Preemption Order*.¹² As discussed below, that exception to the normal rule of Section 152(b) of the FCA that states have jurisdiction over intrastate communications permits preemption when both (1) it is impossible to separate the service into interstate and intrastate components, and (2) state regulation negates federal regulatory objectives.¹³ The NPSC appealed the decision to the Eighth Circuit, which affirmed the preliminary injunction based on the “impossibility exception,” but stated there was no need to decide whether nomadic VoIP is a telecommunications service or an information service. *Vonage v. NPSC*, 564 F.3d at 906, n.5. The NPSC is currently enjoined from assessing Vonage, and is not currently assessing other nomadic VoIP providers.

C. Kansas Fund.

After evaluating the FCC’s *VoIP Contribution Order*, the KCC opened a docket, developed a record and made interim findings and conclusions that it should require VoIP providers in Kansas to contribute to the Kansas Universal Service Fund (“KUSF”). A copy of this KCC order is attached as Exhibit C.¹⁴ It considered state law, the DC Circuit Court of Appeals’ decision upholding the FCC’s *VoIP Contribution Order*, and the Federal Internet Tax

¹¹ *Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission*, 543 F.Supp. 2d 1062 (D. Ne. 2008).

¹² *Id.* at 1067-1068 (citing *Vonage Preemption Order*, 19 FCC Rcd. 22404 (2004)).

¹³ See n. 33 below.

¹⁴ *In the Matter of the 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 at pp. 4-16 (Jan. 9, 2008) (“*KUSF Order*”).

Freedom Act (“ITFA”), which contained a clause disclaiming any preemption of state USF assessments on Internet-based calling.¹⁵

On balance, the KCC found that it had implied power to require VoIP contributions, based on federal and state authority, although an amendment to state law would clarify its state law authority.¹⁶ It also determined that identifying jurisdictional traffic was a “non-issue” if the FCC’s safe harbor mechanism was employed.¹⁷ It decided to move forward with implementing contribution requirements on interconnected VoIP providers.¹⁸

The KCC felt so strongly about clarifying state authority that it sought guidance from its State Legislature. In response, the Legislature adopted legislation directing the KCC to impose contribution requirements on interconnected VoIP providers to the extent not prohibited by federal law.¹⁹ Pursuant to this legislation, the KCC imposes contribution requirements on nomadic interconnected VoIP providers to ensure its contribution system requires all providers using the PSTN contribute to support universal service, and does not give one provider class an advantage over others. The KCC joins this Petition to seek the same clarity in federal law.

The KCC has not been involved in any litigation regarding universal service assessments of VoIP providers. As discussed below, its assessment of the intrastate revenues of wireless carriers was affirmed by the Tenth Circuit in litigation that concluded a number of years ago.

¹⁵ *Id.* at pp. 5-7.

¹⁶ *Id.* at pg. 3.

¹⁷ *Id.* at pg. 4.

¹⁸ *Id.* at pp. 16-17.

¹⁹ Amended Kan. Stat. Ann. § 66-2008(a) reads as follows: “The commission shall require every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services, *and to the extent not prohibited by federal law, every provider of interconnected VoIP service, as defined by 47 C.F.R. § 9.3* (October 1, 2005), to contribute to the KUSF on an equitable and nondiscriminatory basis.” (Amendment italicized).

D. There is no Need for a Declaratory Ruling Regarding Fixed VoIP Service.

This Petition concerns nomadic interconnected VoIP service, which allows customers to travel and place calls to persons on the PTSN and receive calls from persons on the PTSN anywhere where the customers can find a broadband Internet connection (“nomadic VoIP service”). The Eighth Circuit carefully limited its opinion affirming the preliminary injunction against the NPSC to nomadic VoIP service, as opposed to fixed VoIP service. Fixed VoIP providers generally run landline facilities directly to fixed customer premises. The Court explained that the geographic end points of fixed VoIP communications are known, making it easier for fixed VoIP providers to distinguish interstate from intrastate calls, and that “[t]his case involves nomadic interconnected VoIP services.”²⁰ The FCC confirmed in 2006 that, whatever the scope of the preemption ordered in the *Vonage Preemption Order*, that preemption does not apply to a provider who can determine call jurisdiction.²¹ No injunction is in place against the NPSC (or KCC) regarding fixed VoIP service. Fixed VoIP providers are contributing substantial sums to the NUSF and KUSF and so are supporting universal service in these states.

III. DISCUSSION

For multiple policy and legal reasons, the FCC should not preempt state assessments of universal service contributions on the intrastate revenues of nomadic VoIP providers.

²⁰ “Nomadic service allows a customer to use the service by connecting to the Internet wherever a broadband connection is available, making the geographic originating point difficult or impossible to determine. Fixed VoIP service, however, originates from a fixed geographic location. For example, cable television companies offer interconnected VoIP service, and the transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined and the interstate and intrastate portions of the service are more easily distinguished. This case involves nomadic interconnected VoIP services.” *Vonage v. NPSC*, 564 F.3d at 902-903.

²¹ *VoIP Contribution Order*, ¶ 56.

A. State USF Assessments Lawfully Complement Federal USF Assessments.

1. States Need to Extend Contribution Requirements to VoIP Providers for the Same Market and Public Policy Reasons as the FCC.

In its *VoIP Contribution Order*, the FCC extended federal contribution requirements to interconnected VoIP providers to accomplish universal service goals in changing telecommunications markets. States feel the same market pressures, and must adjust universal service policies in a similar manner to achieve joint federal/state universal service goals.

FCA Section 254(f) identifies universal service as a fundamental federal policy objective, and specifically authorizes states to take steps to preserve and advance universal service. Indeed, both the Act and the FCC require that states supplement federal efforts to achieve universal service, and assure that universal service goals are achieved within state boundaries. As the 10th Circuit Court of Appeals held in *Qwest v. FCC*, 258 F.3d 1191 at 1203 (2001), the FCA requires “a partnership between federal and state governments to support universal service:”

The Telecommunications Act plainly contemplates a partnership between the federal and state governments to support universal service. *See e.g.* § 254(b)(5) (“There should be specific, predictable and sufficient Federal and state mechanisms to preserve and advance universal service.”); § 254(f) (“Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and non-discriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.”); § 254(k) (placing complementary duties on the FCC and the states “to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.”)

That Court held that the FCC had to rely on state action on universal service to fulfill Congress’s goals and had to “undertake the responsibility to ensure that states act.” *Id.* at 1204 (emphasis in original). As practical and legal matters, the federal USF cannot bear universal service financial

burdens alone. States *must* have sufficient mechanisms to preserve universal service, and *must* help assure affordable and reasonably comparable rates within their borders.²²

As the FCC recognized in its *VoIP Contribution Order*, the migration of circuit-switched wireline voice service to VoIP is placing substantial pressure on traditional universal service contribution methods. The FCC found that stand-alone interstate long distance revenues have been declining, while interconnected VoIP services have been growing dramatically.²³ The same trend is occurring in the states. For example, Nebraska projects that total estimated VoIP revenue in the state for both nomadic and fixed applications is already \$5.5 million (\$385,000 per year in NUSF remittances). Based on an estimated 33% growth per year in VoIP revenues, and assuming other providers in the state, such as Qwest, Windstream and Cox convert to a VoIP platform, VoIP will account for approximately 29% of the NUSF in 2011.

Similar to the FCC, states need to apply state universal service contribution requirements to all VoIP providers, not just the fixed VoIP providers who are already making substantial contributions, in order to assure that their universal service funds remain sustainable. If nomadic VoIP providers are not required to contribute to support universal service, the funding base will shrink over time. Moreover, nomadic VoIP providers will gain an artificial regulatory advantage

²² For example, the FCC requires non-rural carriers to average their costs statewide in order to determine whether they qualify for federal support. As the FCC has said: “Statewide averaging effectively enables the state to support its high-cost wire centers with funds from its low-cost wire centers through implicit or explicit support mechanisms, rather than unnecessarily shifting funds from other states [through the Federal Fund].” *In the Matter of Federal-State Joint Board on Universal Service*, 18 FCC Rcd. 22559, ¶ 24 (2003). States have the responsibility for ensuring rates are affordable and reasonably comparable within their borders, to the extent possible, from their own state resources.

²³ *VoIP Contribution Order* at ¶ 3. The FCC noted that nationally, the number of VoIP subscribers had grown from 150,000 in 2003 to 4.2 million by the end of 2005. See *Telecommunications Industry Association, TIA’s 2006 Telecommunications Market Review and Forecast*, 71 (2006), cited in *VoIP Contribution Order* at ¶ 3, n. 9.

over all other providers, and increase market share even more. Ultimately, services in high-cost rural areas may not be able to be priced at levels comparable to that in urban areas, violating Section 254(b)(3), and in some cases, state law.

Not only will states have less money to support rural voice service, but they will not be able to help the FCC further broadband deployment. A number of states allow use of state USF high cost support for modern network infrastructure capable of providing access to broadband services, if the network is capable of providing basic local services as well. As long as their funds are sustainable, states can continue helping the FCC make broadband deployment affordable. Also, state USFs can support broadband connections for telemedicine and schools and libraries applications, aiding the federal goals of deploying broadband to promote improved medicine, education and distance learning.

Further, just as the FCC found for the federal system,²⁴ states must extend contribution requirements to nomadic VoIP providers to ensure competitive neutrality and a system of “equitable and fair contributions.”²⁵ It would be wholly inappropriate to exclude nomadic interconnected VoIP providers from contribution obligations as nomadic VoIP continues to grow and attract subscribers who previously relied on traditional telephone service, wireless service, or fixed VoIP service.²⁶ As the FCC said, contribution obligations should not shape communications providers’ technology decisions, or encourage regulatory arbitrage.²⁷ The competitive neutrality principle is equally important for states, because Congress’s mandate to preserve and advance universal service is expressly conditioned on states taking action on a

²⁴ *VoIP Contribution Order* at ¶ 44.

²⁵ *See* 47 U.S.C. § 254(f) & Kan. Stat. Ann. § 66-2008(a) as amended (requiring contributions "on an equitable and nondiscriminatory basis").

²⁶ *VoIP Contribution Order* at ¶ 44.

²⁷ *Id.*

competitively neutral basis.²⁸ All categories of providers other than nomadic VoIP already contribute to federal universal service programs on their interstate revenues and contribute to state universal service programs in Nebraska and Kansas on their intrastate revenues. This includes circuit-switched interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, wireless carriers, and fixed VoIP providers. The discriminatory advantage claimed by nomadic VoIP providers threatens to undermine universal service as it provides incentives for consumers to select non-contributing nomadic VoIP providers instead of other providers, thereby decreasing the volume of revenue that supports universal service and making it harder to sustain universal service programs.

In another parallel to the federal system, states must ensure that nomadic interconnected VoIP providers that benefit from universal service through interconnection with the PSTN fairly share its cost. As the FCC observed, much of VoIP's appeal derives from customers' ability to place calls to, and receive calls from, the PSTN.²⁹ Nomadic VoIP providers receive these benefits for intrastate service as well. They should support high-cost PSTN service intrastate in the same manner as they do for interstate service. For all these reasons, confirming that states may impose contribution requirements on nomadic VoIP providers will advance and complement the FCC's decision in the *VoIP Contribution Order*.

States establish intrastate revenues on which a state contribution factor is assessed by offering the same options as the FCC has provided for interstate contributions, and thereby simplify reporting by providers and avoid burdening the federal USF contribution base. For example, both the NPSC and KCC allow VoIP providers to use either the inverse of the FCC's

²⁸ 47 U.S.C. § 253(b).

²⁹ *VoIP Contribution Order* at ¶ 43.

safe harbor percentage, estimates of intrastate revenues based on traffic studies or actual measured intrastate revenues, as the basis for their contribution. These are the exact same three mechanisms for dividing total revenue into interstate and intrastate components approved by the FCC in its *VoIP Contribution Order*, which the D.C. Circuit affirmed in relevant respects. FCC Form 499A Line 404.4 and 404.5 already require that Interconnected VoIP providers break their revenues into interstate and intrastate components.

State USF assessments on nomadic VoIP providers also serve as a backstop that protects the federal USF from manipulation. Because total revenues must add up to 100%, a provider that understates to the federal USF the percentage of its revenue that is interstate (including international) correspondingly overstates the percentage of its revenue that is intrastate. Consequently, if state USFs are not preempted from assessing intrastate nomadic VoIP revenue, there is less of an incentive for providers to submit to the federal USF traffic studies or reports of actual interstate revenues that understate the percentage of their revenues that are interstate/international, as underreporting interstate revenues results in overstating assessable intrastate revenues.³⁰ Similarly, providers utilizing the safe harbor can lawfully shortchange the federal USF by paying contributions on only 64.9% of their revenues even if their actual interstate revenues are much higher. But, so long as states are not preempted from assessing the remaining 35.1% of revenues, providers with high interstate revenues have less incentive to rely

³⁰ Additionally, instead of being limited to the Hobson's choice of letting a suspicious traffic study or actual revenue report go unchallenged or devoting the substantial resources necessary to audit it, the USAC or FCC staff can, as a first step, contact state USF administrators to make sure the provider who claims low interstate/international revenue percentages is properly paying into the state USFs on the correspondingly higher self-reported intrastate revenues. This joint federal-state enforcement strategy is consistent with that already in place concerning state certification that Eligible Telecommunications Carriers ("ETCs") are using USF funds properly, but cannot be used if the FCC preempts states here.

on the safe harbor and more incentive to submit a traffic study or actual revenue data reflecting their true higher interstate revenues. “It is the [FCC’s] policy preference that providers contribute to the Fund based on their actual data rather than on a safe harbor percentage where possible.”³¹ Even if the provider with high interstate revenues uses the safe harbor, the resulting state assessment on 35.1% of the provider’s revenues ensures that all revenue earned from customers in states which assess nomadic VoIP supports universal service at either the federal or state level, and so mitigates any imprecision in setting the safe-harbor.

2. The FCA Does Not Require Preemption of State USF Assessments.

Because of the FCC’s broad discretion to clarify, supplement, or revise its prior orders, whether the Eighth Circuit correctly construed the FCC’s 2004 *Vonage Preemption Order* is of limited practical significance going forward.

If the statement in the FCC’s *Amicus Curiae* brief that the *Vonage Preemption Order* did not preempt state USF assessment of intrastate nomadic VoIP revenue is correct, then the FCC should *clarify* that it never preempted these assessments. In that case, neither existing nor future state assessments are preempted. Part B of this Petition explains why this is the proper result, and why the FCC has authority under the Supreme Court’s *Brand X* opinion to reach it.

However, even if the FCC decides to depart from the interpretation of the *Vonage Preemption Order* that it expressed in its *Amicus Curiae* brief, and finds that the *Vonage Preemption Order* did preempt state USF assessment of nomadic VoIP revenues, the Eighth Circuit explained that the FCC may approve state USF assessments of intrastate nomadic VoIP revenue, at least going forward. “Thus, while a universal service fund surcharge *could be assessed* for intrastate VoIP services, the FCC has made clear it, and not state commissions, has

³¹ *VoIP Contribution Order* at ¶ 28 (discussing wireless safe harbors).

the responsibility to decide if such regulations will be applied.” *Vonage v. NPSC*, 564 F.3d at 905 (emphasis added). This same conclusion also flows from the fact that any preemption results from the FCC’s decision in the *Vonage Preemption Order*, not some unambiguous mandate in the FCA. The FCC may reassess and revise the conclusions in its prior orders at any time.³² Two elements are necessary for impossibility preemption: (1) it must be impossible to separate a service into interstate and intrastate components, and (2) preemption is necessary to prevent a conflict between federal regulation and state regulation.³³ Because the FCC is responsible for determining what federal regulatory objectives are, within broad limits set in the FCA, the second element depends on policy decisions by the FCC, which can change.

The FCC should declare that preemption of a state USF contribution requirement on nomadic VoIP providers is not necessary to protect a valid federal regulatory objective and in no way negates the FCC’s exercise of its own authority to regulate the interstate aspects of universal service funding. Thus, the second element necessary for preemption is not met. As noted above, the NPSC and KCC are using the same methodologies adopted by the FCC to divide aggregate VoIP provider revenues into interstate/international and intrastate components. The D.C. Circuit on judicial review of the FCC’s *VoIP Contribution Order* held that the approximate nature of the safe harbor calculation was good enough and that there did not need to be a precise to-the-penny calculation of interstate revenues.³⁴ Thus, there is no need to allocate each

³² *Brand X*, 545 U.S. at 981 (“[I]f the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”)

³³ *Minn. Public Utility Commission v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

³⁴ “The relevant question is whether the agency’s numbers are within a zone of reasonableness, not whether its numbers are precisely right’... Perfection... is not what the law requires.” *Vonage Holdings Corp.*, 489 F.3d at 1242 (quoting *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-62 (D.C. Cir. 2001)).

individual VoIP call to a particular jurisdiction. In its *VoIP Contribution Order*, the FCC stressed that requiring interconnected VoIP providers to contribute based on a “safe harbor” factor or a traffic study was necessary to protect and advance universal service and consistent with the principle of competitive neutrality.³⁵ Assessing nomadic VoIP allows the federal and state USFs to provide “sufficient Federal and State” universal service support, as Section 254(b)(5) requires.

In a closely on-point precedent, the FCC in a 1997 declaratory ruling held that state USF assessment of wireless carriers, another “nomadic” service, was lawful and did not constitute state regulation of wireless entry or wireless rates. The D.C. Circuit affirmed the FCC, as did the Fifth and Tenth Circuits.³⁶ Then, “in response to concerns... regarding difficulties associated with distinguishing between their interstate and intrastate revenues,” the FCC “adopted interim safe harbors for CMRS providers to use when reporting interstate telecommunications revenues for universal service contribution purposes.”³⁷ Co-Petitioner KCC (whose assessment of wireless carriers was upheld by the 10th Circuit) and other commissions, including the Texas Public Utility Commission (whose assessment of wireless carriers was affirmed by the FCC and then on judicial review by the D.C. Circuit), base their calculation of assessable intrastate wireless revenue on the inverse to the FCC’s safe-harbor for determining interstate wireless revenue. The NPSC and KCC make this same option available to nomadic VoIP providers.

³⁵ *VoIP Contribution Order* at ¶ 44.

³⁶ *In the Matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 1735, 1737 (1997), *aff’d.*, 168 F.3d 1332 (D.C. Cir. 1999); *Texas Office of Public Utility Counsel*, 183 F.3d 393, 432, n. 64 (5th Cir. 1999); *Sprint Spectrum, L.P. v. Kansas State Corp. Commission*, 149 F.3d 1058, 1061-1062 (10th Cir. 1998).

³⁷ *In The Matter of Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24952, 24965, ¶ 20 (2002).

The FCC need not decide whether interconnected VoIP is a “telecommunications service” or something else in order to grant the requested declaratory ruling. The FCC has found that VoIP is “telecommunications” but has not yet decided whether it is a “telecommunications service.”³⁸ If interconnected VoIP is a “telecommunications service,” which it most likely is,³⁹ then VoIP providers are “telecommunications carriers” under 47 U.S.C. § 153(44). In that scenario, Section 254(f) unequivocally and without exception mandates that “[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute on an equitable and nondiscriminatory basis” to state USFs, which means that states would be in violation of federal law if they declined to assess intrastate nomadic VoIP revenues. *Sprint Spectrum*, 149 F.3d at 1062 (because section 254(f) “mandates” that states assess “all telecommunication carriers,” a state “would apparently be in violation of federal law if it established a universal service fund but did not require contributions from wireless providers.”)

However, if nomadic VoIP service is not a “telecommunications service,” then the state’s optional statutory authority under Section 254(f) to implement “additional” support “mechanisms” still safeguards state assessments against any preemption.⁴⁰ In that scenario,

³⁸ *VoIP Contribution Order* at ¶¶ 39, 41.

³⁹ “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public... regardless of the facilities used.” 47 U.S.C. § 153(46). VoIP providers sell their produce “for a fee” to the broad consumer and business mass market, i.e. “directly to the public.” VoIP telephone service is the finished product the consumer perceives she is purchasing rather than an input into some other product, and so is the finished retail product being “offered.” *Brand X*, 545 U.S. at 990. The FCC has already found that VoIP service is “telecommunications,” based on a finding tracking the statutory definition at 47 U.S.C. § 153(43). *VoIP Contribution Order* at ¶¶ 39, 41. Also, Vonage classifies itself as providing “telephone communications” in filings with the SEC, and promotes itself as a telecommunications service provider in its national advertising campaign.

⁴⁰ 47 U.S.C. § 254(f). The legislative history of Section 254 explains that a “State may adopt additional requirements with respect to universal service in that State, so long as those additional
(Continued)

states would have the mandatory discretion to assess nomadic VoIP using mechanisms that did not burden the federal fund.

Section 1107 of the Internet Tax Freedom Act fortifies the conclusion that the FCC need not decide whether nomadic VoIP service is a telecommunications service or information service. It explains that federal policy regarding taxation of the Internet does not preclude state USF assessments, and so even traffic actually sent over the public Internet (a method of traffic routing utilized primarily by nomadic VoIP providers) is subject to state USF assessment:

- (a) Universal Service. -- Nothing in this Act shall prevent the imposition or collection of any fees or charges used to preserve and advance federal universal service *or similar state programs* --
 - (1) authorized by section 254 of the Communications Act of 1934 (47 U.S.C. § 254); or
 - (2) in effect on February 8, 1996.⁴¹

The State Petitioners acknowledge the hypothetical mentioned by the Eighth Circuit in *Vonage v. NPSC* in which two states use conflicting proxies to break down overall intrastate revenues into state-specific intrastate revenues, with the result that intrastate revenue associated with a single customer is assessed by both states. *See* 564 F.3d at 905-06. This presents a “how” issue distinct from the fundamental issue of “whether” states may assess intrastate nomadic VoIP revenue. Indeed, by explaining in the same opinion that the FCC “could” approve assessments of intrastate nomadic VoIP revenue, the Eighth Circuit confirmed that such potential for duplicative assessments did not require the FCC to preempt. *Id.*

requirements do not rely upon or burden Federal universal service support mechanisms.” House Conf. Rep. No. 104-458 at 132, 4 U.S.C.A.A.N. 10, 143 (1996).

⁴¹ The Internet Tax Freedom Act is a note to 47 U.S.C. § 151 (2008 supplement) and is found at Pub. L. 105-277, Div. C, Title XI, §§ 1100-1104 (1998), as amended Pub. L. 107-75, § 2 (2001), Pub. L. 108-435, §§ 2 to 6A (2004), Pub. L. 110-108 §§ 2 to 6 (2007) (emphasis added).

States have long successfully dealt with similar potential for duplicative assessments by two or more states in various taxation fields (e.g. income taxes) through exclusion and credit systems which account for taxes or assessments paid (or income or revenue reported) to other states. While there is no reason to believe similar procedures won't work here, Part C of this Petition requests a second declaratory ruling (or rule) designating a nationwide safe-harbor mechanism such as a customer's billing address that states may use to allocate intrastate revenue to a specific state. This would prevent conflicts that could lead to duplicative assessments. But in the interim, until designation of uniform safe harbor mechanism occurs, a system in which state USFs exclude from assessable revenue those revenues being assessed by another state will prevent duplicative assessments. Accordingly, while the FCC considers a safe harbor mechanism, State Petitioners commit to providing appropriate assessment exclusions or credits in the unlikely event that a nomadic VoIP provider is actually assessed by a State Petitioner and another state USF on the same intrastate revenue.⁴² Notably, neither Vonage nor any other nomadic VoIP provider has ever asked the NPSC or the KCC to provide such an exclusion or credit.

The time needed to work through the details involved in ensuring there are absolutely no conflicts in allocating intrastate revenues among states should not delay issuing an initial declaratory order that confirms the fundamental principle that states may assess USF contributions on intrastate nomadic VoIP revenue. "The best must not become the enemy of the good, as it does when the FCC delays making any determination while pursuing the perfect"

⁴² This could, for example, happen if a customer with a Kansas registered 911 service address has a Nebraska billing address. *See* Part C of this Petition.

regulatory solution.⁴³ If the initial declaratory ruling is delayed in order to address the state-by-state allocation issue in detail, nomadic VoIP providers can be expected to take advantage of the delay by refusing to make any contributions to state USFs. That would increase the universal service support burden imposed on all other categories of providers, and increase the burden on the federal USF to meet Section 254 universal service mandates without as much assistance from state USFs. The FCC could qualify an initial order declaring state USF assessments are not preempted so that the order does not protect any state which issues a duplicative assessment and arbitrarily refuses to provide an appropriate credit or exclusion to remedy that situation.

B. The FCC Has Never Preempted State USF Assessments of Intrastate Nomadic VoIP Revenue.

The FCC should formalize the position it took in its *Amicus Curiae* brief and *clarify* the *Vonage Preemption Order* by declaring that Order did not preempt state USF assessments of intrastate nomadic VoIP revenue. By confirming what existing law already provided, as opposed to establishing new law going forward, the FCC will confirm that existing as well as future state assessments are lawful. This will prevent erosion of the universal service contribution base and maintain a level playing field among competitors during whatever time it takes to resolve this Petition. At the same time, the FCC will avoid lending its imprimatur to the suggestion (noted in the Eighth Circuit’s opinion) that the FCC must pre-approve each and every state regulation that somehow affects nomadic VoIP, even when the regulation has nothing to do with the entry or economic regulation that the FCC has preempted. *See* 564 F.3d at 905.

⁴³ *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 341-42 (D.C. Cir. 1980); *see also, United Hosp. v. Thompson*, 383 F.3d 728, 733 (8th Cir. 2004) (“The solution provided, while incomplete, more than satisfies the rational basis test. The perfect must not become the enemy of the good.”)

1. The FCC Remains Free, Despite the *Vonage v. NPSC* Litigation, Definitely to Interpret the Scope of its *Vonage Preemption Order*.

The ruling in *Vonage v. NPSC* does not prevent the FCC from providing this confirmation that it never preempted state USF assessments of intrastate nomadic VoIP revenue. The Eighth Circuit did not determine that the FCA unambiguously preempted state USF assessments of intrastate nomadic VoIP revenue or unambiguously required FCC pre-approval before such state USF assessments could take place. *Vonage v. NPSC*, 564 F.3d at 905. Rather, the Court held that the District Court “did not abuse its discretion” in finding a likelihood that *Vonage* would prevail on the merits and issuing a preliminary injunction, because a “reasonable interpretation” of the *Vonage Preemption Order* was that the FCC had determined in that Order that FCC approval should be required before assessment of intrastate nomadic VoIP revenue takes place. *Id.*⁴⁴ It did not say this was the best or only reasonable interpretation of the Order. *Id.* Neither the FCC nor Co-Petitioner KCC is a party to the *Vonage v NPSC* litigation.⁴⁵

The procedural posture is similar to the *Portland* and *Brand X* cases in which the Ninth Circuit Court of Appeals held that cable modem service was a telecommunications service, and the FCC then issued its own order disagreeing with the Court and declaring that cable modem service was an information service. In *Portland*, AT&T sued a municipal government in federal court in a dispute over franchise fees which involved the issue of whether cable modem service was an information service or a telecommunications service.⁴⁶ During appellate proceedings before the Ninth Circuit, the FCC submitted an *amicus curiae* brief explaining that the Court should not decide how to classify cable modem service. The Ninth Circuit disagreed with the

⁴⁴ See also, *id.*, 564 F.3d. at 904 (“We review the district court's grant of a preliminary injunction for abuse of discretion, giving deference to the discretion of the district court.”)

⁴⁵ An *amicus curiae* is not a party to the litigation in which it participates. *Adams v. Bell*, 711 F.2d 161, 197, n. 128 (D.C. Cir. 1983). Thus the FCC is not a party to *Vonage v. NPSC*.

⁴⁶ *AT&T Corp. v. Portland*, 216 F.3d 871, 877-880 (9th Cir. 2000).

FCC's *amicus curiae* brief and issued an opinion holding that cable modem service was a telecommunications service.⁴⁷ The FCC then issued a declaratory ruling rejecting the Ninth Circuit's opinion and declaring that cable modem service was an information service.⁴⁸ The Supreme Court then affirmed the FCC's decision in its *Brand X* opinion.⁴⁹

In *Brand X*, the Supreme Court held that the FCC, as the agency charged with administering the FCA, is not bound to follow prior court rulings such as *Portland* unless the court ruling declares that the FCA "unambiguously" requires a particular result.⁵⁰ "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁵¹ Because the FCA did not unambiguously require that the FCC classify cable modem service as a telecommunications service, the Supreme Court affirmed the FCC's decision to reject the Ninth Circuit's *Portland* decision and classify cable modem service as an information service. *Id.*

It follows from *Brand X* that the FCC has the authority to decline to follow court interpretations of the FCC's own prior orders, at least if the court did not find that the prior FCC order unambiguously requires a particular result. An agency's decision interpreting its own prior orders or rules is entitled to deference just like an agency's decision interpreting the statute it

⁴⁷ *Id.*

⁴⁸ *Declaratory Ruling and Notice of Proposed Rulemaking, In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC.Rcd. 4798, ¶ 7 (2002).

⁴⁹ *Natl. Cable and Telecom. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 996 (2005).

⁵⁰ *Brand X*, 545 U.S. at 982.

⁵¹ *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

administers, unless the prior rule or order unambiguously requires a particular result.⁵² As noted above, the Eighth Circuit did not say there was only one reasonable way to interpret the *Vonage Preemption Order*, just that there was “[a] reasonable interpretation” supporting the District Court’s decision to issue a preliminary injunction. 564 F.3d at 905 (emphasis added). Vonage’s apparently successful argument to the Eighth Circuit that an *Amicus Curiae* brief is not due deference has no relevance in the context of this administrative proceeding, which seeks an FCC order that will be due deference. So long as the FCC enters an order in resolving this Petition, rather than some less formal action, a court in a future judicial review proceeding must affirm any reasonable interpretation by the FCC of the *Vonage Preemption Order*, even if some other reasonable interpretation of that Order may exist.⁵³

2. The FCC Did Not Preempt State USF Assessments.

If restated in the form of an order, the interpretation expressed in the FCC’s *Amicus Curiae* brief is surely at least reasonable and so due deference. In the *Vonage Preemption Order*, the FCC never addressed state USF assessments of intrastate nomadic VoIP revenue. However, the FCC provided a rationale that clearly distinguishes state USF assessments from the state entry and economic regulation that the FCC did preempt.

The FCC found the first element necessary for “impossibility preemption” was satisfied because Vonage lacked the equipment that would be needed to separate its nomadic VoIP service

⁵² *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). “Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is... controlling unless plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted). *Chevron* deference also applies to agency interpretations of agency adjudicative orders such as declaratory rulings, not just rules. *Trans Union Corp. v. FTC*, 81 F.3d 228, 230 (D.C. Cir. 1996).

⁵³ *Brand X*, 545 U.S. at 982; *Christensen*, 529 U.S. at 587; *Auer*, 519 U.S. at 461.

into interstate and intrastate components.⁵⁴ Examining the second element necessary for preemption (that state regulatory policies frustrate federal regulatory policies), the FCC contrasted: (a) its decision not to require information service providers or non-dominant telecommunications services providers to obtain FCC certification before providing service and not to require them to file tariffs with the FCC, and (b) Minnesota’s effort to impose entry and rates regulation on Vonage.⁵⁵

This contrast between federal non-regulation of entry and rates and state regulation of those matters is the key to understanding the Order. The FCC found that, because Vonage could not determine whether specific nomadic VoIP calls were interstate or intrastate, Vonage could not avoid the burden of complying with Minnesota’s certification and tariffing requirements by declining to carry Minnesota intrastate calls, and therefore Minnesota’s policy of entry and economic regulation prevented Vonage from taking advantage of the federal policy that there be no such entry or economic regulation. In this way, Minnesota entry and rate regulation frustrated federal regulatory policy.⁵⁶ This satisfied the second preemption element.

In this case, there is no conflict between federal assessment of interstate nomadic VoIP revenue and state assessment of intrastate nomadic VoIP revenue. State assessments complement rather than “negate” federal policies, so the second preemption element is not met. Vonage does not have to obtain an FCC certificate before providing domestic service, nor must it file a FCC tariff, but it must contribute to the federal USF. The FCC has never adopted a policy against federal (or state) USF assessment of VoIP revenues. Its *Amicus Curiae* brief explains:

⁵⁴*Vonage Preemption Order* at ¶ 30.

⁵⁵ *Vonage Preemption Order* at ¶¶ 20, 21.

⁵⁶ *See Vonage Preemption Order* at ¶ 30.

In the *Vonage Preemption Order*, the FCC found that Minnesota’s entry and tariff regulations of Vonage’s service conflicted with the FCC’s deregulatory policies applicable to the interstate component of Vonage’s service. The FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional ‘economic regulation.’ ...

[T]he NPSC USF Order does not present a conflict with the FCC’s rules or policies. Rather, the NPSC’s decision to require interconnected VoIP providers to contribute to the state’s universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC’s rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska’s state universal-service contribution requirement.

FCC Amicus Curiae Brief at 14-15 (8th Cir. Case No. 07-1764) (Aug. 5, 2008) (Ex. A hereto).

The Eighth Circuit did not find that there was a policy conflict between state USF assessments and federal USF assessment. Instead, the Court quoted the following passage from the *Vonage Preemption Order* as supporting “[a] reasonable interpretation” that the FCC had created a requirement that the FCC pre-approve any state regulation of nomadic VoIP service:

In this [Order], we preempt an order of the Minnesota Public Utilities Commission... applying its traditional “telephone company” regulations to Vonage’s DigitalVoice service, which provides voice over Internet protocol (VoIP) service and other communications capabilities. We conclude that Digital Voice cannot be separated into interstate and intrastate communications for compliance with Minnesota’s requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP... by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether *certain* regulations apply to Digital Voice and other IP-enabled services having the same capabilities

564 F.3d at 905 (quoting *Vonage Preemption Order*, ¶ 1) (emphasis added). The Court cited the portion of this passage in which the FCC says that the “Commission, not the state commissions” decides whether “*certain* regulations” can be applied to nomadic VoIP providers. As noted, the Court concluded that the FCC “could” decide to approve assessment of intrastate revenues. *Id.*

The “*certain* regulations” that the FCC was referring to in the *Vonage Preemption Order* must be some regulations, but not all regulations – otherwise there was no need for the qualifier “certain.” More specifically, “certain regulations” must refer to state regulations which conflict with federal policy and so trigger preemption when calls cannot be jurisdictionally separated.

With regard to state regulations which do conflict with federal policy, the FCC rather than the state commissions does indeed have the “responsibility” to approve those regulations before they can go into effect, because the FCC would need to make a finding that the regulation no longer conflicts with federal policy in order to remove the pre-existing preemption.⁵⁷ But there is nothing in the *Vonage Preemption Order* to suggest that state regulations which never conflicted with federal policies in the first place require any sort of advance FCC pre-approval. State law is either preempted or not preempted. There is no *procedural* hurdle requiring states to obtain FCC clearance before promulgating state rules that do not negate federal policies.

In its *Amicus Curiae* brief, the FCC states flatly that it did not preempt the NPSC rules at issue. This means that the FCC did not adopt any general pre-approval requirement, as it has never explicitly pre-approved state USF assessments on intrastate nomadic VoIP revenue. Requiring states to come to the FCC for pre-approval each and every time they promulgate or substantially revise rules applying to nomadic VoIP providers that do not conflict with the FCC policy against entry or rate regulation (e.g. rules regarding universal service contributions, 911 program contributions, and prevention of slamming) could flood the FCC with state petitions. There is no reason to go in that direction. The President recently reminded all agencies of his policy of confining preemption to narrow limits. *See the President’s Memorandum for the*

⁵⁷ As the FCC subsequently explained in the *VoIP Contribution Order*, the pre-existing preemption will also be removed if a provider develops the means to separate the service into interstate and intrastate components. *VoIP Contribution Order*, ¶ 56.

Heads of Executive Departments and Agencies on Preemption (May 20, 2009) (supplied as Ex. D).

Subsequent FCC orders demonstrate that the decision to preempt state entry and economic regulation did not extend to state USF assessments of nomadic VoIP revenue. The *VoIP 911 Order*, issued just 8 months after the *Vonage Preemption Order*, notes with apparent approval the fact that states were requiring that VoIP providers contribute financially to state 911 programs.⁵⁸ The *VoIP Contribution Order* explains that the “discussion of section 230 in the Vonage Order cautioning against regulation [of VoIP] was limited to ‘traditional common carrier economic regulations’ and so did not cover universal service.”⁵⁹ The *Embarq Broadband Forbearance Order* distinguishes “economic regulation” from universal service obligations and other “non-economic regulations designed to further important public policy goals.”⁶⁰

3. It is Not “Manifestly Unjust” to Enforce Existing State Assessments.

The nomadic VoIP providers have no reliance interest that would require the FCC to limit to prospective-only effect a declaratory order confirming that it has not preempted state USF assessments of intrastate nomadic VoIP revenue. Because declaratory rulings construe existing law, they generally apply retrospectively as well as prospectively. For example, in its declaratory ruling that AT&T’s enhanced pre-paid calling card service was a

⁵⁸ *First Report and Order and Notice of Proposed Rulemaking, In the Matter of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, 20 FCC.Rcd. 10245, ¶ 52 (2005). State financial contribution requirements, whether for USF or 911, are distinct from rules requiring nomadic VoIP providers obtain state approval of 911 compliance plans before entering the market. The latter category of rules are a form of entry regulation and so are preempted. See *Vonage Preemption Order*, ¶ 42 (“Because Minnesota inextricably links pre-approval of a 911 plan to become certificated to offer service in the state, the application of its 911 requirements operates as entry regulation.”)

⁵⁹ *VoIP Contribution Order* at ¶ 49, n. 166.

⁶⁰ *Embarq Broadband Forbearance Order*, 222 FCC Rcd. 19478, 19481, ¶ 5 (2007).

telecommunications service, the FCC directed payment of universal service contributions on past calls, and the D.C. Circuit affirmed.⁶¹ A prospective-only limitation is appropriate only if necessary to avoid “manifest injustice” resulting from reasonable reliance on a “settled rule.”⁶²

Before making these assessments on nomadic VoIP providers, States Petitioners provided public notice of administrative proceedings in which they adopted contribution requirements, so nomadic VoIP providers have been on notice at all times that State Petitioners were imposing contribution obligations on them.⁶³

C. By Designating a Uniform “Safe-Harbor” Mechanism that States May Elect to Use to Determine State-Specific Intrastate Revenue, the FCC Can Assist States in Eliminating Any Risk of Duplicative Assessments

State Petitioners request a second declaratory order or rule⁶⁴ addressing the calculation of *state-specific* intrastate revenues for purposes of assessment. Specifically, State Petitioners request that the FCC declare that states have the discretion to adopt any mechanisms that do not assess interstate revenues and that contain procedures designed to ensure that no provider pays assessments to more than one state on the same intrastate revenues. This will give the states

⁶¹ “The Commission action [a declaratory ruling] constituted adjudication. Retroactivity is the norm in agency adjudications no less than in judicial adjudications. [W]e have drawn a distinction between agency decisions that substitut[e]... new law for old law that was reasonably clear and those which are merely “new applications of existing law, clarifications, and additions. ... The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to “manifest injustice. The Commission's decision in this case did not change settled law; AT & T does not and indeed cannot point us to a settled rule on which it reasonably relied.” *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

⁶² *Id.*

⁶³ The NPSC is enjoined from collecting universal service assessments from Vonage.

⁶⁴ While State Petitioners believe that the initial order confirming the basic principle that the FCC is not preempting (and has not preempted) state USF assessments of intrastate nomadic VoIP revenue should be a declaratory ruling, it is less important whether a follow-up order addressing allocation of intrastate revenues among the states is a rule or a declaratory ruling.

flexibility to iron out any inconsistencies that could possibly result in duplicative assessments by two or more states.

Further, to minimize the disruption to universal service programs resulting from preemption litigation, the FCC should designate a “safe harbor” mechanism that states may elect to use to determine state-specific intrastate revenue. States which utilize the safe-harbor mechanism would be using a uniform methodology and so would not generate any conflicting assessments with each other. Accordingly, any state which utilizes that FCC-approved safe-harbor would be protected from preemption litigation. That would be a strong incentive for states to elect to utilize the safe-harbor. A state which does not elect to use the safe-harbor could still avoid duplicative assessments by a variety of means, including by excluding revenues assessed by another state from the assessable revenue base or granting appropriate credits.

1. Billing Address.

The first potential safe-harbor is to allocate to each state the intrastate revenues from customers with a billing address in that state. This is the approach the NPSC adopted. It is administratively simple and non-burdensome because providers already maintain a billing address for each account in order to render bills. Billing address can be relatively easily verified in any audit and the computation is simple. Where a business customer has operations in multiple states but only one billing address, then pursuant to NPSC rules, the provider may develop an intrastate service allocation factor and remit the universal service fund surcharge based upon that factor.⁶⁵

⁶⁵ Notably, in *Vonage v. NPSC*, the Eighth Circuit did not express any concern with that possibility that the nomadic VoIP customer might roam and make calls outside the state in which his or her billing address is located – its concern was with the possibility of two states using inconsistent proxies. *See* 564 F.3d at 906. As the D.C. Circuit held in affirming the FCC’s (Continued)

2. Registered 911 Addresses.

A second potential uniform safe harbor mechanism is to allocate intrastate revenues to the state in which the customer registers his physical address for purposes of 911 calling. The FCC's rules already require nomadic VoIP providers to encourage their customers to report an actual physical service address from which calls are being made so that 911 calls can be accurately routed to a nearby 911 center. 47 CFR 9.5(d).

The KCC currently uses the customer's primary service address, which under this FCC rule should be the registered 911 address, to determine Kansas intrastate revenues. As noted above, during the interim period before a national safe harbor is established, the KCC and the NPSC will exclude from assessable intrastate revenue any revenues that are assessed by another state USF due to differences in assessment methodologies. Therefore, for example, the two states would not both assess revenues earned from any customers who might have a Nebraska billing address but a Kansas primary service address (registered 911 location). It is doubtful that a large number of customers would fall in that category.

Customers have obvious personal safety incentives to register 911 addresses that match their actual physical location at the time they place a call and can update their registered 911 address as they travel. If registered 911 address becomes the national safe harbor, then, for those customers who decline to establish a registered 911 address, billing address would serve as the back-up safe harbor mechanism.

selection of 64.9% as the safe harbor for dividing VoIP revenues into interstate and intrastate components, "perfect precision" is not required and "some inevitable imprecision" is accepted in estimating the revenues falling in the different jurisdictions for purposes of assessing universal service contributions. *Vonage Holdings Corp.*, 489 F.3d at 1242.

3. FCC Form 499-A Allocations.

A third potential safe-harbor could be implemented by the FCC itself by refining the Form 499-A filings nomadic VoIP providers already make with USAC and distributing those filings to state USFs. In addition to requiring a breakdown between interstate and intrastate revenue, Form 499-A already requires that nomadic VoIP providers break revenue down into eight multi-state regions.⁶⁶ For example, line 509 requires reporting of revenues in Arkansas, Kansas, Missouri, Oklahoma, and Texas. Other lines require reporting of revenues from other regional groups of states. Logically, providers must add up revenues relating to each state to supply these region-level calculations. As a next step, they can break out each state's revenue portion to determine individual state contribution bases. Thus, under this approach, interconnected VoIP providers can adapt the methodology they already use for Form 499 to calculate state-by-state revenue components. This approach prevents duplicative assessments by giving VoIP providers themselves the initial responsibility for allocating their revenue among the states, subject to audit and review.

Each of these possible safe-harbors, if approved by the FCC, could serve as a uniform allocation methodology and avoid conflicts among state assessments. They vary in the enforcement issues they present. Because not all states have state USFs and assessment rates vary among states USFs, both billing address and registered 911 location may be superior to a system in which providers decide how they allocate intrastate revenue among states.

⁶⁶ See FCC Form 499A Lines 503-510 and Instructions Page 31 (In completing Lines 503-510 “Carriers and interconnected VoIP providers should calculate or estimate the percentage of revenue they billed in each region based on the amount of service they actually provided in the parts of the United States listed for each region”).

IV. CONCLUSION

In order to maintain sufficient federal and state universal service support as required by Section 254(b)(5) of the FCA, the FCC should declare that state USF assessment of intrastate nomadic VoIP revenue is not preempted and has not been preempted, so long as the state does not assess interstate revenue. The FCC should also declare that states may utilize any method for allocating intrastate nomadic VoIP revenue among states for purposes of assessment that contains procedures designed to prevent duplicative assessment of the same intrastate revenue by two or more states. Finally, in a follow-up declaratory order or rule, it should establish a uniform safe-harbor mechanism that states may utilize to perform this allocation without being exposed to disruptive preemption litigation.

Dated this 16th day of July, 2009.

Respectfully submitted by:

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