

**THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

Before Commissioners:      Thomas E. Wright, Chairman  
                                 Michael C. Moffet  
                                 Joseph F. Harkins

In the Matter of the Investigation to      )  
Address Obligations of VoIP Providers      )      Docket No. 07-GIMT-432-GIT  
with Respect to the KUSF      )

**ORDER MAKING INTERIM FINDINGS AND CONCLUSIONS RELATIVE TO  
QUESTIONS POSED FOR INVESTIGATION**

The above captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being fully advised in all matters of record, the Commission finds and concludes as follows:

**BACKGROUND**

1.      On June 27, 2006, the Federal Communications Commission (FCC) released an *Interim Order* that, *inter alia*, served to ensure the stability and sufficiency of the Federal Universal Service Fund (FUSF) by: 1) requiring Interconnected Voice over Internet Protocol (VoIP) providers to contribute to the FUSF; and 2) determining that the *wireline toll providers* interstate safeharbor of 64.9% was a reasonable safeharbor percentage for Interconnected VoIP providers.<sup>1</sup> Specifically, the FCC found that requiring Interconnected VoIP service providers to contribute is: 1) consistent with its permissive authority in Section 254 of the Federal Telecommunications Act (Act or FTA) to extend universal service contribution obligations to classes of "telecommunications providers", as that term was construed by the FCC, that benefit from universal service through their interconnection with the Public Switched Telephone

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<sup>1</sup> FCC 06-94, "Report and Order and Notice of Proposed Rulemaking", released June 27, 2006, ¶ 3, p. 3.

Network (PSTN); and 2) is consistent with the principle of competitive neutrality which guides the development of universal service policy. Based on these two findings, the FCC concluded that extending universal service contribution obligations to Interconnected VoIP providers is in the public interest.<sup>2</sup> These parts of the FCC order were affirmed on appeal in *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240-1243 (decided June 1, 2007, and discussed in paragraph 14 below).

2. On August 10, 2006, Commission Staff (Staff) filed testimony in Docket No. 06-GIMT-332-GIT, the annual Kansas Universal Service Fund (KUSF or Fund) assessment docket. That testimony described the above changes ordered by the FCC, the potential impact on the KUSF, and recommended the Commission open a new docket specifically on how to treat VoIP providers for KUSF purposes.<sup>3</sup> Thereafter, on November 2, 2006, the Commission opened the instant docket to address whether it should require VoIP providers to contribute to the KUSF.

3. In its order opening the instant docket, the Commission requested parties to file comments addressing, at a minimum, the following:

- "a. The Commission's statutory authority to require VoIP providers to contribute to the KUSF.
- b. The ability of VoIP providers to identify local and interstate traffic.
- c. Whether any decision by the Commission to require contributions should differ based on whether a provider adopts the FCC's safe harbor or utilizes another method to calculate traffic."<sup>4</sup>

4. Interested parties filed comments on December 15, 2006, and reply comments on January 12, 2007. Due to pending legislation in Kansas, namely SB 49, the Commission paused from taking further action in this docket.

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<sup>2</sup> FCC 06-94, *Id.*, ¶¶ 38-45.

<sup>3</sup> Docket No. 06-GIMT-332-GIT, Reams Supplemental Testimony, filed Aug. 10, 2006.

<sup>4</sup> Order, Nov. 2, 2006, p. 4.

5. On April 30, 2007, the Commission entered a Notice of *Ex Parte* Communication from the House Utilities Committee<sup>5</sup>; a Notice of Additional Authority<sup>6</sup>; and an Order requesting Additional Comment on these developments. The Comment Period closed July 16, 2007. Since that time, the Commission has been monitoring developments in Congress, specifically concerning legislation introduced concerning 47 U.S.C. § 254 (f)<sup>7</sup>, a key provision of the FTA from which states derive their authority concerning state universal service funds and the Internet Tax Freedom Act Amendments Act of 2007. The Commission has also been monitoring developments with other state funds which have addressed, or are currently addressing this very issue and will continue to do so.<sup>8</sup>

6. As more fully discussed below, the Commission concludes that:

- (i) There is no federal statutory authority expressly permitting or precluding it from requiring Interconnected VoIP providers to contribute to the KUSF. Federal authority however, may be implied from various sources of federal law, and other States' practices. Such implication poses limited risk against a claim of federal pre-emption.
- (ii) There is no Kansas statutory authority expressly permitting the Commission to require Interconnected VoIP providers to contribute; such defect, however, could be cured by the passing of an amendment containing the language of SB 49, which was tabled until the 2008 legislative session.<sup>9</sup> Without such an amendment, State statutory authority can be implied from a construction of certain State statutes, but such a construction leaves open the potential of future litigation challenging the requirement to contribute on State grounds.

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<sup>5</sup> Letter from House Utilities Committee Chairman reporting that SB 49 was passed 40-0 by the Senate, and that the House heard testimony.

<sup>6</sup> Granting Staff's motion to take notice of *Minn. Pub. Utils. Comm'n v. FCC*, 483 F. 3d 570 (2007) (decided March 21, 2007 and upholding the FCC decision pre-empting Minn. PUC's attempt to "regulate" VoIP).

<sup>7</sup> See e.g., HR 2054, Universal Service Reform Act of 2007, Sec. 8, State Authority, Introduced Apr. 26, 2007, & S. 101, "Universal Service For American's Act", Introduced Jan. 4, 2007, both of which have had no action since referred to committee.

<sup>8</sup> For example, Nebraska which had both a legislative amendment and an order by its Public Service Commission to implement contributions by Interconnected VoIP providers; New Mexico which appears to have simply legislated the requirement, and Connecticut, though not having a high cost fund, is, as of December 19, 2007, considering VoIP provider obligations relative to Lifeline and Telephone Relay Service programs.

<sup>9</sup> The House Committee approved "amendatory language", inserting "to the extent not prohibited by federal law." See House Committee Letter filed in this docket.

- (iii) The ability of Interconnected VoIP providers to identify local and interstate traffic is a non-issue if the safeharbor mechanism utilized by the FUSF is employed.
- (iv) Following the practice utilized in New Mexico, Interconnected VoIP providers may choose among the same three methods for determining required contributions to the KUSF that the FCC has found appropriate for determining contributions to the FUSF. An industry workshop shall follow to address implementation issues.

#### FINDINGS OF FACT

7. The Commission appreciates the parties' efforts in preparing their comments and has considered all of the remarks contained therein, as well as additional authorities, including developments in other states and at the federal level. The Commission notes Staff's continuing summary of the comments and will not repeat such summary herein except where essential to aid the discussion. Generally, the comments, suggestions and recommendations presented by the contributing parties were helpful; the Numbers and Connections based Contribution Methodology proposed by AT&T, is, as Staff notes, beyond the scope of this docket. In resolving this docket, and as contemplated in the Commission's initial order framing the issues, the Commission believes the questions presented are purely questions of law, policy and implementation. Therefore, the matter can be resolved without an evidentiary proceeding and without the need for formal factual findings.<sup>10</sup> However, the Commission does conclude an implementation workshop is warranted to address certain basic issues.

#### LEGAL AUTHORITIES

8. Several legal authorities bear on the analysis, and are set forth at the outset both as a backdrop for discussion, and to demonstrate the murky regulatory environment concerning universal service and VoIP technology.

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<sup>10</sup> See Dkt. No. 06-GIMT-1289-GIT, ¶ 12 (Treatment of Competitive Neutrality Issue.)

*Relevant Federal Statutes & Laws*

9. State regulatory authority regarding universal service is derived from 47 U.S.C. § 254(f) of the FTA, which states:

"Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the state, to the preservation and advancement of universal service in that state. A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden the universal service support mechanisms."

Under this provision, so long as regulations are not inconsistent with FCC rules, states are permitted to adopt regulations to preserve and advance universal service. Clearly, adding another base of contributors, *i.e.*, the Interconnected VoIP providers, which are already contributing at the federal level, and which would provide additional funds to the KUSF, does not run afoul of Section 254(f). In fact, one might argue that not including such contributors in a state fund is inconsistent with Section 254(f).<sup>11</sup>

10. State regulatory authority concerning universal service is also supported by the terms of 47 U.S.C. § 253(b) of the Act. While Subsection 253(a) forbids any state or local statute, regulation or legal requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service", the relevant part of 253(b) states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary

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<sup>11</sup> See FCC Order 07-140, 22 F.C.C.R. 15712, 22 FCC Rcd. 15712, 42 Communications Reg. (P&F) 156, 2007 WL 2241209, (F.C.C.), August 06, 2007, MD 07-8, which stated: "Interconnected VoIP service is increasingly used to replace traditional telephone service and, as the interconnected VoIP service industry continues to grow and to attract customers who previously relied on traditional voice service, it was *inappropriate to exclude* interconnected VoIP service from universal service contribution requirements."

to preserve and advance universal service . . . [.] The FCC may preempt State actions to preserve and advance universal service under Section 253(d) of the Act which states:

"If, after notice and an opportunity for public comment, the [FCC] determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the FCC shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

At least two states with state universal service funds (New Mexico & Nebraska), require Interconnected VoIP providers to contribute to their funds, and have done so without facing a claim of preemption. No party in this docket has demonstrated that contributing to the KUSF would have a prohibitive effect on their service offering regardless of how it is classified or defined. Furthermore, the Commission formally adopted the FCC definition of competitive neutrality in Docket No. 06-GIMT-1289-GIT.<sup>12</sup> The principle requires that universal service rules do not unfairly favor or disfavor one technology over another, or unfairly advantage or disadvantage one provider over another.<sup>13</sup> Since requiring Interconnected VoIP providers to contribute to the FUSF is competitively neutral, requiring such providers to contribute to the state fund is likewise competitively neutral.

11. In addition to the above authorities, on October 31, 2007, the President signed into law the Internet Tax Freedom Act (ITFA) Amendments Act of 2007.<sup>14</sup> That law extended the ITFA, which was due to expire, until November 1, 2014. Section 1107 of the ITFA states:

"(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

<sup>12</sup> See Docket No. 06-GIMT-1289-GIT, Order dated March 27, 2007, ¶20.

<sup>13</sup> See Statement of FCC Chairman Martin accompanying the FCC's Interim Order, WC No. 04-36, requiring VoIP providers to contribute to the FUSF.

<sup>14</sup> See Gov Track.us.H.R. 3678—110<sup>th</sup> Congress (2007):  
<<http://www.govtrack.us/congress/bill.xpd?tab=summary&bill=h110-3678>>

"(2) in effect on February 8, 1996. (Emphasis added.)<sup>15</sup>

The Commission believes this provision reflects Congressional intent that the states are not only permitted to continue to implement their own universal service funds, but further, that such funds may require contributions to support universal service from services such as Interconnected VoIP, that utilize Internet Protocol as long as the state universal service fund is authorized by Section 254 of the Act.<sup>16</sup>

#### *Relevant Federal Case Law*

12. Two recent cases decided at the federal level, though not binding on the 10<sup>th</sup> Circuit, persuasively bear on the issues in this docket: *Minn. Pub. Utils. Comm'n v. FCC*, decided by the Eighth Circuit Federal Court of Appeals in March of 2007, and *Vonage Holdings Corp. v. FCC*, decided by the D.C. Circuit in June of 2007.<sup>17</sup> Each will be summarized in turn.

13. In the *Minnesota* decision, the Eighth Circuit considered petitions filed seeking review of an order of the FCC<sup>18</sup> preempting state regulation of telecommunication services utilizing VoIP. The core holdings of this decision are as follows:

- i) it was sensible for the FCC to address question of the impossibility exception without first determining whether VoIP service should be classified as a telecommunication service or an information service;
- ii) FCC properly considered economic burden of identifying geographic endpoints of VoIP communications;
- iii) competition and deregulation were valid federal interests the FCC could protect through preemption of state regulation;
- iv) FCC did not arbitrarily or capriciously preempt Minnesota's 911 requirements; and

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<sup>15</sup> Internet Tax Freedom Act, Pub.L. 105-277, Div. C, Title XI, §§ 1100 to 1104, Oct. 21, 1998, 112 Stat. 2681-719, as amended Pub.L. 107-75, § 2, Nov. 28, 2001, 115 Stat. 703; Pub.L. 108-435, §§ 2 to 6A, Dec. 3, 2004, 118 Stat. 2615 to 2618; Pub.L. 110-108, §§ 2 to 6, Oct. 31, 2007, 121 Stat. 1024.

<sup>16</sup> Compare Nebraska PUC Order NUSF-40/PI-86 entered March 22, 2005, ¶ 37 (relying on the 2004 enactment of the Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, Section 1107.)

<sup>17</sup> *Minn. Pub. Utils. Comm'n v. FCC*, 483 F. 3d 570 (2007); *Vonage Holdings Corp. v. FCC*, 489 F. 3d 1232 (2007).

<sup>18</sup> (FCC), 2004 WL 2601194).

v) challenge by New York Public Service Commission, asserting that state regulation of fixed VoIP services should not be preempted, was not ripe for review.

Candidly, the core holdings have little to do with Interconnected VoIP providers' obligations with respect to universal service funding at either the federal or state level. The Eighth Circuit decision was specifically directed at an FCC order which reads:

"1. In this Memorandum Opinion and Order (Order), we preempt an order of the Minnesota Public Utilities Commission (Minnesota 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 DigitalVoice 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 – the *Pulver Declaratory Ruling* and the *AT&T Declaratory Ruling* - by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities. For such services, comparable regulations of other states must likewise yield to important federal objectives. Similarly, to the extent that other VoIP services are not the same as Vonage's but share similar basic characteristics, we believe it highly unlikely that the Commission would fail to preempt state regulation of those services to the same extent. We express no opinion here on the applicability to Vonage of Minnesota's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices. We expect, however, that as we move forward in establishing policy and rules for DigitalVoice and other IP-enabled services, states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints.

"2. Our decision today will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping us answer the questions that remain after today's Order - questions regarding the regulatory obligations of providers of IP-enabled services. We plan to address these questions in our *IP-Enabled Services Proceeding* in a manner that fulfills Congress's directions 'to promote the continued development of the Internet' and to 'encourage the deployment' of advanced telecommunications capabilities. Meanwhile, this Order clears the way for increased investment and innovation in services like Vonage's to the benefit of American consumers."

It is important to note that the Minnesota Public Utilities Commission order pre-empted was issued in a Minnesota Commission proceeding captioned *In the Matter of Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*.<sup>19</sup> To be clear, our ruling in the instant docket is limited exclusively to the issue of whether Interconnected VoIP providers must contribute to the KUSF. By requiring such providers to do so, even if it means classifying them under the presently existing language of K.S.A. 66-2008(a), the Commission is not treating them as a "traditional 'telephone company'", *i.e.*, in the manner the FCC found objectionable.

14. In contrast to the *Minnesota* decision, the *Vonage* decision is more on point. *Vonage* specifically concerns the precise FCC order that prompted the opening of the instant docket, *i.e.*, the FCC's June 2006 Interim Order requiring Interconnected VoIP providers to contribute to the FUSF. In *Vonage*, the D.C. Circuit ruled that the FCC has permissive authority to require Interconnected VoIP providers to make FUSF contribution payments under Section 254(d) of the Act. The Court found reasonable the FCC's interpretation of Section 254(d) that VoIP providers are "provider[s] of interstate telecommunications" because they provide telecommunications as a component of VoIP service. The Court also upheld as reasonable the 64.9 percent VoIP safeharbor. While the Court agreed that the analogy between VoIP and wireline toll service was "imperfect," it found that Vonage did not make the requisite stringent showing "that wireless is so much the better analogue for VoIP that the Commission acted arbitrarily and capriciously by failing to select it." The Court, however, vacated as inequitable and discriminatory the requirement that VoIP providers, but not wireless carriers, submit traffic studies to the Commission for approval before relying on them as the basis for FUSF payments. The Court found that the Commission's explanation for this - that pre-approval would be

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<sup>19</sup> Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (issued Sept. 11, 2003).

disruptive to wireless carriers - hardly justified treating VoIP and wireless differently. As the Court explained, the pre-approval requirement was no less disruptive to VoIP providers who went "overnight from making no direct USF contributions to contributing at nearly twice the level of wireless carriers."

Had the *Vonage* decision not upheld the contribution requirement and the safeharbor provision, states which have required, or will require Interconnected VoIP providers to contribute to state funds, would face extreme resistance, if not defeat. The converse cannot be said, with the same precision for the actual result—*i.e.*, upholding the federal contribution requirement completely clears the way for states to impose such a requirement. The particular states' own law and regulations concerning the particular state fund comes into play.

#### *Relevant Kansas Law*

15. The key statute concerning the Kansas Universal Service Fund is found at K.S.A. 2006 Supp. 66-2008. Subsection (a) states, in relevant part:

"The commission shall require *every* telecommunications carrier, *telecommunications public utility* and wireless telecommunications service provider that provides intrastate telecommunications services to contribute to the KUSF on an equitable and nondiscriminatory basis." (Emphasis added.)

This subsection was addressed in SB 49 which proposed to add by amendment, language concerning VoIP providers. The proposed amendment read as follows:

"(a) The commission shall require every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services *and every VoIP provider as defined by K.S.A. 2006 Supp. 12-5353, and amendments thereto*, to contribute to the KUSF on an equitable and nondiscriminatory basis."

K.S.A. 2006 12-5353 defines VoIP provider as:

". . . a provider of interconnected VoIP service but does not include any telecommunications carrier or local exchange carrier, as defined in K.S.A. 66-1,187, and

amendments thereto, which holds a certificate of public convenience and necessity issued by the state corporation commission."

"Interconnected VoIP service "is also defined in K.S.A. 2006 Supp 12-5353 as having the same meaning provided in 47 C.F.R. 9.3 (Oct. 1, 2005.)." Commission Staff summarized the developments concerning SB 49 in its additional comments. That summary reads as follows:

"Correspondence From the House Energy and Utilities Committee

"3. As indicated in Staffs Comments and Reply Comments, Staff believes the Commission has the authority to require interconnected VoIP providers to contribute to the KUSF and it is in the public interest to do so. Subsequent to the filing of comments, SB 49 was introduced in the Senate Utilities Committee. This proposed legislation would require interconnected VoIP providers to contribute to the KUSF. SB 49 amended K.S.A. 2006 Supp. 66-2008 (a) to specifically include interconnected VoIP providers in the list of entities the Commission must require to contribute to the KUSF. The Senate Utilities Committee passed SB 49 favorably from the committee to Senate as a whole. The Senate then passed SB 49 by a vote of 40-0. The House Energy and Utilities Committee amended the language in SB 49 to define interconnected VoIP provider consistent with 47 C.F.R. 9.3 and to indicate that the Commission should require contribution to the KUSF to the extent not prohibited by federal law. While the proposed legislation was generally supported, SB 49 was ultimately tabled until the 2008 Session.

"4. 47 C.F.R. 9.3 defines interconnected VoIP service. It states that, [a]n interconnected Voice over Internet protocol (VoIP) service is a service that:

- (1) Enables real-time, two-way voice communications;
- (2) Requires a broadband connection from the user's location;
- (3) Requires Internet protocol-compatible customer premises equipment (CPE);

and,

- (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

"This definition is consistent with the definition contained in the Commission's Order issued on November 2, 2006, which opened this docket. Thus, the actions of the Legislature to include reference to this definition do not provide cause for the Commission to alter the definition of an interconnected VoIP provider it has set out for purposes of this docket.

"5. While the Senate Utilities Committee and the Senate as a whole adopted language in SB 49 that would have required interconnected VoIP providers to contribute to the KUSF, the House Energy and Utilities Committee amended the language to state that interconnected VoIP providers, 'to the extent not prohibited by federal law', would be required to contribute to the KUSF. This language would have required the Commission

to evaluate the current state of the law on this matter to determine whether interconnected VoIP providers could be required to contribute to the KUSF. That was and remains the purpose of this proceeding. *Staff maintains its position that the Commission can and should require interconnected VoIP providers to contribute to the KUSF as set out in its comments and reply comments.*"<sup>20</sup>

16. For State law authorization, Staff's comments and reply comments relied on a construction of the term "telecommunications public utility" contained in K.S.A. 66-2008(a) (set forth with emphasis in ¶ 15 above), and specifically defined in K.S.A. 66-1,187(n), and K.S.A. 66-104. These latter two statutes, in pertinent part, and with added emphasis, state:

"[66-1,187] (n) 'Telecommunications public utility' means *any public utility*, as defined in K.S.A. 66-104, and amendments thereto, which owns, controls, operates or manages any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages, as defined in K.S.A. 66-104, and amendments thereto, or the provision of telecommunications services in or throughout any part of Kansas. [Emphasis added.]

**"66-104. Utilities subject to supervision; exceptions.** (a) The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery, or any part thereof, *for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state[.]*"

#### DISCUSSION/CONCLUSIONS

17. The two rounds of comments and reply comments from the parties—Staff, CURB, Embarq, AT&T, Cox, and Verizon provided key information for the Commission's consideration. In sum, Staff, CURB, and Embarq contend that the Commission is authorized by both federal and state law to require Interconnected VoIP providers to contribute to the KUSF. On the other hand, and on differing rationales, Cox, AT&T, and Verizon disagree.

##### *(i) Federal authority*

18. Regarding federal law, obviously the key issue is whether it would pre-empt the Commission or the Legislature or both, from requiring Interconnected VoIP providers from

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<sup>20</sup> Additional Comments of Commission Staff, ¶¶ 3-5.

contributing to the KUSF. As the opposing views suggest, there is no clear-cut answer, only varying interpretations of language that amounts to mere dicta.

19. The core holding of the *Vonage* decision simply stated that the FCC had permissive authority under Section 254(d) to require Interconnected VoIP providers to contribute to the FUSF because these providers are "providers of telecommunications services", that such contributions promote competitive neutrality, and it was therefore in the public interest for them to do so. This ruling says nothing about the states' authority to require contributions to their respective state funds or about the merits of a potential federal pre-emption claim. However, in the Commission's view, silence on the precise issues in this docket is not deadly. The *Vonage* opinion suggests the authority for requiring contributions to universal service funds rests in the phrase "providers of telecommunications services." Section 254(f) contains a similar phrase and further support in the language permitting states to adopt their own regulations within certain limitations.

20. What the Commission gleans from the current status of the law is simply that no federal authority, *on its own*, provides a clear, and unambiguous statement, that states can or cannot require Interconnected VoIP providers to contribute to state funds. However, when all of the federal authorities set forth above are collectively considered, the Commission believes a claim that a regulation or a law requiring such contributions is pre-empted by federal law is likely to fail.

21. The United States Constitution's Supremacy Clause gives Congress, not the courts, authority to preempt state law.<sup>21</sup> The FTA does not completely preempt state law in the field of telecommunications.<sup>22</sup> However, federal preemption occurs when there is conflict

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<sup>21</sup> *U.S. Const. Art. VI, cl. 2; La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

<sup>22</sup> See *Qwest Corp. v. Scott*, 380 F.3d 367, 372 (8th Cir.2004).

between federal and state law.<sup>23</sup> Preemption is compelled “whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”<sup>24</sup> Thus, federal law impliedly preempts state law where it is “impossible for a private party to comply with both state and federal requirements.”<sup>25</sup>

22. Assuming that either the 2008 Legislature acts to amend K.S.A. 66-2008, or the Commission requires contributions from Interconnected VoIP providers in the absence of such legislation according to the federal methodology, there would be no conflict between federal and state law. Further, there would be no violation of either Section 253(a) or (b) that would give rise to an *express* pre-emption claim under Section 253(d). Nor is it plausible to assert that it is impossible for an Interconnected VoIP provider to comply with both federal and state universal service requirements; such providers are already contributing in, for example, New Mexico and Nebraska, and these requirements have not been challenged on the basis of pre-emption.

23. The above discussion, plus the recent legislation concerning the IFTA discussed in ¶ 11, support the Commission’s conclusion that there is no federal statutory authority *expressly* permitting or precluding the Commission or the Kansas Legislature from requiring, via the federal methodology, Interconnected VoIP providers to contribute to the KUSF. Federal authority however, may be implied from various sources of federal law and other states’ practices.

(ii) *State authority*

24. A legislative amendment such as tabled SB 49, would unambiguously decide the issue of whether requiring Interconnected VoIP providers to contribute to the KUSF is authorized by State law. Otherwise, K.S.A. 66-2008(a) must be interpreted by principles of

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<sup>23</sup> See e.g., *La. Pub. Serv. Comm’n*, 476 U.S. at 368-69.

<sup>24</sup> *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 383 (1992).

<sup>25</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).

statutory construction, including a determination of legislative intent, that it was meant to include (or not meant to exclude) Interconnected VoIP providers somewhere in the meaning of the phrase "*every telecommunications carrier, telecommunications public utility . . .*[" Likewise, language encompassing, but not limited to "the provision of telecommunications services in or throughout any part of Kansas[" appearing in K.S.A. 66-1,187(n), or similar language appearing elsewhere would have to be construed.

25. Staff suggests throughout its pleadings that the term "telecommunications public utility", as defined in K.S.A. 66-104 encompasses, for purposes of requiring KUSF contributions under K.S.A. 66-2008(a), Interconnected VoIP providers. While this may not be the only plausible construction, the Commission concludes such an interpretation is rational. This conclusion is not only in the public interest, but is supported by the Commission's expert understanding of the principle of competitive neutrality, in that competitive bias would likely result if Interconnected VoIP providers, whose services, like other services, allow the ability to access the PSTN were not required to contribute. Furthermore, as CURB notes in its comments, the policy goals of preserving and advancing universal service cannot be met if the KUSF is not funded adequately.

26. The above discussion supports the conclusions that: There is no Kansas statutory authority expressly permitting the Commission to require Interconnected VoIP providers to contribute; such defect, however, could be cured by the passing of an amendment containing the language of SB 49, which was tabled until the 2008 legislative session. Without such an amendment, State statutory authority can be implied from a construction of certain State statutes, but such a construction leaves open the potential of future litigation challenging the requirement to contribute on State grounds.

Based on these conclusions, the Commission further concludes, that even absent a legislative amendment such as tabled SB 49, a rational construction of K.S.A. 66-2008(a) in light of our public interest mandate, and the guiding principle of competitive neutrality, compel requiring Interconnected VoIP providers to contribute to the KUSF in a manner more specifically described below.

*(iii) tracking local and interstate traffic &  
(iv) use of the FCC safeharbor percentage*

27. The *Vonage* decision to uphold the safeharbor provision, seems, in the Commission's view, to have resolved the tracking of local and interstate traffic problems raised by VoIP providers. Concerning the use of the safeharbor provision, the Commission notes the language in the New Mexico Universal Service fund work-sheet, and believes such language, could be imposed here. That language states:

"Interconnected VoIP providers are required to report all retail telecommunications revenue billed to their customers. They may choose among the same three methods for determining required contributions to the state USF that the FCC has found appropriate for determining interconnected VoIP providers' contributions to the Federal USF, namely "safe harbor", actual revenue allocations between interstate and intrastate calls and the results of a traffic study. In imposing the obligation of VoIP providers to contribute to the state USF, the [New Mexico Public Regulatory Commission] approved use of the FCC "safe harbor" default percentage of 35.1%. Additionally, to the extent that the "safe harbor" percentage is higher than some providers' actual intra state use, providers may instead contribute to the fund based on actual revenue or by conducting a traffic study."

The Commission is reluctant to specifically order that same language be used here, without giving the parties an opportunity to review such language in an implementation workshop. The Commission also believes that other issues, such as notification issues, *i.e.*, identifying Interconnected VoIP providers; timing issues, co-ordination with the outside fund administrator, review of the safeharbor percentage, etc., might benefit from further, informal, discussion.

**IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT**

A. The above findings and conclusions set forth above and in paragraphs 6, 23, 26, and 27, are made.

B. Staff shall coordinate with Advisory Counsel to schedule within 30 days of this order an implementation workshop to be conducted within 30 days thereafter. The scheduling order shall *tentatively* list discussion topics. Staff shall attempt to contact the Interconnected VoIP providers that might be known to be operating in Kansas, and affected by this order, who are not parties to this docket.

C. A party may file a petition for reconsideration of this Order within fifteen days of the date of this Order. If service is by mail, three additional days may be added to the 15-day time limit to petition for reconsideration.

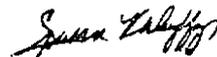
**BY THE COMMISSION IT IS SO ORDERED.**

Wright, Chmn.; Moffet, Comm.; Harkins, Comm.

Dated: JAN 09 2008

ORDER MAILED

JAN 09 2008

 Executive Director

\_\_\_\_\_  
Susan K. Duffy  
Executive Director

PPK

EXHIBIT D  
PRESIDENT OBAMA'S  
MEMORANDUM ON PREEMPTION

**THE WHITE HOUSE**

Office of the Press Secretary

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For Immediate Release

May 20, 2009

May 20, 2009

**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND  
AGENCIES**

SUBJECT: Preemption

From our Nation's founding, the American constitutional order has been a Federal system, ensuring a strong role for both the national Government and the States. The Federal Government's role in promoting the general welfare and guarding individual liberties is critical, but State law and national law often operate concurrently to provide independent safeguards for the public. Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.

An understanding of the important role of State governments in our Federal system is reflected in longstanding practices by executive departments and agencies, which have shown respect for the traditional prerogatives of the States. In recent years, however, notwithstanding Executive Order 13132 of August 4, 1999 (Federalism), executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.

The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal

system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

To ensure that executive departments and agencies include statements of preemption in regulations only when such statements have a sufficient legal basis:

1. Heads of departments and agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation.
2. Heads of departments and agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132.
3. Heads of departments and agencies should review regulations issued within the past 10 years that contain statements in regulatory preambles or codified provisions intended by the department or agency to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption. Where the head of a department or agency determines that a regulatory statement of preemption or codified regulatory provision cannot be so justified, the head of that department or agency should initiate appropriate action, which may include amendment of the relevant regulation.

Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory authorities. Heads of departments and agencies should consult as necessary

with the Attorney General and the Office of Management and Budget's Office of Information and Regulatory Affairs to determine how the requirements of this memorandum apply to particular situations.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA