N A R U C

National Association of Regulatory Utility Commissioners

August 24, 2009

NOTICE OF ORAL EX PARTE CONTACT

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **NARUC notice of oral ex parte contact involving the proceedings captioned:**

In the Matter(s) of

Nebraska Public Service Commission and Kansas Corporation Commission Petition for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues; **WC Dkt. 06-122**

In the Matter of a National Broadband Plan for Our Future; **GN Dkt. 09-51**

Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol Subscribership; **WC Dkt. 07-38**

International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act; **GN Dkt. 09-47**

Dear Secretary Dortch:

On Thursday, August 20,[1] NARUC's General Counsel, Brad Ramsay, met with Priya Aiyar – *Chairman Genachowski's Legal Advisor for Wireline Competition and International Issues.* During the discussions with Ms. Aiyar, the undersigned suggested the following.

[1] NARUC respectfully requests any waivers needed to file this notice one day out-of-time.

ON THE NEBRASKA/KANSAS PETITION:

Petitioners Nebraska Public Service Commission (NPSC) and Kansas Corporation Commission have asked the FCC to declare that State Universal Service Funds may assess Nomadic VoIP intrastate revenues based on the intrastate complement to the current federal safe harbor for interstate assessments. NARUC supported Nebraska in the Eighth Circuit litigation[2] that prompted the filing of this petition.

As the FCC's amicus in that proceeding effectively acknowledges[3] Congressional intent is clear on this point. Even Vonage, in a recent ex parte meeting with agency officials, concedes the petitioner request by choosing not to object to future contributions to State programs.[4]

There is no dispute Vonage on the central point of the State request. All agree nomadic VOIP providers should contribute to State funds.

There is no reason for the FCC to address anything else[5] in what NARUC hopes will be an expeditious response to the States' request.

The only real dispute is over *when* Vonage will have to begin to pay into existing State programs. Vonage's' competitors pay now. There is no legal or policy reason to delay issuing the requested declaration.

Vonage raises the specter of inconsistent State billing regimes as requiring an extended FCC rulemaking. But that provides no rationale for delay.

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[2] See, *Vonage Holdings Corporation* v. *Nebraska Public Service Commission*, 564 F. 3d 900 (8th Cir. May 1, 2009), available online at: <http://www.ca8.uscourts.gov/opns/opFrame.html>.

[3] See, August 5, 2008 *Brief for Amicus Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal*, filed in *Vonage Holdings Corp.* v. *Nebraska PSC et al., Case No. 08-1764, available at:* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916162

[4] See, Notice of Oral Ex Parte Contact filed by Brita D. Strandberg on behalf of Vonage Holdings Corporation on August 7, 2008, at 1, *In the Matter of Nebraska Public Service Commission and Kansas Corporation Commission Petition for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues;* WC Dkt. 06-122. Available online at: *<http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934802>. (*"Vonage does not object to contributing to state Universal Service Funds ("USF"). Vonage also agrees with the Nebraska Public Service Commission ("NPSC") and the Kansas Corporation Commission ("KCC") to the extent their Petition recognizes the FCC has the authority and responsibility to determine whether and in what circumstances state USF programs do not conflict with federal policy and therefore are not preempted.")

[5] Like, e.g., the claim the FCC intended to preempt State USF assessments of nomadic VOIP revenues in its Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004), which is specious – clearly ignoring the FCC's specification that the FCC has NOT preempted the NPSC USF order. See, note 3, supra.

The FCC can clearly act based on the record presented. Indeed, the FCC can issue an *interpretive rule* clarifying the existing interim June 27, 2006 specified federal safe harbor of 64.9 percent necessarily assumes a complementary State safe harbor of 35.1 percent[6] without additional proceedings.

Both NPSC and the Kansas Corporation Commission have already committed to grant exclusions from assessable income to ensure that providers assessed by one State are not also assessed by the Nebraska or Kansas funds on the same revenues.[7] Any concerns that any customer might actually get assessed twice for the same service can be easily handled in the declaratory ruling by specifying that the order does not protect any State which issues a duplicative assessment and arbitrarily refuses to provide an appropriate credit (or perhaps specifying that the FCC will take up the question of double assessments if and when such concern arise and/or specify that a particular collection basis will be presumptively valid in such cases).

ON STATE BROADBAND DATA COLLECTION:

A July 2009 NARUC resolution asks the FCC to "immediately grant a petition for declaratory ruling affirming that: (1) it is an important aim of federal policy to expand the scope of available broadband services data; and (2) the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State, provided such State agrees to provide a minimum level of data confidentiality and protection."

NARUC expects to file a petition for declaratory ruling shortly based on the resolution. Given the clear Congressional goals to expeditiously collect broadband data, the FCC should remove all doubt and specify there are no limits on data the states can collect. Sections 706 and 254 of the Telecommunications Act of 1996,[8] as well as the express terms of the BDIA and the

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[6] See *Universal Service Contribution Methodology*, WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, and 98-170, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) (*2006 Interim Contribution Methodology Order*), available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.doc>, 71 Fed Reg. 38781 (July 10, 2009) at: <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=1507078061+1+2+0&WAISaction=retrieve>.

[7] See, July 16, 2009 *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the alternative, adoption of a rule declaring that State Universal Service Funds may Assess Nomadic VoIP Intrastate Revenues*, at 19, (committing to grant exclusions from assessable income to avoid double assessment that could occur in exceedingly rare and unusual situations), available online at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916161>.

[8] 47 U.S.C. §706 and §254 (1996). In Section 706, Congress specifies ***that States*** (and the FCC) "***SHALL*** encourage the deployment…of advanced telecommunications capability" a term Congress defined "without regard to any transmission media or technology, as high speed, switched, broadband telecommunications capability. (emphasis added) Pub. L. No.104-104,110 Stat. 56, § 706 (codified in the notes to 47 U.S.C. §157) This section must be read in *pari materia* with the Act's emphasis for access to such services for schools, libraries, and rural health care facilities, as well as the 47 U.S.C. § 254(c)'s requirement to periodically update what services can be supported by federal programs (and - necessarily the allowed State analogues). In 47 U.S.C. § 254 (b), the linkage between Congress's desire for States to promote advanced services and a periodically evolving universal service is explicit. It *mandates* that the FCC explicitly base its policies to advance universal service (which includes both "advanced" and "information" services) on the existence of STATE mechanisms. Specifically that section states " [T]he FCC SHALL base policies for the preservation and advancement of universal service on the following

American Recovery and Reinvestment Act of 2009, (P.L. 111-5, 123 Stat. 115 (2009)) clarify Congress's expressed goals that *States will* both: (i) promote the deployment of advanced infrastructures and information services themselves, and (ii) collect information to assist efforts to map the current and ongoing state of the deployment of broadband services.

If you have any questions about this letter, please do not hesitate to contact the undersigned at 202.898.2207 or jramsay@naruc.org.

Respectfully Submitted,

/s/

James Bradford Ramsay
NARUC General Counsel

cc: Priya Aiyar (by e-mail)
Chairman's Legal Advisor for Wireline Competition and International Issues

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principles . . . (2) . . . Access to advanced services . . . (3). . .Consumers in all regions. . .including those in rural, insular, and high cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas. . .(5). . .There should be specific, predictable and sufficient Federal AND STATE mechanisms to preserve and advance universal service." (emphasis added) Id. In 47 U.S.C. § 254 (f), Congress mandates that every provider of INTRASTATE telecommunications contribute to a States program.