BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rules Allowing State Universal Service Funds to Assess Charges on Nomadic Voice Over Internet Protocol Intrastate Revenues	WC Docket No. 06-122

COMMENTS OF THE OREGON TELECOMMUNICATIONS ASSOCIATION AND THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION

September 9, 2009

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I. SUMMARY

On July 16, 2009, the Nebraska Public Service Commission ("NPSC") and the Kansas Corporation Commission ("KCC") jointly petitioned the Federal Communications Commission ("Commission") for a declaratory ruling that the Commission 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 NPSC and KCC presented a very articulate argument in support of granting the requested declaratory ruling. In pertinent part, NPSC and KCC argued:

- As a result of the Eighth Circuit's decision in Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n, 564 F.3d 900 (8th Cir., 2009) ("*NPSC Order*"), a declaratory ruling is needed to clarify that states may assess universal service contributions on intrastate nomadic VoIP revenue.
- A declaratory ruling that states may assess universal service contributions on intrastate nomadic VoIP revenue is consistent with the provisions of the Telecommunications Act of 1996 creating a federal-state partnership to support universal service.
- Using the inverse of the safe harbor adopted by the Commission in its order placing USF contribution obligations on interconnected VoIP providers or, alternatively, allowing the nomadic VoIP provider to submit a traffic study estimating the interstate percentage or reporting an actual interstate percentage based on actual revenue allocations, provides a sufficient mechanism to ensure that state assessments do not impermissibly include interstate revenue.

The Oregon Telecommunications Association ("OTA") and the Washington Independent Telecommunications Association ("WITA") heartily endorse the Petition of the NPSC and KCC and urge the FCC to expeditiously issue the requested declaratory ruling.

NPSC and KCC requested a second declaratory ruling that states have discretion to adopt any mechanism that does not assess interstate revenues and contains procedures designed to ensure that no provider pays assessments to more than one state on the same intrastate revenue and to provide safe harbor mechanisms that states may elect to use to calculate assessable revenues. OTA and WITA have no opposition for this request for a second declaratory ruling, but offer no specific comments in this portion of the filing. Instead, OTA and WITA urge the Commission to take action as quickly as possible on the first request for declaratory ruling. It is very important that states be declared to have authority to assess universal service support contributions on nomadic VoIP providers without fear of preemption litigation.

II. BACKGROUND

OTA is a trade association that represents the interests of its telecommunications company members. All of OTA's members meet the definition of a rural telephone company as set forth in 47 U.S.C. § 153(37). OTA's members include the following companies: Asotin Telephone Company d/b/a TDS Telecom, Beaver Creek Cooperative Telephone Company, Canby Telephone Association d/b/a Canby Telcom, Cascade Utilities, Inc., CenturyTel of Oregon, Inc. d/b/a CenturyLink, CenturyTel of Eastern Oregon, Inc. d/b/a CenturyLink, Clear Creek Telephone & Television, Colton Telephone Company, Eagle Telephone System, Inc., Gervais Telephone Company, Helix Telephone Company, Home Telephone Company d/b/a TDS Telecom, Malheur Home Telephone, Midvale Telephone Exchange, Molalla Communications, Inc. d/b/a Molalla Communications, Monitor Cooperative Telephone Company, Monroe

Telephone Company, Mt. Angel Telephone Company, Nehalem Telecommunications, Inc., North-State Telephone Co., Oregon-Idaho Utilities, Inc., Oregon Telephone Corporation, People's Telephone Co., Pine Telephone System, Inc., Pioneer Telephone Cooperative, Roome Telecommunications Inc., St. Paul Cooperative Telephone Association, Scio Mutual Telephone Association, Stayton Cooperative Telephone Company, Trans-Cascades Telephone Company and United Telephone Company of the Northwest, d/b/a CenturyLink.

WITA is a trade association that represents the interests of its members, who all qualify under the definition of rural telephone company, in the State of Washington. WITA's members are as follows: Asotin Telephone Company d/b/a TDS Telecom, CenturyTel of Cowiche, Inc. d/b/a CenturyLink, CenturyTel of Inter-Island, Inc. d/b/a CenturyLink, CenturyTel of Washington, Inc. d/b/a CenturyLink, Ellensburg Telephone Company d/b/a FairPoint Communications, Hat Island Telephone Company, Hood Canal Telephone Co., Inc. d/b/a Hood Canal Communications, Inland Telephone Company, d/b/a Inland Networks, Kalama Telephone Company, Lewis River Telephone Company, Inc. d/b/a TDS Telecom, Mashell Telecom, Inc. d/b/a Rainier Connect, McDaniel Telephone Co. d/b/a TDS Telecom, Pend Oreille Telephone Company, Pioneer Telephone Company, St. John Co-operative Telephone and Telegraph Company, Tenino Telephone Company, The Toledo Telephone Co., Inc., United Telephone Company of the Northwest, d/b/a CenturyLink, Western Wahkiakum County Telephone Company d/b/a Wahkiakum West, Whidbey Telephone Company and YCOM Networks, Inc. d/b/a FairPoint Communications.

In Oregon, there is a state universal service fund (Oregon Universal Service Fund or "OUSF") that is administered by the Oregon Public Utility Commission. The OUSF is funded

through contributions on intrastate telecommunications revenue. Currently, OUSF funding does not include assessments on nomadic VoIP providers.

Washington has a universal service mechanism that is funded through a state universal service access element. This access element was first created in the case of Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Company, et al., Cause No. U-85-23, et al., Seventeenth Supplemental Order and Eighteenth Supplemental Order (1986). It was affirmed in the docket entitled Washington Utilities and Transportation Commission v. Washington Exchange Carrier Association, et al., Docket No. UT-971140, Ninth Supplemental Order Approving Washington Carrier Access Plan (2000).

Although neither the OUSF nor the Washington universal service access element involve assessments against nomadic VoIP providers at the current time, it is very important that state commissions have the flexibility to assess the increasingly growing volume of intrastate revenues related to nomadic VoIP providers in light of the decreasing availability of intrastate telecommunications revenues from non-VoIP sources.

III. OTA AND WITA SUPPORT THE PETITION OF THE NPSC AND KCC FOR DECLARATORY RULING

The Petition for Declaratory Ruling was filed by NPSC and KCC to address the Eighth Circuit's *NPSC Order*. Following issuance of the *VoIP Contribution Order* (Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, Universal Service Contribution Methodology, 21 FCC Rcd 7518, ¶ 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)), NPSC and KCC developed rules to require interconnected VoIP providers to contribute to state USF funding mechanisms based on their residual intrastate revenues. See, 291Neb. Admin. Code, Chapter 10 §§ 001-007 and 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. 07-6IMT-432-GIT (Kansas Corp. Comm., Jan. 9, 2008). Subsequently, NPSC sought to compel state universal service contributions from at least one intrastate nomadic VoIP provider, specifically Vonage. Vonage brought a challenge to that assessment which made its way to the Eighth Circuit.

In the briefing before the Eighth Circuit, the Commission filed an *amicus* brief stating that there is no conflict between federal assessments of universal service contributions on the interstate portion of a nomadic VoIP provider's revenue and state assessment of universal service contributions on the remaining intrastate portion. However, the Eighth Circuit upheld the lower court's granting of a preliminary injunction, finding that the lower court did not abuse its discretion in issuing the preliminary injunction. *NPSC Order* at 905. It is important to note that the district court did not rule that there was federal preemption of state USF assessments on nomadic VoIP providers, but, instead, that the preliminary assessment was that Vonage was likely to prevail in its argument that all state regulation of interconnect VoIP service had occurred. Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm., 543 F. Supp.2d 1062, 1067-8 (D. Neb. 2008). Thus, the NPSC and KCC have petitioned that the Commission clarify through a formal order, not just through an *amicus* brief, that states may assess universal service contributions on intrastate nomadic VoIP revenue.

Although the Commission need not determine whether VoIP service is telecommunications service or information service for purposes of this declaratory ruling, at its heart, VoIP is simply another transmission mechanism for the delivery of voice-to-voice traffic. The Commission was absolutely right when it ruled that interconnected VoIP providers "benefit from universal service because much of the appeal of their services to consumers derives from

their ability to place calls to and receive calls from the [public switched telephone network]." *VoIP Contribution Order* at ¶ 34. Further, in the *VoIP Contribution Order*, the Commission found that requiring interconnect VoIP providers to contribute to universal service promotes the principle of competitive neutrality by reducing "the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *VoIP Contribution Order* at ¶ 44.

In the *VoIP Contribution Order*, the Commission required interconnected VoIP providers to contribute on their interstate revenues and gave the interconnected VoIP providers three options to determine the percentage of their revenues that would be classified as interstate. These three options are: (1) the use of a safe harbor under which 64.9% of the revenues are deemed to be interstate; (2) submitting a traffic study estimating the interstate percentage; or (3) reporting an actual interstate percentage based on actual revenue allocations. *VoIP Contribution Order* at ¶¶ 53 and 57.

Without a declaratory ruling from the Commission, state commissions that assess state universal service contributions on the intrastate revenues of nomadic VoIP providers may face preemption litigation. The core argument in preemption litigation is that the two-part test for federal preemption has been met in that it is (1) impossible to separate the service into interstate and intrastate components and (2) state regulation negates federal regulatory objectives. Minn. Public Utility Comm'n v. FCC, 483 F.3d 570, 578 (8th Cir. 2007). As set out in detail in the Petition of the NPSC and KCC, preemption should not occur and the Commission should make it clear that preemption is inappropriate.

As the Commission articulated in the *VoIP Contribution Order*, the assessment of interconnected VoIP providers, including nomadic VoIP providers, is appropriate because those

providers benefit from universal service through the ability to place and receive calls from the public switched telephone network. Further, such assessments promote the principle of competitive neutrality under 47 U.S.C. § 254. Those principles apply as equally on the state level as on the federal level. Thus, state regulation which assesses universal service contribution obligations on nomadic VoIP providers would not negate federal regulatory objectives. In fact, it would be consistent with these objectives. Thus, the second prong of the federal preemption test is not met and preemption is not appropriate.

In addition, if a state uses the inverse of the safe harbor adopted by the Commission in the *VoIP Contribution Order*, so that 35.1% of revenues are deemed to be intrastate, the "impossibility" test is set aside as no longer an issue. Further, states could also use the other two mechanisms set forth by the Commission in the *VoIP Contribution Order* by allowing nomadic VoIP providers to submit a traffic study estimating the interstate percentage or report actual intrastate percentage based on actual revenue allocations. Thus, in these instances, whether a safe harbor is used that reflects the Commission's safe harbor or actual data is used, the first prong of the federal preemption test is not met.

As pointed out in the Petition filed by NPSC and KCC, telecommunications carriers are increasingly switching to VoIP platforms. This means there is less intrastate revenue from traditional circuit switch platforms. This, in turn, places pressures on state universal service funds if carriers using VoIP platforms can argue that state universal service contribution obligations do not apply to VoIP service. The basis for moving to VoIP platforms should be the transmission efficiencies inherent in that platform or the other operational benefits of such a platform. It should not be based upon an unfair competitive advantage or regulatory arbitrage by

arguing what is a voice call at one end of the call and a voice call at the other end of the call is somehow exempt from state universal service contribution obligations.

There is no reason that the Commission should not act expeditiously to issue the declaratory ruling requested by NPSC and KCC. OTA and WITA urge the Commission to take that action as soon as possible.

IV. CONCLUSION

The Petition for Declaratory Ruling submitted by NPSC and KCC presents a concise, well-articulated argument to support issuance of the declaratory ruling sought by those two state commissions. The declaratory ruling is needed to avoid costly and time-consuming preemption litigation when states assess intrastate universal service contribution obligations on nomadic VoIP providers. The requested declaratory ruling would be consistent with the objectives for universal service under the Telecommunications Act of 1996 and should be issued at the earliest opportunity.

Respectfully submitted this 9th day of September, 2009.

By: _____

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