Before the
Federal Communications Commission
Washington, D.C. 20554

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

Comments of The Nebraska Rural Independent Companies and the Nebraska Telecommunications Association

Dated: September 9, 2009

The Nebraska Rural Independent Companies

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SUMMARY

The Nebraska Rural Independent Companies ("Nebraska Companies") and the Nebraska Telecommunications Association ("NTA") appreciate the opportunity to submit these Comments. The Nebraska Companies and NTA focus their Comments on the following points:

1. The Commission should adopt the reasoning of the *Amicus Brief*[1] concerning the scope of preemption of states' authority to assess state universal service fund ("USF") surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues.
2. The Commission should promptly issue a declaratory ruling in response to the Petition of the Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling.
3. The ability of states to assess state USF surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues is important to the continuing viability of state USFs and to the preservation of universal service.
4. The Commission should utilize the approach developed in regard to assessment of state USF surcharges on revenues derived from jurisdictionally mixed services furnished by commercial mobile radio service providers to resolve the issues surrounding assessment of such surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues.
5. The Commission should establish a uniform method for determining the state with which nomadic interconnected VoIP service provider revenues will be associated, and thus, avoid duplicate state USF assessment of such revenues.

[1] *Amicus Brief* submitted on behalf of the United States Department of Justice and the Federal Communications Commission on August 5, 2008, in *Vonage Holdings Corp v. Nebraska Public Service Commission,* 564 F.3d 900 (8th Cir. 2009) ("*Vonage v. NPSC*").

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Comments of The Nebraska Rural Independent Companies and Nebraska Telecommunications Association

I. Introduction.

The Nebraska Companies[2] and the NTA hereby submit the following Comments in the above-captioned proceeding. These Comments are provided in response to the Commission's Public Notice released on August 10, 2009. The Nebraska Companies and NTA will focus their Comments on the following five areas:

1. The Commission should adopt the reasoning of the *Amicus Brief* concerning the scope of preemption of states' authority to assess state universal service fund ("USF") surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues.

[2] Companies submitting these Comments are: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telcom, Inc., Consolidated Telephone Company, Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K. & M. Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco.

2. The Commission should promptly issue a declaratory ruling in response to the Petition of the Nebraska Public Service Commission ("NPSC") and Kansas Corporation Commission ("KCC") for Declaratory Ruling (the "*Petition*").
3. The ability of states to assess state USF surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues is important to the continuing viability of state USFs and to the preservation of universal service.
4. The Commission should utilize the approach developed in regard to assessment of state USF surcharges on revenues derived from jurisdictionally mixed services furnished by commercial mobile radio service ("CMRS") providers to resolve the issues surrounding assessment of such surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues.
5. The Commission should establish a uniform method for determining the state with which nomadic interconnected VoIP service provider revenues will be associated, and thus, avoid duplicate state USF assessment of such revenues.

II. The *Amicus Brief* Sets Forth the Correct Approach for the Commission's Preemption Analysis.

In the *Amicus Brief,* the Commission's General Counsel unequivocally concluded that the *NPSC USF Order*[3] is not preempted by the *Vonage Preemption Order*,[4] stating as follows:

> In contrast to the *Vonage Preemption Order,* the *NPSC USF Order* does not present a conflict with the NPSC'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

[3] *In re Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund,* App. No. NUSF-1, Prog. Order No. 18 (April 17, 2007) ("*NPSC USF Order*").

[4] *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 Utilities Commission v. FCC,* 483 F.3d 570 (8th Cir. 2007).

> rationale of the *Vonage Preemption Order provides no basis to conclude that the FCC has preempted Nebraska's state universal-service contribution requirement.*[5]

The General Counsel very specifically stated the position that the NPSC's requirement that providers of nomadic VoIP service contribute to Nebraska's state universal service fund does not frustrate federal policy objectives, but rather, promotes such objectives.[6]

Furthermore, in the *Amicus Brief* the Commission's General Counsel concluded that the NPSC's methodology for assessing the state fund's contribution requirements avoided assessment of any revenues deemed interstate, and was confined to only revenues deemed intrastate. In so stating, the NPSC's assessment on 35.1% of nomadic interconnected VoIP provider revenues as the reciprocal of the safe harbor of 64.9% of such revenues derived from interstate operations was endorsed without qualification.[7] The *Amicus Brief* states that the methodology in the *NPSC USF Order* eliminates any possibility that an interconnected VoIP provider would be required to pay into both the Nebraska Universal Service Fund ("NUSF") and into the federal USF on the same revenues. The Commission should reach the same conclusion.

With regard to the Commission's resolution of the remaining issue of establishment of a mechanism to determining state-specific intrastate revenues, the NPSC and KCC have committed to grant exclusions and to avoid duplicative assessment of intrastate revenues pending the Commission's identification of a safe harbor mechanism to resolve this issue.[8] On a going forward basis, the Nebraska Companies and NTA recommend that the Commission adopt an intrastate revenue assessment mechanism discussed in Section VI below.

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[5] *Amicus Brief* at 15 (emphasis added).
[6] *Id.*
[7] *Id.* at 16-17. The NPSC's alternative methods by which an interconnected VoIP provider could establish interstate and intrastate assessable portions of its revenue – through a traffic study or through a method to accurately distinguish interstate and intrastate traffic – were similarly endorsed as ensuring that interstate and intrastate revenues remain distinct.
[8] *Petition* at 19.

III. The Commission Should Proceed to Issue a Declaratory Ruling in Response to the *Petition*.

The Commission's General Rules of Practice and Procedure provide as follows regarding issuance of declaratory rulings: "The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion *issue a declaratory ruling* terminating a controversy or *removing uncertainty*."[9] There can be no doubt that the *Petition* was filed to obtain guidance from the Commission to remove the uncertainty regarding the scope of the Commission's preemption of state universal service assessments on nomadic interconnected VoIP service providers pursuant to the 2004 *Vonage Preemption Order,* particularly in light of the Eighth Circuit's subsequent decision in *Vonage v. NPSC* and the positions set forth in the *Amicus Brief* filed therein. Further, the filing of the *Petition* has resulted in ex parte filings that confirm that no dispute exists between Vonage Holdings Corp. ("Vonage"), the NPSC and the KCC on the "central point" that nomadic VoIP service providers should contribute to state USFs.[10]

The *Petition* seeks an order from the Commission that the "*Vonage Preemption Order* did not preempt state USF assessments of intrastate nomadic VoIP revenues", as well as a declaratory ruling "addressing the mechanisms for calculating ***state specific*** intrastate revenues for purposes of assessment."[11] As discussed hereinabove, the Commission's positions set forth in the *Amicus Brief* concerning preemption make it particularly appropriate for the declaratory ruling sought by the *Petition* to be issued. Specifically, the *Amicus Brief* declared that:

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[9] 47 C.F.R. § 1.2 (emphasis added).

[10] *See,* Notice of Oral Ex Parte Contact filed by Brita D. Strandberg on behalf of Vonage Holdings Corp. on August 7, 2009 at 1 ("*Vonage Ex Parte*"); Letter from Elizabeth H. Ross, Counsel for the NPSC and KCC, to Marlene Dortch, Secretary of the Commission, dated August 17, 2009 at 1 ("*NPSC/KCC Ex Parte*"); and Notice of Oral Ex Parte Contact filed by James Bradford Ramsay on behalf of the National Association of Regulatory Commissioners ("NARUC") on August 24 2009 at 2 ("*First NARUC Ex Parte*").

[11] *Petition* at 3.

> 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.' . . . . 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.[12]

As such, issuance of a declaratory ruling by the Commission to formalize the limited scope of the *Vonage Preemption Order* regarding preemption of state universal service contribution requirements is both a logical as well as a practical step for the Commission to take.[13] Inclusion of a uniform mechanism for states to determine the state-specific nomadic interconnected VoIP service provider intrastate revenues that may be assessed so as to avoid duplicate state assessments is an appropriate extension of the Commission's elimination of any lingering uncertainties as to the interpretation of the scope of the *Vonage Preemption Order.*

The Nebraska Companies and NTA submit that action by the Commission through a declaratory ruling will provide all interested parties a sufficient opportunity to provide comments, will afford the Commission a platform to clarify the intended scope of preemption of the *Vonage Preemption Order,* and will allow the Commission to identify and approve the mechanism that will avoid duplicate state assessment of intrastate revenues derived from nomadic interconnected VoIP service. Use of the declaratory ruling procedure as opposed to a rulemaking proceeding will facilitate prompt resolution by the Commission of the issues presented in the *Petition.*[14]

While Vonage has filed an Ex Parte in connection with this matter in which it advocates that the Commission should respond to the *Petition* "by opening a rulemaking

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[12] *Amicus Brief* at 14-15.

[13] *See* Notice of Oral Ex Parte Contact filed by James Bradford Ramsay on behalf of NARUC on September 2, 2009 at 3-4, fn. 7 ("*Second NARUC Ex Parte*") for a presentation of the legal authorities that support the propriety of issuance of a declaratory ruling by the Commission in the instant matter.

proceeding to address the issues raised by the NPSC and the KCC,"[15] no persuasive arguments are presented in such Ex Parte as to why a declaratory ruling by the Commission does not equally serve the policy goals identified by Vonage. Any perceived preference for a rulemaking proceeding versus a declaratory ruling by the Commission is offset by the opportunity for the Commission to more promptly remove the uncertainties currently relating to state assessment of USF charges on intrastate nomadic interconnected VoIP service revenues through the prompt issuance of the declaratory ruling requested by the *Petition*.

IV. State USF Programs are Essential Components of Federal Policy as Expressed in the 1996 Telecommunications Act.

Section 254(b) of the Communications Act designates "the preservation and advancement of universal service" as a critical federal policy goal. "Every Telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d) The Commission requires interconnected VoIP providers to contribute to the federal USF.[16]

Similarly, Congress preserved the authority of the states to adopt regulations to require telecommunications carriers that provide intrastate telecommunications services to make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service in the state. 47 U.S.C. § 254(f) Of course, as stated in the *Petition*, both Nebraska and Kansas have established state funds.[17]

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[14] *See, First NARUC Ex Parte* at 3 pointing out that: "The only real dispute [in this proceeding] is <u>*when*</u> 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." (emphasis in original)
[15] *Vonage Ex Parte* at 1.
[16] *Report and Order and Notice of Proposed Rulemaking, Universal Service Contribution Methodology,* 21 FCC Rcd 7518, 7536, para. 34 (2006).
[17] *Petition* at 5-7.

The Nebraska Companies and NTA emphasize that the final sentence of Section 254(f) allows states to "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 Federal universal service support mechanisms."[18] Nebraska's mechanisms for preserving and advancing universal service in Nebraska, for example, are specific, predictable and sufficient,[19] and, as the *Amicus Brief* persuasively argues, the NPSC's mechanism concerning assessment of interconnected VoIP service provider revenues neither relies on nor burdens any Federal universal service support mechanisms. Subsection 254(f) thus permits Nebraska to assess interconnected VoIP service provider revenues according to its adopted mechanism.

Migration of circuit-switched wireline voice service to VoIP is placing pressure on traditional universal service contribution methods.[20] For state USFs to remain viable, assessment of revenues generated by nomadic interconnected VoIP service providers is needed in addition to the contributions to USFs that are being made by fixed VoIP providers and other telecommunications service providers.

Competitive neutrality requires that nomadic VoIP service providers must contribute not only to the federal USF, but also to state USFs. Providers of telecommunications other than nomadic VoIP already contribute to the federal USF, and contribute to the NUSF. These contributors include incumbent local exchange carriers, competitive local exchange carriers, interexchange carriers, wireless carriers and fixed VoIP carriers. All users of the Public Switched Telephone Network ("PSTN") should contribute on an equitable and

[18] 47 U.S.C. § 254(f) (emphasis added).
[19] *See generally, Neb. Rev. Stat.* §§ 86-316 – 86-329 (Reissue 2008).

nondiscriminatory basis to its support – both on an interstate and on an intrastate basis. Failure to require nomadic VoIP service providers to contribute to the funds that support universal service would be contrary to the requirements of 47 U.S.C. §§ 251(b)(4) and 254(f).

V. The Commission Should Adopt a Consistent Policy Framework Regarding Jurisdictionally Mixed Services.

Although not fully analogous, mobile wireless service and nomadic VoIP service share several important similarities relevant to preemption principles that warrant the Commission's consideration. Both services are jurisdictionally mixed, containing both interstate and intrastate components, and in both cases the Commission exercises primary regulatory jurisdiction over service providers. Further, both types of provider networks interconnect with the PSTN, in which user locations are reliably associated with their geographic toll rate centers via the NPA-NXX prefix of their telephone numbers.

Whenever a wireless user travels outside his geographic rate center (whether "roaming" beyond his wireless provider's network or not) such user breaks the connection between the physical location at the time that the call is placed and the location indicated by the user's wireless NPA-NXX code, in much the same way that a nomadic VoIP user does when such user places a VoIP call from a location unassociated with the user's telephone number rate center. Users of both services are equally free to place and receive calls in locations other than the one associated with their NPA-NXX code or their billing address.

While it is now commonplace for wireless carriers to ascertain – during a call, and with considerable precision – the inherently variable physical locations of their mobile users at the points when calls are placed through analysis of radio signal strength and tower location, such capability was not an early feature of wireless service. Despite the lack of any reliable

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[20] *Id.* at 10-11.

relationship between a nomadic VoIP user's NPA-NXX and physical location, and despite VoIP providers' current difficulties in automatically determining – at call-time, and with considerable precision – a nomadic user's physical location, the fact remains that nomadic VoIP users, even if they are computers and not human beings, do exist in real space and time.[21] Their reliance on cyberspace to place and receive calls,[22] even SIP calls[23] made, for example, from a Wi-Fi coffee shop hotspot, does not elevate nomadic interconnected VoIP service users from an ascertainable geographic location into the uncharted cyberspace.[24]

One difference between wireless service and nomadic VoIP service regarding preemption is that Congress has enacted a statutory preemption provision specifically targeting wireless service,[25] however, no such law exists that preempts state regulation of VoIP. Section 332, generally speaking, preempts any state from imposing entry or rate regulations on mobile wireless providers. It contains an exception for state universal service policies, but this exception has effect only if wireless services "are a substitute for land line telephone exchange service for a substantial portion of the communications within such State." The net result is that as a general matter in today's communications marketplace, this exception is inapplicable and

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[21] Interconnected VoIP services users may also call 911 from their actual physical locations, hence the Commission's issuance of the *First Report and Order* in the *E911 Requirements for IP-Enabled Service Providers* proceeding, WC Docket No. 05-196, 20 FCC Rcd 10245, FCC 05-116, rel. June 3, 2005 (*"VoIP 911 Order"*), requiring that interconnected VoIP service providers obtain a Registered Location for each of their users and properly route 911 calls to the appropriate PSAP.

[22] *Minnesota Public Utilities Commission v. FCC,* 483 F.3d 570, 574 (8th Cir. 2007).

[23] Session Initiation Protocol is a standard, public domain signaling protocol widely used by VoIP service providers; *see* Internet Engineering Task Force (IETF) Request For Comment (RFC) 3261, available at http://www.ietf.org/rfc/rfc3261.txt.

[24] *Vonage Preemption Order,* para. 24 states: "The Internet's inherently global and open architecture obviates the need for any correlation between Vonage's DigitalVoice service and its end users' geographic locations." Further, para 25 thereof, describes the functionalities of Vonage's DigitalVoice service as forming "an integrated communications service designed to overcome geography, not track it" and the service itself as having a "total lack of dependence on *any* geographically defined location." Notwithstanding such statements, support for the notion that VoIP service is any more nomadic than is mobile wireless service is lacking.

[25] 47 U.S.C. § 332.

only the general preemption against states' attempts to impose entry and rate regulation on wireless service is effective.

Nevertheless, three separate circuit courts have upheld the Commission's determination that the state USF assessment of mobile wireless carrier revenues is lawful and *does not constitute rate or entry regulation.*[26]

It bears noting in this context that the analysis in the FCC's discussion of preemption contained in the *Vonage Preemption Order* is narrowly focused on conflicts between specific federal policy objectives and *state regulation of entry and rates and tariff requirements* (in the event VoIP is deemed a telecommunications service) or *state imposition of economic regulation* (should VoIP be found to be an information service).[27] The conflict analysis also notes the similarities between nomadic VoIP and CMRS regarding issues of regulatory jurisdiction.[28] The Nebraska Companies and NTA believe the Commission should confirm that state USF assessment upon nomadic VoIP service provider revenue is fully consistent with state USF assessment on wireless carrier service revenue.

Another important difference between VoIP and CMRS is that mobile wireless service is classified as a telecommunications service under the Telecommunications Act of 1996, whereas the Commission has made no such determination with respect to interconnected VoIP service. In light of this classification distinction, it is essential that the Commission promptly clarifies the scope of its preemption of the Minnesota regulations at issue in the *Vonage Preemption Order,* specifying that such preemption did not, and does not extend to state USF assessment on nomadic interconnected VoIP service provider revenues.

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[26] *Petition* at 16, fn. 36.
[27] *Vonage Preemption Order*, paras. 20-22.
[28] *Id.*, para. 22.

VI. The Commission Should Resolve Potential Conflicts Between States Resulting from Inconsistent Methods of Assessing the Intrastate Portion of Nomadic VoIP Service Provider Revenues.

The Nebraska Companies and NTA urge the Commission to issue guidance to the states by prescribing a methodology for determining the state with which intrastate nomadic VoIP service provider revenues should be associated. The Nebraska Companies participated in the proceeding which culminated in the issuance of the *NPSC USF Order*, and presented the NPSC with two possible methods for associating nomadic VoIP revenues with a particular state for the purpose of assessing the intrastate portion thereof: (1) registered location[29] and (2) billing address. The Nebraska Companies urged the NPSC to utilize billing address, due to the possibility that end users' registered locations may not be readily available to administrative billing systems for revenue analysis. In its *NPSC USF Order,* the NPSC adopted customer billing address as the determinant of the state with which to associate nomadic VoIP service revenues, citing its long history of reliance on customer address for similar jurisdictional allocation purposes.[30]

Subsequent to the entry of the *NPSC USF Order*, the staff of the KCC has reported that at least one nomadic VoIP service provider requiring payment via automatic credit card payment lacks information regarding customers' billing addresses.[31] In light of this report, the Nebraska Companies and NTA recommend that the Commission consider permitting any nomadic VoIP service provider for which reliance on billing addresses would be unduly burdensome to use the end user's registered location to determine the state with which to associate the end user's revenue. However, the FCC should also address the fact that a given end user's registered

[29] *VoIP 911 Order*, para. 46
[30] *NPSC USF Order* at 14.

location may change during a billing period. In any event, the Commission should adopt a policy that minimizes the potential for conflicting assessment regimes between states.

VII. Conclusion

The Nebraska Companies and NTA urge the Commission to adopt the reasoning of the *Amicus Brief* that the contribution rules established by the NPSC to implement the *NPSC USF Order* are fully consonant with the FCC's rules and policies and are contemplated by § 254(f) of the Act. The Commission should expressly find that the *Vonage Preemption Order* provides no basis to conclude that the Commission has preempted state commissions' authority to assess state universal service fund surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues.

The Commission should act promptly by issuing a declaratory ruling in response to the *Petition* declaring that state USF assessment of intrastate nomadic interconnected VoIP service provider revenue is not and has not been preempted, so long as the state does not assess interstate revenue. In such declaratory ruling, the Commission should further declare that states should utilize the approach developed in regard to assessment of state USF surcharges on revenues derived from jurisdictionally mixed services furnished by CMRS providers to resolve the issues surrounding assessment of such surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues. Finally, the Commission should establish a uniform method for determining the state with which nomadic interconnected VoIP service provider revenues will be associated, and thus, avoid duplicate state USF assessment of such revenues.

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[31] *In the Matter of the Investigation to Address the Obligations of VoIP Providers with Respect to the KUSF,* Kansas Corporation Commission, Docket No. 07-GIMT-432-GIT, Staff Recommendations and Report, page 10 (Aug. 1, 2008). Note that lack of customers' billing addresses is not, in principle, limited to VoIP service providers.

Dated: September 9, 2009.

THE NEBRASKA RURAL INDEPENDENT COMPANIES

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The Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telco, Inc.,
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Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hamilton Telephone Company,
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