

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

Nebraska Public Service Commission and )                    WC Docket 06-122  
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 )

**COMMENTS OF 8X8, INC.**

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**I. INTRODUCTION**

8x8, Inc. (“8x8”) respectfully submits its comments in response to the Public Notice (“Notice”) released by the Federal Communications Commission (“FCC” or “Commission”) on August 10, 2009 in the above-captioned docket. The Notice requests comment on the petition filed by the Nebraska Public Service Commission (“NPSC”) and the Kansas Corporation Commission (“KCC”) (together, “Petitioners”) on July 16, 2009, which requests a declaratory ruling that the Commission has not preempted states from assessing Universal Service Fund (“USF”) charges on the intrastate revenues of providers of nomadic interconnected voice over Internet protocol (“VoIP”) services.<sup>1</sup> The Petitioners also request that the Commission declare that individual states have discretion to adopt any mechanisms that do not assess interstate revenues and that contain procedures designed to ensure that no provider pays assessments to more than one state on the same intrastate revenues.<sup>2</sup> Finally, the Petitioners request, in the alternative, that the Commission propose and adopt rules to allow states to assess USF charges on the intrastate revenues of nomadic interconnected VoIP providers.<sup>3</sup>

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<sup>1</sup> *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122 (filed July 16, 2009) (“Petition”).

<sup>2</sup> *See* Petition, at 3.

<sup>3</sup> *See* Petition, at 3-4.

8x8 opposes the Petition to the extent it seeks to reverse federal law and require retroactive contributions to state USF. First, the Petitioners provide no basis under the Communications Act of 1934, as amended (“the Act”) to justify such a reversal. Nor do they provide any basis for overturning the FCC’s long-held policy to exercise exclusive federal jurisdiction over nomadic interconnected VoIP services.<sup>4</sup> In the alternative, 8x8 respectfully submits that the Commission should address the issues presented by the Petitioners through its holistic reform of the USF system, or at a minimum, through a rulemaking proceeding where the Commission can more thoroughly review and vet the various interplaying issues. Finally, regardless of the procedural path that the Commission takes, it should clarify that under no circumstances can the states retroactively impose USF contribution requirements on interconnected VoIP service providers.

## **II. THE FCC SHOULD ADHERE TO THE ACT AND PAST COMMISSION ORDERS**

The Petitioners request a ruling that would allow states to impose USF and other funding obligations on interconnected VoIP service providers is inconsistent with the Act, the *Vonage Preemption Order*, and the *VoIP USF Order*.<sup>5</sup> The Act provides that “[e]very *telecommunications carrier* that provides intrastate telecommunications service shall contribute, on an equitable and non-discriminatory basis ....”<sup>6</sup> This contrasts with the Commission’s federal USF authority, which extends beyond telecommunications carriers and includes “provider[s] of interstate telecommunications.”<sup>7</sup> The FCC’s *VoIP USF Order* found that interconnected VoIP service providers fall into this latter category, and thus required them to contribute to the federal USF program on that basis. States, however, do not have such authority under the Act.

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<sup>4</sup> See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*Vonage Preemption Order*”) (emphasis supplied).

<sup>5</sup> *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (“*VoIP USF Order*”).

<sup>6</sup> 47 U.S.C. § 254(f).

<sup>7</sup> 47 U.S.C. § 254(d).

The FCC has left open the question of whether interconnected VoIP services are an “information” service or a “telecommunications” service.<sup>8</sup> While the Commission has continued to make case-by-case determinations concerning the obligations of interconnected VoIP providers based on the *exclusive federal jurisdiction* articulated in the *Vonage Preemption Order*, it prevents states from unilaterally imposing regulatory requirements on VoIP that may conflict with federal policy. Geographic boundaries have little application in the provision of VoIP services. However, such boundaries have significant implications in determining the jurisdiction of state telecommunications regulators. Section 2(a) of the Act grants the FCC jurisdiction over “all interstate and foreign communication” and over “all persons engaged . . . in such communication.”<sup>9</sup> Section 2(b) of the Act reserves to the states jurisdiction “in connection with intrastate communication service.”<sup>10</sup> If a service has both interstate and intrastate components or capabilities, and it is impossible or burdensome to separate them, the FCC may exercise its authority to preempt inconsistent state regulations that thwart federal objectives. This is what the FCC did in the *Vonage Preemption Order*.<sup>11</sup> In that decision, the FCC did not determine whether nomadic interconnected VoIP services are information or telecommunications services, but it found that “the characteristics of [nomadic interconnected VoIP services] preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota’s regulations would thwart federal law and policy.”<sup>12</sup> The FCC likewise suggested that Congress’s manifest preference for an unregulated Internet provided additional support for the preemption of state regulations, and that “multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other

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<sup>8</sup> See, e.g., *VoIP USF Order*, ¶35.

<sup>9</sup> 47 U.S.C. § 152(a).

<sup>10</sup> 47 U.S.C. § 152(b).

<sup>11</sup> *Vonage Preemption Order*, at 22413, ¶ 17 (citing *Qwest Corp. v. Scott*, 380 F.3d 367, 374 (8th Cir. 2004)).

<sup>12</sup> *Vonage Preemption Order*, at 22411, ¶ 14.

states.”<sup>13</sup> The Commission’s linking of preemption with the impossibility of distinguishing interstate from intrastate traffic shows that the FCC was deciding not only a matter of policy, but also a matter of jurisdiction.

**A. The Petition Ignores the Reasoning Behind the *Vonage Preemption Order***

The logic of the FCC’s *Vonage Preemption Order* applies just as forcefully to state USF programs as it does to rate and entry regulation, notwithstanding the Petitioners’ claims to the contrary.<sup>14</sup> One reason the FCC preempted Minnesota’s attempt to regulate Vonage was due to the impossibility of imposing a Minnesota regulation on services provided solely within Minnesota. The Commission has already reviewed, and dismissed, numerous approaches not only to separate a nomadic interconnected VoIP service’s interstate and intrastate components, but also to distinguish one state’s jurisdiction from another’s. In the end, the Commission found that without a practical way to separate the service, state attempts to regulate nomadic interconnected VoIP services unavoidably reached the interstate components of that service.<sup>15</sup>

Given the nature of interconnected VoIP services, and the ability of end users to use such services nomadically, the Commission found that both the geographic location of the end user at any particular time as well as the geographic location of the “termination” of the communication is difficult or impossible to pinpoint.<sup>16</sup> The Commission also reviewed and dismissed the use of a customer’s billing address or address of residence as a jurisdictional proxy.<sup>17</sup> As the Commission noted, when a subscriber with a Minnesota billing address or address of residence uses Vonage’s service from any location outside the

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<sup>13</sup> *Vonage Preemption Order*, at 22412, ¶ 14.

<sup>14</sup> *See* Petition, at 20-23

<sup>15</sup> While the Commission has historically applied the geographic “end-to-end” analysis to distinguish interstate from intrastate communications, the Commission found that nomadic VoIP service “mak[es] jurisdictional determinations about particular [VoIP] communications based on an end-point approach difficult, if not impossible.” *Vonage Preemption Order*, at 22419, ¶ 24.

<sup>16</sup> “This ‘impossibility’ results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously, none of which the provider has a means to separately track or record.” *Id.* at 22419-20, ¶ 25.

<sup>17</sup> *Vonage Preemption Order*, at 22422, ¶ 28.

state to call a party located in Minnesota, Minnesota would treat that communication as “intrastate” based on the address proxy for that subscriber’s location, yet in actuality it would be an interstate call. The Commission called such proxies “poor fits,” and rejected them as a basis for state jurisdiction.<sup>18</sup>

The difficulties of assigning jurisdiction to particular states applies with equal force in the USF context. If each state were to adopt a different USF assessment method, for example, by using telephone number proxies, registered address proxies, or other methods, they would invariably double-assess those revenues, or otherwise assess revenues that are not “intrastate.” Because of the unique nature of interconnected VoIP services, providers cannot assign services or revenues to a particular state. Some states establish USF contribution on an access line basis, as well as a percentage of intrastate toll revenues.<sup>19</sup> Others use a hybrid approach which includes a per access line surcharge.<sup>20</sup> Some simply use a per-line surcharge to fund the program.<sup>21</sup> The Petitioners have proposed to use the reverse 35.1% safe harbor to determine that some nomadic interconnected VoIP calls should be classified as intrastate, but would also use a billing-address or other proxies to determine which calls are jurisdictionally intrastate.<sup>22</sup> As noted above, this method plainly conflicts with the FCC’s repeated rejection of a billing-address proxy for determining the jurisdiction of an interconnected VoIP call. Thus, even if it were appropriate to assume that 35.1% of interconnected VoIP traffic is intrastate, the use of a billing-address proxy would still be untenable in a multi-state context. While the Petition states that state conflict issues can be “ironed out,”<sup>23</sup> states do not have an interest in addressing this issue, and the FCC should not be burdened with arbitrat-

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<sup>18</sup> *Vonage Preemption Order*, at 22422, ¶¶ 28-29. The Commission also considered, and dismissed, other means of assigning interconnected VoIP services communications to a particular state jurisdiction, such as using a subscriber’s NPA/NXX as a proxy for their geographic location. *Id.* at 22421, ¶ 26. “[B]ecause subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.” *Id.* “Similarly, if a Minnesota NPA/NXX subscriber residing in Minnesota used its service outside the state to call someone in Minnesota, that call would appear to be an intrastate call when it is actually interstate.” *Id.*, ¶ 27.

<sup>19</sup> *See* Ariz Admin. Code R14-2-1205.

<sup>20</sup> *See In the Matter of the Annual Revision of the Universal Service Fund Surcharges to Become Effective October 1, 2007*, Order No. 30419, CASE NO. GNR-T-07-03, (Id. PUC Aug. 31, 2007).

<sup>21</sup> *See Kentucky Public Service Commission, Instructions for Completing Kentucky Universal Service Fund Report at [http://psc.ky.gov/agencies/psc/forms/usf\\_instruct2004.pdf](http://psc.ky.gov/agencies/psc/forms/usf_instruct2004.pdf) (visited August 8, 2009).*

<sup>22</sup> *See* Petition, at 2, 5, 7, 28-30.

<sup>23</sup> *See* Petition, at 28-29.

ing conflict disputes among fifty jurisdictions, which is why federal preemption remains necessary in the first place.<sup>24</sup>

## **B. State USF Programs Are Not Facing Collapse**

The facts do not show that interconnected VoIP services are causing state USF funding problems. Under existing FCC rules, interconnected VoIP service providers may use a 64.9% “safe harbor” to determine how much revenue should be classified as “interstate” for purposes of federal USF contributions. This safe harbor percentage assumes 35.1% of interconnected VoIP service revenues could be assigned to the “intrastate jurisdiction,” which would, in practice, be sub-divided in order to attribute a corresponding percentage for each state. Even assuming *arguendo* that such interconnected VoIP providers could segregate intrastate revenues among the states, practically speaking, each state would only receive a small share of that 35.1%.

Even assuming (for the sake of argument) that interconnected VoIP service *might* have a deteriorative effect on the funding base of state USF funding programs, the facts of historical contribution rates show that the demand on state programs is not outpacing contributions. The USF contribution rate histories of Nebraska and Kansas, which have not shown sustained or significant increases over the past several years, illustrate the lack of any real state USF crisis:

### **Nebraska**

- Effective October 1, 2005 - 5.75%<sup>25</sup> (lowered from 6.95% due to large USF balance)
- July 1, 2006 to June 30, 2007 - 5.75%<sup>26</sup>

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<sup>24</sup> Even if the Act is interpreted in a way that would allow state USF assessment, states must still interpret their enabling statutes to permit such assessments. However, because many state statutes impose USF only on “telecommunications services” (often using definitions that are similar or identical to those in the federal statute), states might classify VoIP services in a manner that would be inconsistent with federal law. This could, in turn, create numerous inconsistent results across both state and federal law. This was precisely what the *Vonage Preemption Order* sought to prevent. The staff of the Kansas Corporation Commission, for example, has declared that “absent a decision by the FCC in the *IP-Enabled Services Proceeding*, the Commission may decide whether all interconnected VoIP services meet the definitions of carrier required to contribute to the KUSF.” *In the Matter of the Investigation to Address Obligations of VoIP Providers with Respect to the KUSF*, Additional Reply Comments of Commission Staff, Docket No. 07-GIMT-432-GIT, (rel. July 16, 2007).

<sup>25</sup> *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning July 1, 1999*, Order Setting Surcharge, Docket NUSF-4 (Ne. PSC, July 6, 2005).

- Effective April 1, 2007 - 6.95%<sup>27</sup> (raised due to lower fund balance)
- July 1, 2007 to June 30, 2008 - 6.95%<sup>28</sup>
- July 1, 2008 to June 30, 2009 - 6.95%<sup>29</sup>
- July 1, 2009 to June 30, 2010 - 6.95%<sup>30</sup>

### Kansas<sup>31</sup>

- March 1, 2005 to February 28, 2006 - 5.02%
- March 1, 2006 to February 28, 2007 - 6.07%
- March 1, 2007 to February 29, 2008 - 4.35%
- March 1, 2008 to February 28, 2009 - 4.65%
- March 1, 2009 to February 28, 2010 - 5.03%

As demonstrated above, the contribution rates in the Petitioners' states have remained relatively steady over the past several years. The reason for this is simple: interconnected VoIP service providers already indirectly support state USF programs through purchases of services from CLECs, and thus, are not causing financial strain to state USF programs.

### **III. A RULEMAKING PROCEEDING IS THE PROPER VENUE TO ADDRESS STATE USF CONTRIBUTION OBLIGATIONS OF INTERCONNECTED VOIP SERVICE PROVIDERS**

Absent an outright rejection, a broad-based rulemaking proceeding is the appropriate avenue to address the concerns raised by the Petition. The issue of whether certain classes of interconnected VoIP providers should be subject to state USF contribution requirements necessarily involves many areas of law and policy. The Commission should establish a rulemaking proceeding to ensure that it has the

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<sup>26</sup> *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning July 1, 1999, Order Setting Surcharge, Docket NUSF-4 (Ne. PSC, June 27, 2006).*

<sup>27</sup> *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning July 1, 1999, Order Setting Surcharge on an Emergency Basis, Docket NUSF-4 (Ne. PSC, Dec. 19, 2006).*

<sup>28</sup> *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning July 1, 1999, Order Setting Surcharge from July 1, 2007 through June 30, 2008, Docket NUSF-4 (Ne. PSC, June 26, 2007).*

<sup>29</sup> *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning July 1, 1999, Order Setting Surcharge from July 1, 2008 through June 30, 2009, Docket NUSF-4 (Ne. PSC, May 28, 2008).*

<sup>30</sup> *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning July 1, 1999, Order Setting Surcharge from July 1, 2009 through June 30, 2010, Docket NUSF-4 (Ne. PSC, June 2, 2009).*

<sup>31</sup> Kansas Corporation Commission, History of Kansas Universal Service Fund at <<http://www.kcc.state.ks.us/telecom/kusfhistory.pdf>> (visited September 8, 2009).

benefit of a full record before it modifies the *status quo*, and to be certain that states design their interconnected VoIP USF funding requirements efficiently and in a manner that does not conflict with federal policy. Further, a rulemaking proceeding will allow the Commission to reconsider mechanisms to ensure that states avoid conflicts amongst one-another (as well as preemption by the FCC), and will also give the Commission flexibility to adopt changes in federal universal service contribution methodologies without the need to re-establish regulations specific to one industry sector.<sup>32</sup>

Further, a rulemaking would be the most equitable response to the Petition. When a state public utility commission first tried to regulate interconnected VoIP services, the FCC confirmed that “this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [nomadic interconnected VoIP services].”<sup>33</sup> That decision was broad; it preempted Minnesota from applying *any* of the state’s “traditional ‘telephone company’ regulations,” including Minn. Stat. § 237.16 subd. 9, which is the state law that requires service providers to contribute to the state’s USF program.<sup>34</sup> The United States Court of Appeals for the Eighth Circuit reviewed the FCC’s decision, and concluded the FCC, not the states, must determine if states may assess USF on interconnected VoIP service providers.<sup>35</sup>

While the Commission is free to revisit its decision to preempt state imposition of USF and to change its policy prospectively, it must explain any departure from existing law. “[A]n agency choosing to alter its regulatory course ‘must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.’”<sup>36</sup>

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<sup>32</sup> See, e.g., *Universal Service Contribution Methodology*, WC Docket No. 06-122, AT&T Petition for Immediate Commission Action to Reform Its Universal Service Contribution Methodology (filed July 10, 2009).

<sup>33</sup> *Vonage Preemption Order*, 19 FCC Rcd at 22405, at ¶ 1.

<sup>34</sup> See *Vonage Preemption Order*, at n.28.

<sup>35</sup> See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 564 F.3d 900 (8th Cir. 2009), *aff’g* 543 F. Supp. 2d 1062 (D. Neb. 2008); see also *N.M. Pub. Regulation Comm’n v. Vonage Holdings Corp.*, Civ. No. 08-607 WJ/RHS, Memorandum Opinion and Order (D.N.M. July 28, 2009) (overruling state commission’s objections to magistrate judge’s proposed findings and adopting recommendation of dismissal of state commission’s suit seeking USF contributions);

<sup>36</sup> *Action for Children’s Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.1970)).

#### **IV. THE COMMISSION SHOULD SPECIFICALLY REJECT ANY ATTEMPT TO APPLY STATE USF ON INTERCONNECTED VOIP SERVICES RETROACTIVELY**

Regardless of whether it issues a declaratory ruling or a notice of proposed rulemaking, the Commission should declare that states may not retroactively impose USF contributions on interconnected VoIP service providers. Retroactive application of a decision may be appropriate only where the decision is merely a clarification, correction, or application of existing law.<sup>37</sup> On its face, the *Vonage Preemption Order* preempted state USF regulations.<sup>38</sup> Nothing in the *VoIP USF Order* altered, clarified, or reversed that determination; nor could it without a reasoned explanation for any such change. Permitting states to apply USF to interconnected VoIP service providers therefore would not be a clarification or application of existing law.

Even if the Commission were to attempt to characterize any declaratory ruling as a clarification of existing law, the courts would be unlikely to apply that determination retroactively. The courts apply a multi-part test in determining whether retroactivity is appropriate, considering: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.<sup>39</sup> For the reasons set forth above, the imposition of USF on interconnected VoIP services by states would be a sharp departure from existing law and policy, would directly contravene interconnected VoIP service providers' reliance on the existing rule, and would be burdensome for interconnected VoIP service providers to implement. As such, even if the Commission

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<sup>37</sup> *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2006) (“In cases in which there are ‘new applications of existing law, clarifications, and additions,’ the courts start with a presumption in favor of retroactivity.”) (citations omitted)

<sup>38</sup> *See Vonage Preemption Order*, at n.28 (listing, among others, the Minnesota statutory provisions applicable to the state's USF program).

<sup>39</sup> *See Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1980); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987).

ultimately decides that states may impose USF on interconnected VoIP service providers, there is no basis under law for retroactive application of that new determination.

## V. CONCLUSION

For the reasons stated herein, 8x8 respectfully submits that the Commission should deny the Petition. In the alternative, the Commission should establish a rulemaking proceeding (or address state USF contribution requirements on interconnected VoIP services through a holistic review of the Universal Service system generally). Finally, should it ultimately allow states to impose USF on interconnected VoIP services, the Commission should declare that states may not retroactively apply USF contributions against interconnected VoIP service providers.

Respectfully submitted,

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