

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Universal Service Contribution ) WC Docket No. 06-122  
Methodology )  
)  
Petition for Declaratory Ruling of the )  
Nebraska Public Service Commission and )  
the Kansas Corporation Commission or, in )  
the Alternative, Adoption of Rule )  
Declaring that State Universal Service )  
Funds May Assess Nomadic VoIP )  
Intrastate Revenues )

**REPLY COMMENTS OF QWEST  
COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc. (“Qwest”) submits these comments in accord with the Commission’s Public Notice seeking comments on the above-referenced Petition.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Nebraska Public Service Commission and the Kansas Corporation Commission (“State Commissions”) seek a declaratory ruling that the Commission has not preempted states from assessing universal service charges on the intrastate revenues of providers of nomadic VoIP service.<sup>2</sup>

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<sup>1</sup> See Public Notice, Comment Sought on Petition of Nebraska Public Service Commission and the 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, DA 09-1774, rel. Aug. 10, 2009.

<sup>2</sup> Petition for Declaratory Ruling of the Nebraska Public Service Commission and the Kansas Corporation Commission or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, WC Docket No. 06-122, filed July 16, 2009.

Under its *Vonage Preemption Order*<sup>3</sup> the Commission has generally preempted state regulation of VoIP services. Irrespective of whether that preemption encompasses state universal service assessments on those services, the Commission is free to amend the scope of that preemption based on further preemption analysis.

But, in any review of that preemption, the Commission should retain preemption of state certification, tariff and related regulations of VoIP because those regulations conflict with the Commission's deregulatory policies applicable to VoIP service. Any determination that state universal service assessments need not be preempted should be narrow and occur only where the Commission determines that state universal service assessments on VoIP services do not conflict with federal policies applicable to those services.

State universal service assessments on VoIP services should mirror federal universal service assessments on those services so as not to burden federal universal service mechanisms.

As suggested by the State Commissions, the Commission should adopt a uniform approach for state universal service assessments that would enable states to assess universal service contributions on VoIP services without conflicting with federal policies. But, instead of the alternative methods proposed by the State Commissions, the uniform approach should be assessments based on the place of primary use similar to that currently applied to mobile telecommunications services in the Mobile Telecommunications Sourcing Act.<sup>4</sup>

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<sup>3</sup> See *In the Matter of 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*"), *aff'd sub nom.*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8<sup>th</sup> Cir. 2007).

<sup>4</sup> 4 U.S.C. § 116, *et seq.*

## II. DISCUSSION

### A. The Commission Should Reaffirm That VoIP Services Are Jurisdictionally Interstate Services For Which State Regulation Is Generally Preempted.

While there is disagreement as to whether the preemption of state regulation of VoIP services in the Commission's *Vonage Preemption Order* encompasses state universal service assessments on those services, it is agreed that the Commission may revisit that preemption determination. In the *Vonage Preemption Order*, the Commission recognized Vonage's VoIP service as a "jurisdictionally mixed" service, a service that is capable of communications both between intrastate end points and interstate end points.<sup>5</sup> There the Commission explained that these types of services

are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. In such circumstances, the Commission may exercise its authority to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations.<sup>6</sup>

The Commission determined both that (1) it was impractical to separate the VoIP service's interstate and intrastate components and (2) application of Minnesota's telecommunication service regulations to VoIP services interfered with the Commission's deregulatory policies for VoIP services. The Commission preempted application of all state regulations pertaining to tariffing, certification and related requirements to VoIP services.

Subsequently, the Commission determined that providers of interconnected VoIP services should contribute into the federal universal service fund and provided three methods by which

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<sup>5</sup> *Vonage Preemption Order*, 19 FCC Rcd at 22413-14 ¶ 18.

<sup>6</sup> *Id.* at 22413 ¶ 17 (footnotes omitted).

those providers can contribute on the interstate piece of their VoIP services.<sup>7</sup> In doing so, the Commission provided three ways in which revenues from VoIP services could be separated as interstate and intrastate revenues for purposes of universal service assessments. Given this, it is appropriate for the Commission to explicitly address whether state universal service assessments can be applied to the intrastate piece of these services without burdening federal universal service mechanisms or otherwise conflicting with federal policies regarding VoIP services.<sup>8</sup>

But, if the Commission determines that state universal service assessments can be applied to VoIP services without conflicting with federal policies, it should reaffirm the remainder of the preemption of state regulation of VoIP services. Only the narrow issue of preemption of state universal service assessments is presented in this Petition, and the federal deregulatory policies for VoIP services have not changed.

**B. State Universal Service Assessments On VoIP Services Should Mirror The Federal Universal Service Assessments On Those Services.**

The Communications Act permits the states to adopt regulations to preserve and advance universal service only to the extent that those regulations are consistent with federal universal service regulations and that state universal service support mechanisms do not rely on or burden

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<sup>7</sup> See *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (“*VoIP Interim Contribution Order*”).

<sup>8</sup> If the Commission elects to proceed on these issues via rulemaking, it should address these issues in its open IP-Enabled Services docket, and address the open issues remaining in that docket as well.

federal universal service support mechanisms.<sup>9</sup> To comply with these requirements, state universal service assessments on VoIP services should mirror the federal universal service assessments on those services. In other words, the states should permit VoIP providers to contribute to state universal service funds using the same three options established by the Commission for contribution to the federal universal service fund, as long as the option is applied consistently in both the state and interstate jurisdictions.<sup>10</sup> Any other approach risks inconsistent regulations and burdening federal support mechanisms.

**C. The Commission Should Adopt The Place Of Primary Use As The Uniform State Universal Service Assessment Methodology For VoIP Services.**

The State Commissions also ask the Commission to designate a safe harbor mechanism that states can use to assess state VoIP universal service contributions without fear of preemption litigation. Qwest agrees with the State Commissions and other commenters that it is important that there be a uniform approach for state universal service contributions on intrastate VoIP service.<sup>11</sup> A uniform approach would avoid more than one state assessing universal service contributions on the same intrastate VoIP service. The State Commissions have proposed that

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<sup>9</sup> 47 U.S.C. § 254(f).

<sup>10</sup> Specifically, VoIP providers should be permitted to contribute to state universal service funds by either (1) using the remaining percentage of the interim federal safe harbor as an interim state safe harbor; (2) reporting based on actual intrastate telecommunications revenues; or (3) relying on traffic studies, subject to the same conditions of the federal requirements. *See VoIP Interim Contribution Order*, 21 FCC Rcd at 7554 ¶ 52.

<sup>11</sup> Petition at 28-29 (stating that safe-harbor mechanism would allow Commission to assist states in elimination of risk of duplicative assessments); AT&T Comments, WC Docket No. 06-122, filed Sept. 9, 2009 at 10-11 (recommending that Commission direct states to use a single methodology); Comments of the Nebraska Rural Independent Companies and the Nebraska Telecommunications Association, WC Docket No. 06-122, filed Sept. 9, 2009 at 12-13 (urging Commission to prescribe state universal service sourcing methodology); Comments of the District of Columbia Public Service Commission, WC Docket No. 06-122, filed Sept. 9, 2009 at 4-5 (supporting Commission adoption of a safe harbor to encourage a consistent intrastate revenues assessment methodology).

the safe harbor methodology could be based on (1) billing address; (2) registered 911 address; or (3) FCC Form 499-A allocations.<sup>12</sup>

Instead of any of these approaches, however, the Commission should designate the place of primary use, similar to that used for mobile telecommunications in the Mobile Telecommunications Sourcing Act (“MTSA”), as the uniform state universal service safe harbor assessment methodology for VoIP services.<sup>13</sup> VoIP services, like the wireless services subject to the MTSA, enable a user to place or receive a call from numerous locations. The need to have a uniform state universal service assessment method for VoIP services is similar to the issues faced by the wireless industry that resulted in the MTSA. Adopting the place of primary use as the uniform state universal service assessment safe harbor method for VoIP services would encourage consistent assessment methodologies for state taxes and surcharges on mobile telecommunications.

Each of the alternative safe harbor methodologies offered by the State Commissions are problematic. The use of billing address does not adequately link assessment of the state universal service fee with the location of the service provided. Any company with a centralized accounts payable would result in universal service contributions to a single state when the use of the VoIP services could be spread across the nation. The use of place of primary use requires that an address be obtained by the VoIP service provider for each telephone number.

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<sup>12</sup> Petition at 28-31.

<sup>13</sup> The MTSA contains the following definition of place of primary use:

“The term ‘place of primary use’ means the street address representative of where the customer’s use of the mobile telecommunications service primarily occurs, which must be -- [1] the residential street address or the primary business street address of the customer, and [2] within the licensed service area of the home service provider.” 4 U.S.C. § 124(8). This definition may need to be modified slightly to appropriately address the context of a VoIP provider. Both AT&T and Verizon have suggested place of primary use as a possible sourcing methodology for state universal service assessments. *See* Comments of AT&T Inc. at 10-11; Comments of Verizon and Verizon Wireless, WC Docket No. 06-122, filed Sept. 9, 2009 at n. 10.

Consequently, a place-of-primary-use methodology for determining payment will be closer to that employed by traditional landline service, and the results will be more equitable.

Use of the registered 911 address also could be problematic. Because of the mobile nature of VoIP service and the lack of signals that can be triangulated for location similar to wireless handsets, service providers are establishing web portals to allow customers to enter temporary addresses for 911 purposes. For example, if a customer is visiting their cabin in the mountains, it would be prudent for them to use the web portal to temporarily change the response location. This will avoid the emergency equipment arriving at one location when the call came from another. But requiring state universal service assessments to change based on these temporary reassignments of VoIP service location is not necessary. Implementing a place-of-primary-use methodology avoids this issue. Because the place of primary use is the street address where the customer primarily uses the service, it provides a constant location that generally reflects where the service is used, but is not changed because of the mobility of the service.

FCC Form 499-A and its instructions are necessarily focused on enabling telecommunications providers to correctly determine their interstate and international telecommunications services and interconnected VoIP revenues, so that providers of those services can properly contribute into the federal universal service fund, and other federal support mechanisms, on those revenues. The form has detailed instructions for determining those revenues. And, once intrastate revenues are identified and set aside, any further distinctions regarding these revenues have minimal, if any, use for federal contribution purposes. Currently, referencing these instructions provides no uniform guidance as to the allocations of intrastate revenues between states. And, amending the federal form to require further breakdown of

intrastate revenues seems extraneous to the federal purposes of the form and could be challenged as an unnecessary information collection.

### III. CONCLUSION

As stated above, the Commission should explicitly address the preemptive reach of the *Vonage Preemption Order* with respect to state universal service assessments on VoIP services. Any such assessments should mirror the federal universal service assessments on VoIP services. And, the Commission should modify the MTSA's place of primary use to establish a safe harbor for state sourcing of the state assessments.

Respectfully submitted,

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September 24, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 06-122; 2) served via email on Ms. Cindy Spiers at [Cindy.Spiers@fcc.gov](mailto:Cindy.Spiers@fcc.gov) and Ms. Antoinette Stevens at [Antoinette.Stevens@fcc.gov](mailto:Antoinette.Stevens@fcc.gov) of the Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission; 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com); and 4) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

/s/ Richard Grozier

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