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

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

DECLARATORY RULING

Adopted: October 28, 2010 **Released: November 5, 2010**

By the Commission:

I. INTRODUCTION

1. In this Declaratory Ruling, we advance the goals of universal service by ruling on a prospective basis that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers, so long as a state's particular requirements do not conflict with federal law or policies. Specifically, we conclude that state universal service fund contribution rules for nomadic interconnected VoIP are not preempted if they are consistent with the Commission's contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in another state. In so doing, we resolve a petition of the Nebraska and Kansas state commissions (collectively, Petitioners) for a "declaratory ruling with prospective only effect" that states are not preempted from imposing universal service contribution requirements on "the future intrastate revenues" of nomadic interconnected VoIP providers.[1] Because the amended petition seeks a declaratory ruling with prospective only effect and does not present the question of retroactivity, we need not and do not reach that question in this Declaratory Ruling.

[1] Amendment to Petition of Nebraska Public Service Commission and Kansas Corporation Commission, WC Docket No. 06-122, at 1 (Sept. 14, 2010) (State Petition Amendment); 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 (July 16, 2009) (State Petition). The Petitioners additionally requested a separate declaratory ruling that states have discretion to establish mechanisms to avoid double assessment of nomadic interconnected VoIP revenues by different states and urge the Commission to establish a "safe harbor" method for allocating nomadic interconnected VoIP revenues among the states for universal service purposes. *Id.* at 3. Although we defer action on this request until the Commission takes up long-term reform of the universal service contribution system, *see* FCC, National Broadband Plan: Broadband Action Agenda, http://www.broadband.gov/plan/broadband-action-agenda.html (last visited Sept. 22, 2010), we suggest below one method states may use, *see infra* para. 21 & note 58.

II. BACKGROUND

A. The Act and the Commission's Requirements

2. *Statutory Framework for Universal Service*. Section 1 of the Communications Act of 1934, as amended (the Act), states that the Commission is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and that the agency "shall execute and enforce the provisions of th[e] Act."[2] Universal service is a key component in communications policy for ensuring that charges are reasonable. Section 254(b) of the Act instructs the Commission to establish universal service support mechanisms with the goal of ensuring the delivery of affordable telecommunications services to all Americans.[3] Section 254(b) also provides that Commission policy on universal service shall be based, in part, on the principles that contributions should be equitable and nondiscriminatory and that the support mechanisms should be specific, predictable, and sufficient.[4] The Act mandates universal service contributions from "[every telecommunications carrier that provides interstate telecommunications services" and authorizes the Commission to assess contributions on "[a]ny other provider of interstate telecommunications . . . if the public interest so requires."[5]

3. *Regulation of Interconnected VoIP Services*. The Commission's rules define "interconnected VoIP service" as a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network (PSTN) and to terminate calls to the PSTN.[6] Interconnected VoIP services may be fixed or nomadic. A fixed interconnected VoIP service can be used at only one location, whereas a nomadic interconnected service may be used at multiple locations.

4. On March 10, 2004, the Commission initiated a proceeding to examine issues relating to Internet-Protocol (IP)-enabled services—services and applications delivered over broadband networks including, but not limited to, interconnected VoIP services.[7] In the *IP-Enabled Services Notice*, the Commission asked commenters to address, among other things, the universal service contribution obligations of both facilities-based and non-facilities-based providers of IP-enabled services.[8] The Commission sought comment on its authority, including mandatory and permissive authority under section 254(d), to require universal service contributions by IP-enabled service providers.[9]

5. In the 2004 *Vonage Preemption Order*, the Commission preempted an order of the Minnesota Public Utilities Commission (the *Minnesota Vonage Order*) that "assert[ed] regulatory jurisdiction over" an interconnected VoIP service offered by Vonage (known as DigitalVoice) and

---

[2] 47 U.S.C. § 151.

[3] 47 U.S.C. § 254(b).

[4] 47 U.S.C. § 254(b)(4), (5). The Commission adopted the additional principle that federal support mechanisms should be competitively neutral, neither unfairly advantaging nor disadvantaging particular service providers or technologies. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, 8801–03, paras. 46–51 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

[5] 47 U.S.C. § 254(d).

[6] 47 C.F.R. § 9.3.

[7] *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4864, para. 1 & n.1 (2004) (*IP-Enabled Services Notice*).

[8] *See id.* at 4905, para. 63.

[9] *See id.*

"order[ed] the company to comply with all state statutes and regulations relating to the offering of telephone service in Minnesota."[10] Even though Minnesota purported to regulate only the intrastate aspects of Vonage's service, the Commission concluded that preemption was warranted to avoid a conflict with federal rules and policies applicable to the interstate and international components of Vonage's service.[11] In so doing, the Commission relied upon the "impossibility doctrine" articulated by the courts, which allows the Commission to preempt state regulation when "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies."[12] Specifically, the Commission found the impossibility test satisfied with respect to Vonage's service because there was "no practical way to sever DigitalVoice into interstate and intrastate communications" such that the state regulations at issue could "apply only to intrastate calling functionalities."[13] As a result, the Commission explained, the Minnesota order "unavoidably reach[ed] the interstate components of [Vonage's service] that are subject to exclusive federal jurisdiction" and preemption was necessary to prevent a conflict "with our pro-competitive deregulatory rules and policies" governing VoIP services.[14]

6. Since the *Vonage Preemption Order*, the Commission has issued several orders addressing the regulatory obligations of VoIP providers in a variety of areas.[15] Of particular relevance to this proceeding, the Commission in 2006 adopted rules requiring interconnected VoIP providers to contribute to the federal Universal Service Fund.[16] The Commission explained that interconnected VoIP

[10] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22409, para. 11 (2004) (*Vonage Preemption Order*), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (*MPUC*).

[11] For simplicity, we will hereafter use the term "interstate" when referring to the interstate and international communications subject to the Commission's exclusive jurisdiction.

[12] *MPUC*, 483 F.3d at 578; *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

[13] *Vonage Preemption Order*, 19 FCC Rcd at 22423, para. 31.

[14] *Id.* at 22418, para. 23.

[15] *See, e.g.*, *IP-Enabled Services; 911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (*VoIP E911 Order*) (E911), *aff'd*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005) (assistance for law enforcement); *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 22 FCC Rcd 11275 (2007) (disability access); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007) (customer privacy); *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) (local number portability and numbering administration); *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 (2009) (discontinuance notifications).

[16] *See 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 ofthe 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*, WC Docket Nos. 04-36, 06-122, CC Docket Nos. 90-571, 92-237, 95-116, 96-45, 98-170, 98-171, 99-200, NSD File No. L-OO-72, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7536, para. 34 (2006) (*Interim Contribution*

(continued . . .)

providers, like other contributors, "benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN [Public Switched Telephone Network]."[17] The Commission also concluded that requiring interconnected VoIP providers to contribute to universal service would promote the "principle of competitive neutrality" by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations."[18]

7. Federal universal service contributions are currently calculated on the basis of the end-user revenues that contributors earn from their provision of interstate services; contributors are not assessed based on revenues from intrastate communications.[19] Because of the difficulty that nomadic interconnected VoIP providers have in identifying whether calls are interstate as opposed to intrastate, the Commission in the *Interim Contribution Methodology Order* established a "safe harbor" under which an interconnected VoIP provider may presume that 64.9 percent of its revenues arise from its interstate operations.[20] In the alternative, an interconnected VoIP provider may conduct a traffic study (i.e., a statistical sampling) to estimate the percentage of its revenues attributable to interstate traffic and use that percentage to calculate its contribution amount.[21] Interconnected VoIP providers that are able to determine the jurisdictional nature of their calls may calculate their federal contribution amounts using actual revenue allocations.[22]

B. Vonage v. Nebraska Public Service Commission

8. On April 17, 2007, the Nebraska Public Service Commission (NPSC) entered an order requiring interconnected VoIP service providers to contribute to Nebraska's universal service fund based on their intrastate revenues.[23] Under the *NPSC USF Order*, the amounts that interconnected VoIP providers must contribute to the Nebraska fund are calculated solely on the basis of their intrastate revenues.[24] To separate intrastate and interstate revenues for purposes of determining providers' contribution amounts, the *NPSC USF Order* provides that interconnected VoIP service providers may choose among three options that are based on this Commission's *Interim Contribution Methodology Order:* (1) a safe harbor under which 35.1 percent of the provider's revenues is allocated to the intrastate jurisdiction (calculated by subtracting our interstate safe-harbor of 64.9 percent from 100 percent); (2) the provider's actual Nebraska intrastate revenues; or (3) the provider's Nebraska intrastate revenues

(. . . continued from previous page)
Methodology Order), *aff'd in part and rev'd in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

[17] *Interim Contribution Methodology Order*, 21 FCC Rcd at 7540–41, para. 43.

[18] *Id.* at 7541, para. 44.

[19] 47 C.F.R. § 54.706; *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999) (*TOPUC*).

[20] *Interim Contribution Methodology Order*, 21 FCC Rcd at 7544–45, para. 53.

[21] *Id.* at 7547, para. 57; *see also id.* at 7535 n.115, 7547 n.190. The Commission initially required interconnected VoIP providers to obtain the agency's approval of their traffic studies before using them to calculate universal service payments. *Interim Contribution Methodology Order*, 21 FCC Rcd at 7547, para. 57. The D.C. Circuit, however, vacated the preapproval requirement. *See Vonage v. FCC*, 489 F.3d at 1243–44. Accordingly, interconnected VoIP providers currently may use traffic studies to calculate the amount of their universal service contribution without the Commission's prior approval.

[22] *Interim Contribution Methodology Order*, 21 FCC Rcd at 7544, para. 52.

[23] *See 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. No. 18 (Apr. 17, 2007) (*NPSC USF Order*).

[24] *NPSC USF Order* at 4.

determined through a Commission-approved traffic study.[25] The *NPSC USF Order* states that interconnected VoIP providers should use their "customer's billing address . . . to determine [the] state with which to associate [intrastate] telecommunications revenues" in calculating the amount of state universal service payments.[26]

9. Vonage challenged the *NPSC USF Order* in the U.S. District Court for the District of Nebraska.[27] On March 3, 2008, the district court granted Vonage's request for a preliminary injunction against enforcement of the *NPSC USF Order*, concluding that Vonage was likely to succeed on the merits of its argument that the rationale of the FCC's *Vonage Preemption Order* preempted the *NPSC USF Order*.[28] The NPSC appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed the district court's preliminary injunction.[29] The Eighth Circuit concluded that "[b]ecause Vonage's nomadic interconnected VoIP service cannot be separated into interstate and intrastate usage, the impossibility exception is determinative" of Vonage's likely success on the merits of its preemption claim.[30] The Eighth Circuit noted that, in the *Vonage Preemption Order*, the Commission "ma[de] clear that [the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [Vonage's service] and other IP-enabled services having the same capabilities."[31] A "reasonable interpretation of this language," the court continued, "is the [Commission] has determined, given the impossibility of distinguishing between interstate and intrastate nomadic interconnected VoIP usage, it must have sole regulatory control," and "while a universal service fund surcharge could be assessed for intrastate VoIP services," the Commission must "decide if such regulations will be applied."[32] The Eighth Circuit further observed that the "potential for conflict between state regulations" that use conflicting methods for allocating intrastate revenue among the states also "militates in favor of finding preemption."[33]

10. On July 16, 2009, in the wake of the Eighth Circuit's decision, the Nebraska and Kansas commissions filed their instant petition for declaratory ruling, which they amended on September 14, 2010. As amended, the Petitioners request a declaratory ruling, solely with prospective effect, that states are not preempted from imposing universal service contribution requirements on future intrastate revenues of nomadic interconnected VoIP providers.[34]

---

[25] *Id*. at 13. The *NPSC USF Order* was issued before the D.C. Circuit invalidated the requirement that interconnected VoIP service providers obtain the Commission's preapproval before relying on the results of a traffic study. *See supra* note 21.

[26] *NPSC USF Order* at 14.

[27] *See* Verified Complaint for Declaratory and Injunctive Relief, *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008) (Case No. 4:07-cv-03277-LSC-FG3).

[28] *Vonage Holdings Corp.*, 543 F. Supp. 2d at 1071.

[29] *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009). The Commission was not a party to the litigation, but did file an amicus brief in the Eighth Circuit supporting the Nebraska commission's argument against preemption. The Eighth Circuit's opinion did not address or acknowledge the Commission's amicus brief.

[30] *Id.*

[31] *Id.* (quoting *Vonage Preemption Order*, 19 FCC Rcd at 22404–05, para. 1).

[32] *Id.*

[33] *Id.* at 905–06.

[34] *See* State Petition at 5; State Petition Amendment at 1.

III. DISCUSSION

11. The petition before us is narrowly focused and requests only a determination whether, in light of current circumstances, we should preempt states from imposing universal service contribution requirements on the future intrastate revenues of nomadic interconnected VoIP providers. We conclude, for the reasons discussed below, that we should not preempt the imposition of such requirements on nomadic interconnected VoIP providers so long as (1) the relevant state's contribution rules are consistent with the Commission's universal service contribution rules and (2) the state does not apply its contribution rules to intrastate interconnected VoIP revenues that are attributable to services provided in another state.

12. The parties to this proceeding disagree about the implications of the *Vonage Preemption Order* and how that decision should affect our analysis. On the one hand, the Nebraska and Kansas commissions emphasize that the *Vonage Preemption Order* did not expressly declare that states were preempted from imposing universal service contribution requirements. They note that the Commission's only specific reference to universal service in that order was for the purpose of noting that matters related to universal service requirements for interconnected VoIP providers were not being resolved therein, but rather would be addressed in the separate IP-Enabled Services proceeding.[35] The Commission in the *Vonage Preemption Order* concluded that "the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering [its VoIP service] in that state."[36] Thus, as the states note, the *Vonage Preemption Order* can be read to preempt only state conditions to entry. Because state universal service contribution requirements typically do not impose any burden on a provider until after the provider actually has entered the market, the *Vonage Preemption Order* can be read not to preempt such requirements. On the other hand, as Vonage and other interconnected VoIP providers point out, because the *Vonage Preemption Order* used broad language in preempting the Minnesota Commission from "applying its traditional 'telephone company' regulations to Vonage's DigitalVoice service,"[37] which included universal service contribution requirements, the Commission's reference to "telephone company regulations" can be construed to encompass universal service contributions requirements.[38]

13. Indeed, the *Vonage Preemption Order* has been subject to differing interpretations on this point. When the Nebraska Public Service Commission appealed the district court's ruling preliminarily enjoining the imposition of state universal service contribution requirements on Vonage, the United States and the FCC filed an amicus brief with the Eighth Circuit taking the position that the *Vonage Preemption Order* would best be construed not to preempt Nebraska from requiring Vonage to contribute to the state's universal service fund.[39] The Eighth Circuit neither addressed nor acknowledged the Commission's amicus brief, but adopted a different reading of the *Vonage Preemption Order*. In particular, the court focused on the statement in the *Vonage Preemption Order* that "this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to

[35] *See Vonage Preemption Order*, 19 FCC Rcd at 22432, para. 44; *id.* at 22411 n.46.

[36] *Id.* at 22434, para. 46.

[37] *Id.* at 22404, para. 1.

[38] In footnote 30 of the *Vonage Preemption Order*, 19 FCC Rcd at 22409 n.30, the Commission stated that the "telephone company regulations" subject to preemption included all of the state laws identified in note 28 of the order, 19 FCC Rcd at 22408, n.28. One of the state laws listed in note 28 contained a provision directing the Minnesota Commission to "require contributions to a universal service fund, to be supported by all providers of telephone services." *See* Minn. Stat. § 237.16, subd. 9.

[39] Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal, *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 8th Cir. No. 08-1764 (filed Aug. 5, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284738A1.pdf.

[Vonage's service] and other IP-enabled services having the same capabilities."[40] Although the court did not find that this language clearly mandated preemption of Nebraska's universal service contribution regulations, it declared: "A reasonable interpretation of this language is the FCC has determined, given the impossibility of distinguishing between interstate and intrastate nomadic interconnected VoIP usage, it must have sole regulatory control."[41] On the basis of this interpretation of the *Vonage Preemption Order*, the Eighth Circuit concluded that "the FCC has made clear it, and not state commissions, has the responsibility to decide" whether intrastate VoIP services should be subject to universal service assessments.[42]

14. The Eighth Circuit's reading of the *Vonage Preemption Order* rested on the premise that it is impossible to distinguish "between interstate and intrastate nomadic interconnected VoIP usage."[43] Two years after the *Vonage Preemption Order*, however, the Commission determined that the interstate and intrastate operations of interconnected VoIP providers can be distinguished for the limited purpose of assessing universal service contributions. In the 2006 *Interim Contribution Methodology Order*, the Commission amended its rules to require providers of interconnected VoIP services to contribute to the federal Universal Service Fund on an interim basis.[44] To implement these revised rules, the Commission developed a mechanism that enables providers of interconnected VoIP service to separate their interstate and intrastate revenues for purposes of calculating the amount of their federal universal service contributions.[45] Specifically, the Commission established a "safe harbor" under which an interconnected VoIP provider may presume that its interstate operations produce 64.9 percent of its revenues.[46] Alternatively, under the new rules, an interconnected VoIP provider may conduct a traffic study to estimate the percentage of its revenues that can be attributed to interstate traffic.[47] The Commission further recognized that some interconnected VoIP providers have the capability to track the jurisdiction of their calls. It said that those providers could base their federal universal service contributions on their actual interstate revenues.[48]

15. While the *Interim Contribution Methodology Order* did not address the subject of preemption, its establishment of a mechanism for separating interstate and intrastate revenues in the specific context of universal service contribution requirements has important implications for our preemption analysis in this proceeding. Now that the Commission has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of calculating universal service contributions, we find no basis at this time to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service that have

[40] *Vonage Preemption Order*, 19 FCC Rcd at 22404–05, para. 1, *quoted in Vonage Holdings Corp.*, 564 F.3d at 905.

[41] *Vonage Holdings Corp.*, 564 F.3d at 905.

[42] *Id.* Two months later, a federal district court in New Mexico adopted the Eighth Circuit's interpretation of the *Vonage Preemption Order*. *See New Mexico Public Regulation Commission v. Vonage Holdings Corp.*, 640 F. Supp. 2d 1359, 1367–68 (D. N.M. 2009). Neither this Commission nor the United States participated in that case.

[43] *Vonage Holdings Corp.*, 564 F.3d at 905.

[44] *Interim Contribution Methodology Order*, 21 FCC Rcd at 7536–49, paras. 34–62.

[45] As we explained above, *see supra* para. 7 & note 19, federal universal service contributions are currently calculated solely on the basis of interstate revenues; they cannot be assessed on the basis of intrastate revenues. *See* 47 C.F.R. § 54.706; *TOPUC*, 183 F.3d at 447. Therefore, to ensure the proper calculation of federal universal service contributions, the contributor must be able to distinguish its interstate revenues from its intrastate revenues.

[46] *Interim Contribution Methodology Order*, 21 FCC Rcd at 7544–45, para. 53.

[47] *Id.* at 7547, para. 57.

[48] *Id.* at 7544, para. 52; *see also id.* at 7546, para. 56.

entered the market, so long as state contribution requirements are not inconsistent with the federal contribution rules and policies governing interconnected VoIP service.

16. In light of the *Interim Contribution Methodology Order*, we conclude that the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them. Such providers benefit from state universal service funds, just as they benefit from the federal Universal Service Fund, because their customers value the ability to place calls to and receive calls from users of the PSTN. Similarly, extending state contribution requirements to nomadic interconnected VoIP providers promotes the principle of competitive neutrality by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations."[49]

17. We further conclude that state universal service contribution requirements do not conflict with federal rules to the extent that states calculate the amount of their universal service assessments in a manner that is consistent with the rules adopted in the *Interim Contribution Methodology Order*. Under the Commission's rules, an interconnected VoIP provider contributes to the federal fund on the basis of its revenues from interstate and international traffic; revenues from intrastate traffic are excluded. As described above, the Commission's rules give providers three options by which they can establish their federal universal service revenue base: (1) use a safe harbor under which 64.9 percent of their revenues are deemed to be jurisdictionally interstate (and therefore not intrastate); (2) conduct a traffic study to allocate revenues by jurisdiction; or (3) develop a means of accurately classifying interconnected VoIP communications between federal and state jurisdictions.[50] Therefore, to avoid a conflict with the Commission's rules, a state imposing universal service contribution obligations on interconnected VoIP providers must allow those providers to treat as intrastate for state universal service purposes the same revenues that they treat at intrastate under the Commission's universal service contribution rules. This will ensure that state contribution requirements will not be imposed on the same revenue on which an interconnected VoIP provider is basing its calculation of federal contributions.[51] To the extent a state fails to comply with this limitation in the future, it may be subject to preemption consistent with the prospective Declaratory Ruling we issue today.

---

[49] *Id.* at 7541, para. 44.

[50] *Id.* at 7544–45, paras. 52–54.

[51] Vonage is correct that when the Commission established how interconnected VoIP providers should determine their interstate revenues, it did not explicitly authorize states to assess the corresponding intrastate revenues to fund state-level universal service programs. The Act, however, explicitly delegates authority to states to "determine[]" how state-level universal service programs should be funded so long as they are "not inconsistent with the Commission's rules," 47 U.S.C. § 254(f), and the Commission has never explicitly delegated authority to the states when it has established safe harbors for providers to report their interstate revenues. *See, e.g.*, *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 ofthe 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*, CC Docket Nos. 90-571, 92-237, 95-116, 96-45, 98-170, 98-171, 99-200, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24964–68, paras. 20–27 (2002); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21254–60, paras. 5–15 (1998); *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, File No. WTBIPOL 96-2, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1754, para. 37 (1997) (clarifying that section 332 of the Act does not preempt states from imposing state universal service contribution obligations on wireless service providers).

18. The Commission in the *Interim Contribution Methodology Order* established a framework for allocating interconnected VoIP revenues between federal and state jurisdictions for purposes of calculating the federal universal service assessment. It did not, however, establish a mechanism for allocating intrastate revenues from interconnected VoIP providers among the states. As a result, the interim regulations adopted in the *Interim Contribution Methodology Order* do not protect against the possibility that an interconnected VoIP provider may be subject to double assessment on the same revenues if two states adopt inconsistent methods for determining the intrastate revenue base used to calculate state universal service payments. For example, if State A requires an interconnected VoIP provider to use its customers' billing addresses to allocate revenue while State B relies on the address interconnected VoIP users register for 911 purposes,[52] then the same intrastate revenue associated with an interconnected VoIP user with a billing address in State A and a registered 911 location in State B could be subject to assessment in both State A and State B. This possibility arises because, as the Commission explained in the *Vonage Preemption Order*, an interconnected VoIP user's billing address is not necessarily tied to the physical locations where interconnected VoIP services are used.[53]

19. We conclude that duplicative state assessments conflict with the federal rules and policies governing interconnected VoIP services because their practical effect is to increase the portion of interconnected VoIP revenue assigned to the intrastate jurisdiction beyond that contemplated under the rules adopted in the *Interim Contribution Methodology Order*. The following calculation demonstrates this effect. Assume (for simplicity) that all of an interconnected VoIP provider's customers have a billing address in State A and service address in State B, and those customers have no connection with any other state. Assume further that State A and State B use billing addresses and service addresses, respectively, to determine the state universal service revenue base. In this scenario, the interconnected VoIP provider, if it relies on the federal safe harbor, would be subject to combined federal and state universal service assessments on 135.1 percent of its revenues (64.9 percent for the federal fund, 35.1 percent for State A's fund, and 35.1 percent for State B's fund). This is mathematically equivalent to a rule that allocates 52 percent of interconnected VoIP revenues to the intrastate jurisdiction and 48 percent to the federal jurisdiction—a result that conflicts with the federal safe harbor adopted in the *Interim Contribution Methodology Order*.[54]

20. Double assessments also conflict with the federal policy of competitive neutrality.[55] In the *Interim Contribution Methodology Order*, the Commission emphasized the important federal policy of competitive neutrality in concluding that interconnected VoIP providers should pay into the federal Universal Service Fund to ensure that they would not have an artificial competitive advantage over contributing carriers.[56] For similar reasons, we conclude that duplicative state assessments on interconnected VoIP providers would violate the principle of competitive neutrality by placing

[52] *See* 47 C.F.R. § 9.5(d).

[53] *Vonage Preemption Order*, 19 FCC Rcd at 22406–08, paras. 5–9.

[54] In reality, the effect of double assessments would likely not be as pronounced as in this example because, among other things, some states do not have universal service contribution requirements, state assessment methodologies may not conflict, and the billing and service addresses of most interconnected VoIP customers are likely located in the same state. Theoretically, because not every state imposes contribution requirements on interconnected VoIP providers, any double assessments by states that do impose such requirements might not have the effect, in the aggregate, of causing an interconnected VoIP provider to pay on more than 35.1 percent of the cumulative intrastate revenue it earns from all the states. Even in that situation, however, allowing double assessment would conflict with the federal policy of competitive neutrality. *See infra* para. 20.

[55] *See Universal Service First Report and Order*, 12 FCC Rcd at 8801–03, paras. 46–51 (adopting competitive neutrality as an additional federal universal service principle). State rules for preserving and advancing universal service must comport with federal rules and policy. *See* 47 U.S.C. § 254(f).

[56] *Interim Contribution Methodology Order*, 21 FCC Rcd at 7541, para. 44.

interconnected VoIP providers at an artificial competitive disadvantage with respect to their traditional telephony competitors, which are generally not subject to double assessments.

21. As long as states have a policy against collecting universal service assessments with respect to interconnected VoIP revenue that an interconnected VoIP provider has properly allocated to another state under that state's rules, we do not preempt states from imposing universal service contribution requirements on future intrastate revenues of nomadic interconnected VoIP providers. This issue of duplicative assessments is not one of first impression for the states. Concern about potential double billing of intrastate revenues exists in the wireless context as well, because a wireless customer's principal place of use may be different from his or her billing address. Evidence in the record indicates that states have successfully resolved allocation of wireless intrastate revenues for purposes of state universal service contributions without the need for Commission intervention.[57] In fact, an allocation of revenues among the states modeled on the Mobile Telecommunications Sourcing Act, but adapted to provide interconnected VoIP service providers a means of determining a customer's primary place of use of service, could be a method of ensuring against double assessments in the context of interconnected VoIP.[58] Although there may be an administrative burden on interconnected VoIP providers to allocate their revenues among the states under various state rules, it is similar to what other providers, including wireless providers, have been doing for years. We also believe that any administrative burden is outweighed by the harm to competitive neutrality and to universal service that would occur if we were to preempt all state assessments in this prospective Declaratory Ruling. We will continue to monitor state implementation and enforcement of universal service assessments on interconnected VoIP providers, and we have the authority to reconsider our decision if presented with evidence that states are imposing undue burdens on interconnected VoIP providers' ability to avoid double assessment.

22. We disagree with commenters who argue that state universal service contribution requirements must be preempted to prevent frustration of the federal policies of encouraging the development of IP-based services and promoting the deployment of broadband infrastructure.[59] We do not believe that those policies are best advanced by giving one class of providers an unjustified regulatory advantage over its competitors; indeed, that is one reason that the Commission extended federal universal service requirements to interconnected VoIP providers in the *Interim Contribution Methodology Order*. More generally, our efforts to promote those policies have not precluded us from requiring interconnected VoIP providers to comply with important federal regulatory obligations that advance disability access, public safety, and other important policy goals.[60] We believe similar considerations justify our conclusion not to preempt states from imposing universal service contribution requirements that are competitively neutral and consistent with the Commission's rules, especially where, as here, we see no record evidence (aside from bare allegations) that applying competitively neutral state universal service

[57] Letter from Elizabeth H. Ross, Counsel, Nebraska Public Service Commission and Kansas Corporation Commission, to Marlene H. Dortch, Secretary, FCC, at 1–2 (filed Nov. 3, 2009) (Petitioners Nov. 3 *Ex Parte* Letter) (discussing how state commissions have worked through the allocation of intrastate revenues in the wireless context with the aid of the NARUC Staff Subcommittee on State Universal Service Fund Administrator).

[58] *See* Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252, § 117(b), 114 Stat. 626, 627 (2000), *codified in relevant part at* 4 U.S.C. § 117(b); *see also* Petitioners Nov. 3 *Ex Parte* Letter at 2 (noting that a number of states use a customer's primary place of use for state universal service contribution assessments, consistent with the Mobile Telecommunications Sourcing Act). We note that to the extent an interconnected VoIP provider cannot determine a customer's primary place of use, it would be reasonable if a state allowed the provider to use a proxy for the primary place of use, such as the customer's registered location for 911 purposes. *See* 47 C.F.R. § 9.5(d).

[59] *See* Google Comments at 4–9; 8x8 Comments at 4–7; VON Coalition Comments at 7; *see also* Letter from Glenn S. Richards, Executive Director, VON Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122, at 2–3 (filed Dec. 10, 2009) (VON Coalition *Ex Parte* Letter).

[60] *See supra* note 15.

contribution requirements to interconnected VoIP providers would have a deleterious effect on the development of IP-based services or broadband deployment.

23. The VON Coalition suggests that allowing states to impose universal service payment obligations on interconnected VoIP providers could imply that state commissions may enforce those obligations by denying nonpaying providers the authority to operate in those states.[61] Because we do not have before us any dispute concerning state enforcement against an interconnected VoIP provider, we decline at this time to consider the limits of state enforcement authority in this area. We note, however, that nothing in this Declaratory Ruling affects our conclusion in the *Vonage Preemption Order* concerning preemption of rate regulation, tariffing, or other requirements that operate as "conditions to entry."[62] Nor should this order be construed as interpreting or determining the scope of the *Vonage Preemption Order*.

24. Nothing in this Declaratory Ruling in any way prejudices our authority to adopt a different approach in the context of a broader contribution reform proceeding and, if necessary, to preempt state laws and regulations that frustrate the achievement of federal universal service policies.[63]

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 3, 4(i), 4(j), 201(b), 253(a), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 153, 154(i), (j), 201(b), 253(a), 254, and 303(r), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling, as amended, filed by Nebraska Public Service Commission and the Kansas Corporation Commission IS GRANTED IN PART to the extent specified in this Declaratory Ruling.

26. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Declaratory Ruling SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[61] *See* VON Coalition *Ex Parte* Letter at 2.

[62] *See Vonage Preemption Order*, 19 FCC Rcd at 22415–16, 22422–23, 22430–31, 22432, paras. 20, 29, 42–43, 46.

[63] 8x8 suggests that because section 254(f) of the Act requires that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute" to state funds and does not expressly provide states with authority to impose contribution requirements on non-carrier providers of telecommunications, states may not impose contribution requirements on interconnected VoIP providers to the extent interconnected VoIP services are information services. 8x8 Comments at 2. We have not determined whether interconnected VoIP services should be classified as telecommunications services or information services under the Communications Act. Nor do we see any need to do so here. The express obligation of telecommunications carriers under section 254(f) to support state universal service programs does not limit state authority to extend contribution requirements on interconnected VoIP providers, regardless of their classification, so long as such requirements do not conflict with federal rules and policies. *See* 47 U.S.C. § 254(f) (authorizing states to fund universal service not only through assessing intrastate telecommunications carriers but also through "additional specific, predictable, and sufficient mechanisms").

APPENDIX

List of Commenters

Commenter	Abbreviation
8x8, Inc.	8x8
AT&T Inc.	AT&T
California Small ILECs	California Small ILECs
CenturyLink	CenturyLink
District of Columbia Public Service Commission	D.C. Commission
Google Inc.	Google
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization For The Promotion And Advancement Of Small Telecommunications Companies; Independent Telephone And Telecommunications Alliance; Eastern Rural Telecom Association; Western Telecommunications Alliance; Arizona Local Exchange Carriers Association; Georgia Telephone Association; New Hampshire Telephone Association; Rural Arkansas Telephone Systems; Tennessee Telecommunications Association; Wisconsin State Telecommunications Association	NECA et al.
Nebraska Rural Independent Companies & Nebraska Telecommunications Assoc.	Nebraska Independents
New Mexico Public Regulation Commission	New Mexico Commission
New York Public Service Commission	New York Commission
Oregon Telecom Association and Washington Independent Telecom Association	Pacific Independents
Rural Iowa Independent Telephone Association	Iowa Independents
TCA, Inc.	TCA
Tennessee Regulatory Authority	Tennessee Commission
Verizon and Verizon Wireless	Verizon
Voice on the Net Coalition	VON Coalition
Vonage Holdings Corporation	Vonage

Reply Commenter	Abbreviation
Massachusetts Department of Telecommunications and Cable	Massachusetts Commission
National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization For The Promotion And Advancement Of Small Telecommunications Companies; Western Telecommunications Alliance; Eastern Rural Telecom Association; Independent Telephone And Telecommunications Alliance; Arizona Local Exchange Carriers Association; Georgia Telephone Association; New Hampshire Telephone Association; Rural Arkansas Telephone Systems	NECA et al.
Nebraska Public Service Commission and Kansas Corporation Commission	Nebraska/Kansas Commissions
Nebraska Rural Independent Companies	Nebraska Independents
Qwest Communications International Inc.	Qwest
Vonage Holdings Corp.	Vonage