



N A R U C
National Association of Regulatory Utility Commissioners

September 2, 2009

NOTICE OF ORAL EX PARTE CONTACTS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: NARUC notice of two oral ex parte contacts involving meetings concerning the proceedings captioned:

In the Matter(s) of

Nebraska Public Service Commission and 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; WC Dkt. 06-122

In the Matter of a National Broadband Plan for Our Future; GN Dkt. 09-51

Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol Subscribership; WC Dkt. 07-38

International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act; GN Dkt. 09-47

Dear Secretary Dortch:

On September 1, 2009, NARUC's General Counsel, Brad Ramsay, along with the Chair of NARUC's Committee on Telecommunications, Oregon Commissioner Ray Baum, met separately (1) first, at 11:30 am, with *Nicholas ("Nick") G. Alexander*, the Legal Advisor on Wireline issues to FCC Commissioner Robert McDowell, and (2) second, at 3:45 with FCC General Counsel *Austin Schlick*, FCC Deputy General Counsel *Ajit Pai*, *Christopher Killion*, Deputy Associate General Counsel in OGC's Administrative Law Division, and *Diane Griffin Holland*, Assistant General Counsel, in OGC's Administrative Law Division.

In both meetings, Mr. Baum and Mr. Ramsay addressed issues in two different proceedings. FCC representatives in attendance received a copy of NARUC's April 24, 2009 ex parte, available online at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7020036543.

THE NEBRASKA/KANSAS PETITION:

Petitioners Nebraska Public Service Commission (NPSC) and Kansas Corporation Commission have asked the FCC to declare that State Universal Service Funds may assess Nomadic VoIP intrastate revenues based on the intrastate complement to the current federal safe harbor for interstate assessments.

NARUC supported Nebraska in the Eighth Circuit litigation¹ that prompted the filing of this petition. As the FCC's amicus in that proceeding effectively acknowledges² Congressional intent is clear on this point. ***Even Vonage, in a recent ex parte meeting with agency officials, concedes the petitioner request by choosing not to object to future contributions to State programs.***³

So there is no dispute Vonage on the central point of the State request.

The FCC, Vonage, and the petitioners all agree nomadic VOIP providers should contribute to State universal funds.

There is no reason for the FCC to address anything else⁴ in what NARUC hopes will be an expeditious response to the States' request.

¹ See, *Vonage Holdings Corporation v. Nebraska Public Service Commission*, 564 F. 3d 900 (8th Cir. May 1, 2009) (*Vonage Holdings*), available online at: <http://www.ca8.uscourts.gov/opns/opFrame.html> The rationale of the 8th Circuit's decision relies heavily on Vonage's characterizations of the FCC's original Vonage order as preempting *all* State rules affecting *nomadic* VoIP. Interestingly, even the 8th Circuit specifies the proper TWO-PART legal test for preemption – to wit: “[T]he FCC may preempt all state regulation of services which would otherwise be subject to dual control if it is impossible or impractical to separate the service's interstate and intrastate components, and the state regulation interferes with valid federal rules or policies,” *Vonage Holdings*, mimeo at 7, the decision nowhere addresses either the FCC's amicus brief, or the plethora of statutory citations provided by NARUC, that indicate clearly both Congressional intent and the FCC's interpretation of that intent: State programs to advance universal and advanced services are an explicit Congressional goal; carriers that contribute to the federal program and have intrastate service – are required by the express terms of the statute to contribute to state programs. See notes 5 and 12 *infra*.

² See, August 5, 2008 *Brief for Amicus Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal*, filed in *Vonage Holdings Corp. v. Nebraska PSC et al.*, Case No. 08-1764, available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916162

³ See, Notice of Oral Ex Parte Contact filed by Brita D. Strandberg on behalf of Vonage Holdings Corporation on August 7, 2008, at 1, *In the Matter of Nebraska Public Service Commission and 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*; WC Dkt. 06-122. Available online at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934802 (“Vonage does not object to contributing to state Universal Service Funds (“USF”). Vonage also agrees with the Nebraska Public Service Commission (“NPSC”) and the Kansas Corporation Commission (“KCC”) to the extent their Petition recognizes the FCC has the authority and responsibility to determine whether and in what circumstances state USF programs do not conflict with federal policy and therefore are not preempted.”)

⁴ Like, *e.g.*, the claim the FCC intended to preempt State USF assessments of nomadic VOIP revenues in its Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004), which is specious – clearly ignoring the FCC's specification that the FCC has NOT preempted the NPSC USF order. See, note 3, *supra*.

The only real dispute is over *when* 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.

Vonage, based on the 8th Circuit's decision, raises the specter of inconsistent State billing regimes as requiring an extended FCC rulemaking.⁵ But that provides no justification for delay.

The FCC can clearly act based on the record presented. Indeed, the FCC can issue an *interpretive rule* clarifying the existing interim June 27, 2006 specified federal safe harbor of 64.9 percent necessarily assumes a complementary State safe harbor of 35.1 percent⁶ without any additional proceedings.⁷

⁵ See *Vonage Holdings*, mimeo at 7. ("NPSC's arguments fail to address the conflict which would arise if states adopted conflicting methods or proxies for determining which VoIP customers are subject to their respective universal service fund surcharges . . . a customer's billing address need not correspond to the area code affixed to the customer's telephone number . . . a customer with a Nebraska billing address may be issued a telephone number with a Missouri area code. Under the NUSF, 35.1 percent of the customer's nomadic interconnected VoIP usage will be subject to a surcharge because Nebraska has chosen billing address as a proxy for where the usage occurred. Assume Missouri also adopts a universal service fund surcharge but chooses area code as its proxy for where usage occurs. The customer will be subject to duplicative surcharges in Nebraska and Missouri. This potential for conflict . . . militates in favor of finding preemption.")

The Court's reasoning necessarily suggests current federal assessments are also inaccurate – and the 5th Circuit has specified that assessments against intrastate revenues are not lawful. By setting a safe harbor under 100%, the FCC has already acknowledged the obvious – Vonage's service is clearly used to provide intrastate telecommunications – and Congress specifies – in § 254 – that if you provide intrastate telecommunications services – you “shall” contribute to State programs. When the FCC chose to apply § 254 (d) to nomadic VoIP – the application of § 254(f) logically follows. It is also useful to note what § 254(f) does NOT say. It does not say carriers “shall” contribute to intrastate programs ONLY IF that carrier can sever out precisely - for each customer - the exact level of intrastate usage. But this excessive focus on severability decries the longstanding State and federal practice of using proxies (or safe harbors) - upheld by the courts as long as they have a reasonable basis - when specifying intrastate/interstate usage to achieve regulatory goals, e.g., the existing federal safe harbors for VoIP and CMRS, the 10% rule re: special access tariffs, the Part 32 separations factors, etc. Interestingly, the decision also strongly suggests an FCC specification of an approved method – while deferring action on other methods – will meet the Court's concerns. See discussion in the text, *infra*.

⁶ See *Universal Service Contribution Methodology*, WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, and 98-170, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) (*2006 Interim Contribution Methodology Order*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.doc, 71 Fed Reg. 38781 (July 10, 2009) at: <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=1507078061+1+2+0&WAISAction=retrieve>

⁷ The law is clear that interpretive rules clarifying existing FCC proscriptions are lawful (and require no additional notice). The Administrative Procedure Act requires an agency to publish in the Federal Register a “[g]eneral notice of proposed rule making” when the agency is proposing to make **new** legislative-type rules. 5 U.S.C. §553(b). But the Act expressly permits “interpretive rules” and exempts them from the scope of the notice requirement. 5 U.S.C. §553(b)(3)(A). The case law explains – a federal agency can “declare its understanding of what a [regulation] requires” without notice and comment. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C.Cir.1991); see also 5 U.S.C. § 554(e) (agency may issue declaratory ruling to remove uncertainty); 47 C.F.R. § 1.2 (FCC may issue declaratory rulings). There is no precise demarcation between legislative and interpretive rules. The Court has stated that one key inquiry in making such a determination is “whether the [agency's action] effectively amends a prior legislative rule.” *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). “If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.” *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992). By contrast, a rule is interpretive if it “confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy.” *Id.*, 979 F.2d at 237. “[T]he legislative or interpretive status of the agency rules turns . . . on the prior existence or non-existence of legal duties and rights.” *American Mining Cong.*, 995 F.2d at 1110. That is clearly what the

It is clear that States can “adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State.”⁸ The *only* limitations Congress places on those regulations is that they be “specific” and not “burden Federal universal service support mechanisms.”⁹

Wireline carrier assessments to both State and federal universal service programs are based on the billing address. Commercial Mobile Radio Services (CMRS) are, if anything, more portable than the so-called nomadic VoIP service at issue in this proceeding. The FCC has set a safe harbor for CMRS just as it did in 2006 for interconnected (and allegedly inseverable) nomadic VoIP services.¹⁰ CMRS (and wireline) carriers contribute to both federal and State programs – based on total revenues.

FCC would be doing here. *Compare, Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, at 100 (1995), available online at: <http://www.law.cornell.edu/supct/html/93-1251.ZS.html>. Prior HHS regulations adopted under a statute authorizing the secretary to "establish the methods to be sued for determining reasonable cost" did not set a time for reimbursement. Generally accepted accounting principals required Medicare to reimburse hospitals for losses incurred in refinancing debt in the year the transaction occurs. HHS issued an interpretive rule requiring amortization, and in a 5-4 decision, the Supreme Court pointed out that an "APA rulemaking would still be required if [the guidelines] adopted a new position inconsistent with any of the Secretary's existing regulations. . . [It] does not. . . effect a substantive change in the regulations." *See also, Sprint Corp. V. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003), available online at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200301/01-1266a.txt>. "[A]gencies possess the authority in some instances to clarify or set aside existing rules without issuing a new NPRM and engaging in a new round of notice and comment. For example, in *City of Stoughton v. United States EPA*, 858 F.2d 747, 751 (D.C. Cir. 1988), the court held that the EPA was not required to engage in a new round of notice and comment where it merely adjusted a score under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 . . . in response to public comments. . . Underlying these general principles is a distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements . . . new rules that work substantive changes in prior regulations are subject to the APA's procedures. Thus, in *National Family Planning & Reproductive Health Ass'n v. Sullivan*, the court described as "a maxim of administrative law" the proposition that, "[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." 979 F.2d 227, 235 (D.C. Cir. 1992) (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 *Duke L.J.* 381, 386); see also *Am. Mining Cong.*, 995 F.2d at 1109. The Commission proceedings at issue illustrate the distinction. In the First Reconsideration Order, the Commission clarified its initial rule by providing a definition of the phrase "facilities-based carriers." . . . the Commission's clarification in the First Reconsideration Order merely illustrated its original intent." (some internal citations omitted)

⁸ 47 U.S.C. § 254(f) (1996).

⁹ *Id.*

¹⁰ *See*, the FCC's "*Telecommunications Reporting Worksheet, FCC Form 499-Q (2009)*", available online at <http://www.fcc.gov/Forms/Form499-Q/499q.pdf>, setting safe harbor percentages of 37.1% for cellular telecommunications revenue... And 64,9% for interconnected VoIP revenues. Compare 47 C.F.R. § 54.706 specifying that “[e]ntities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to:(1) Cellular telephone and paging services; (2) Mobile radio services; ... (18) Interconnected VoIP services. Available online at: http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/47cfr54.706.pdf.

This suggests the FCC *could* cite to existing wireline and CMRS contribution mechanisms to *clarify/interpret* the existing regulations and specify State mechanisms that, **are based on billing addresses**, like wireline carriers, that assess no more than the 35.1 percent complement to the federal safe harbor amount - necessarily **do not** double recover costs and also therefore necessarily “do not burden the federal program.”

*For States that use another method to assess carriers, the FCC could indicate it will take up questions of preemption on a case-by-case basis - pointing out accurately – there **is NO evidence in the record of any overlaps** – other than speculative allegations that require some large number of Nebraska residents to have vacation homes in Kansas (or vice versa). Specifically, the FCC can accurately note that [1] Vonage, and similarly situated carriers are the only source of such data, [2] the current percentage of potential overlap (between Kansas and Maine – the only two States the current record indicates currently have different assessment mechanisms) is quite likely zero, and certainly *de minimus*, and [3] since the petition was filed - neither Vonage, nor any other party – including government consumer advocates statutorily charged with protecting ratepayer interests (and more interested than commercial interests in doing so) – have placed any evidence in the record of this proceeding that suggests there is even one such overlap.¹¹*

Moreover, it is likely, if the FCC clarifies that States that assess based on the billing address as outlined *supra*, are definitely consistent with § 254, that other States considering rules to assess nomadic VoIP providers will adjust their rules to line up with sanctioned approach.

Indeed, as pointed out in NARUC’s earlier *ex parte* in this proceeding: “Both NPSC and the Kansas Corporation Commission have already committed to grant exclusions from assessable income to ensure that providers assessed by one State are not also assessed by the Nebraska or Kansas funds on the same revenues.¹² Any concerns that any customer might actually get assessed twice for the same service can be easily handled in the declaratory ruling by specifying that the order does not protect any State which issues a duplicative assessment and arbitrarily refuses to provide an appropriate credit (or perhaps specifying that the FCC will take up the question of double assessments if and when such concern arise and/or specify that a particular collection basis will be presumptively valid in such cases).”

ON STATE BROADBAND DATA COLLECTION:

A July 2009 NARUC resolution asks the FCC to “immediately grant a petition for declaratory ruling affirming that: (1) it is an important aim of federal policy to expand the scope of available

¹¹ If Vonage submits actual evidence of a credible number of such overlaps, the FCC might have to change the rationale for its interpretive rule somewhat. However, in submitting such evidence, Vonage will necessarily be demonstrating how easy it actually is to sever its traffic into intra- and interstate components – which provides another resolution based on the express terms of the 2006 FCC order. The FCC could simply require them to sever the traffic and under its prior ruling – they would be subject to State oversight and have to contribute to State programs.

¹² See, July 16, 2009 *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the alternative, adoption of a rule declaring that State Universal Service Funds may Assess Nomadic VoIP Intrastate Revenues*, at 19, (committing to grant exclusions from assessable income to avoid double assessment that could occur in exceedingly rare and unusual situations), available online at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916161.

broadband services data; and (2) the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State, provided such State agrees to provide a minimum level of data confidentiality and protection.”

NARUC expects to file a petition for declaratory ruling shortly based on the resolution. Given the clear Congressional goals to expeditiously collect broadband data, the FCC should remove all doubt and specify there are no limits on data States can collect. Sections 706 and 254 of the Telecommunications Act of 1996,¹³ as well as the express terms of the BDIA and the American Recovery and Reinvestment Act of 2009, (P.L. 111-5, 123 Stat. 115 (2009)) clarify Congress’s expressed goals that *States will* both: (i) promote the deployment of advanced infrastructures and information services themselves, and (ii) collect information to assist efforts to map the current and ongoing state of the deployment of broadband services.

If you have any questions about this letter, please do not hesitate to contact the undersigned at 202.898.2207 or jramsay@naruc.org.

Respectfully Submitted,

/s/

**James Bradford Ramsay
NARUC General Counsel**

cc: **Nicholas G. Alexander**, Legal Advisor on Wireline issues to FCC Commissioner McDowell
Austin Schlick, FCC General Counsel
Ajit Pai, FCC Deputy General Counsel
Christopher Killion, Deputy Associate General Counsel, Administrative Law Division
Diane Griffin Holland, Assistant General Counsel, Administrative Law Division.

¹³ 47 U.S.C. §706 and §254 (1996). In § 706, Congress specifies that States (and the FCC) “**SHALL** encourage the deployment...of advanced telecommunications capability” a term Congress defined “without regard to any transmission media or technology, as high speed, switched, broadband telecommunications capability. (emphasis added) Pub. L. No.104-104,110 Stat. 56, § 706 (codified in the notes to 47 U.S.C. §157) This section must be read in *pari materia* with the Act’s emphasis for access to such services for schools, libraries, and rural health care facilities, as well as the 47 U.S.C. § 254(c)’s requirement to periodically update what services can be supported by federal programs (and - necessarily the allowed State analogues). In 47 U.S.C. § 254 (b), the linkage between Congress’s desire for States to promote advanced services and a periodically evolving universal service is explicit. It mandates that the FCC explicitly base its policies to advance universal service (which includes both “advanced” and “information” services) on the existence of STATE mechanisms. Specifically that section states “[T]he FCC **SHALL** base policies for the preservation and advancement of universal service on the following principles . . . (2) . . . Access to advanced services . . . (3). . .Consumers in all regions. . .including those in rural, insular, and high cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas. . .(5). . .There should be specific, predictable and sufficient Federal **AND STATE** mechanisms to preserve and advance universal service.” (emphasis added) *Id.* In 47 U.S.C. § 254 (f), Congress mandates that every provider of INTRASTATE telecommunications contribute to a States program.