

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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
[DA No. 09-1774]

**INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
SUPPORTING IMMEDIATE CLARIFICATION OF THE FCC’S RULES**

The National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits these comments in response to the Federal Communications Commission’s ("FCC" or "Commission") August 10, 2009 released Notice¹ in the above-captioned proceeding. *NARUC urges the FCC to immediately issue an interpretive rule clarifying that States may access nomadic VoIP providers to support State universal service programs based on the complement to the federal safe harbor established in the FCC’s June 2006 rule.*

In support of this request, NARUC states as follows:

¹ “Comment Sought On Petition Of Nebraska Public Service Commission And Kansas Corporation Commission For Declaratory Ruling, et al.”, DA 09-1774, (Dkt No 06-122). (rel. August 10, 2009), available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1774A1.doc.

DISCUSSION

Petitioners the Nebraska Public Service Commission (NPSC) and the 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, founded in 1889, includes commissioners at regulatory agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service associated with the intrastate operations of electric, gas, water, and telephone utilities. Both Congress and federal courts have consistently recognized NARUC as a proper entity to represent the collective interests of State public utility commissioners.²

² See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members to Federal-State Joint Boards to consider issues of concern to both State regulators and the Federal Communications Commission on universal service, separations, and other issues); See also 47 U.S.C. § 254 (1996) (describing functions of the Universal Service Joint Board). See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “Carriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations the ICC issued to create the “bingo card” system). See also *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff’d* 672 F.2d 469 (5th Cir. 1982), *aff’d en banc on reh’g*, 702 F.2d 532 (5th Cir. 1983), *rev’d on other grounds*, 471 U.S. 48 (1985); See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *Compare, NARUC v. Federal Energy Regulatory Commission*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. Federal Communications Commission (FCC)*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

NARUC supported NPSC in the Eighth Circuit litigation³ that prompted the filing of this petition. As the FCC's amicus there effectively acknowledges⁴ Congressional intent is clear: **Nomadic VoIP providers are obligated to join their competitors in supporting State universal service programs.**⁵

³ See, *Vonage Holdings Corp. v. Nebraska PSC*, 564 F. 3d 900 (8th Cir. May 1, 2009) (*Vonage Holdings*), available online at: <http://www.ca8.uscourts.gov/opns/opFrame.html>.

⁴ See, August 5, 2008 *Brief for Amicus Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal*, in *Vonage v. Nebraska PSC*, available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916162.

⁵ The 8th Circuit decision relies heavily on Vonage faulty characterization of the FCC Vonage order as preempting *all* State rules affecting *nomadic* VoIP. The decision does specify the proper two-part test for preemption: “[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, (emphasis added). Both must apply before preemption is warranted. Cf. *Qwest Corporation v. Minnesota PUC*, 380 F.3rd 357 (8th Cir 2004), [Available online at <http://www.ca8.uscourts.gov/opns/opFrame.html> by inputting the release date of August 23, 2004.] However, the *Vonage Holding* decision focuses only on the 1st part of the test and nowhere addresses either the FCC's amicus brief, or the plethora of statutory cites that indicate clearly Congressional intent and the FCC's interpretation of that intent: **State programs to advance universal and advanced services are explicit Congressional goals. Carriers that contribute to the federal program and have intrastate service – are required to contribute to State programs.** See, 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.” 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 47 U.S.C. § 254(c)'s requirement to periodically update what services can be supported by federal USF 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. . . should have access to . . . **advanced telecommunications and information services.** . .(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. See also the discussion in note 6 *infra*.

Even Vonage, in a recent ex parte meeting with agency officials, concedes the petitioners' request by choosing not to object to future contributions to State programs.⁶

So there is no dispute 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 else⁷ in what NARUC hopes will be an expeditious response to the States' request.

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.

⁶ See, Notice of Oral Ex Parte Contact filed by Brita D. Strandberg on behalf of Vonage Holdings Corporation filed in the above captioned proceeding on August 7, 2008, at 1, available 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”).”)

⁷ For example, there is no need to address the specious 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). This clearly ignores the FCC's recent specification that the FCC has NOT preempted the NPSC USF order. See, note 3, supra.

The FCC can clearly act immediately based on the record presented. Vonage, based on the 8th Circuit’s decision, raises the specter of inconsistent State billing regimes as requiring an extended FCC rulemaking.⁸ But that provides no justification for delay.⁹

⁸ See *Vonage Holdings Corp. v. Nebraska PSC*, 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.”)

This particular example, on information and belief, is speculative. While NARUC’s counsel has not surveyed all of its member commissions, he is not aware of any State commission that currently is considering or has enacted rules that assess nomadic VoIP providers based on phone numbers to support a State universal service program.

⁹ By setting a safe harbor under 100%, the FCC has already acknowledged the obvious – Vonage’s service is clearly used to also 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 “sever” the interstate portion of nomadic VoIP – the application of § 254(f) logically (and necessarily) 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 precise severability decries the longstanding State and federal practice of using proxies (and/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 State method – *while deferring action on other methods* – will meet the Court’s concerns. See the additional discussion in the text of these comments and the citation in note 17, *infra*.

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 percent¹⁰ without any additional proceedings.¹¹

¹⁰ See *Universal Service Contribution Methodology*, WC Docket 06-122 and 04-36, CC Dockets 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) (*2006 Interim Contribution Order*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.doc, 71 Fed Reg. 38781 (07/10/09) <http://frwebgate3.access.gpo.gov/cgi-in/PDFgate.cgi?WAISdocID+1507078061+1+2+0&WAIAction=retrieve>

¹¹ 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 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 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 F3d 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

It is clear that States can “adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State.”¹² The *only* limitation Congress places on those regulations is that they be “specific” and not “burden Federal universal service support mechanisms.”¹³

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.

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." . . . (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 386) . . . 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).

For other carriers – the FCC's specification of the interstate assessments or safe harbor percentages has been sufficient to limit intrastate assessments. It is clear an interpretive rule granting the requested clarification does not in any way change or repudiate the June 2006 rule establishing the interstate USF assessment.

¹² 47 U.S.C. § 254(f) (1996).

¹³ Id.

The FCC has set a safe harbor for CMRS just as it did in 2006 for interconnected (and allegedly inseverable) nomadic VoIP services.¹⁴

CMRS (and wireline) carriers contribute to **both** federal and State programs. The FCC can 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.” **The FCC should point out in its interpretive rule that whenever the FCC chooses to apply § 254 (d) to “sever” the interstate portion of a carrier’s services – in this case nomadic VoIP – from the intrastate portion via a safe harbor – the application of § 254(f) – REQUIRING State contributions- logically (and necessarily) follows.**¹⁵

¹⁴ 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. See also 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 . . . 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.

¹⁵ See discussion in note 9 *supra*.

For States that use another method to access 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, e.g., some large number of Nebraska residents to have vacation homes in Kansas (or vice versa).

Specifically, the FCC can accurately note the following:

[1] Vonage and other nomadic VoIP providers are the only source of such data,¹⁶

[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*,¹⁷

¹⁶ Vonage has raised an unsupported allegation as a “fact” – that a significant quantum of customers may be subject to overlapping State assessments - as a defense to complying with - what even the FCC has found to be - clear Congressional intent that Vonage contribute to State programs. Vonage is only party to this proceeding in a position to demonstrate if the claim is true. It is hornbook law that, as opposed to the *burden of proof*, “. . . [t]he *burden of producing evidence* on an issue means the liability to an adverse ruling . . . if evidence on an issue has not been produced. *It is usually cast upon the party who has pleaded the existence of the fact...*” See, Cleary, Edward W. et al, *McCormick on Evidence*, West Publishing Hornbook series (March 1978) at page 784 (emphasis added). Vonage has provided no evidence a single customer in any State is in a position to be actually harmed based on the methods suggested by the Nebraska and Kansas commissions (or any other actual State commission rule or proposed rule).

¹⁷ The FCC should emphasize that, by definition, safe harbor proxies are NEVER exact – and have never been required by the courts to be exact. They only have to be reasonable estimates. “The relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right. “... Perfection... is not what the law requires.” *Vonage Holdings Corp.*, 489 F.3d 1232, 1242 (D.C. Cir. 2007) (quoting *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-2 (D.C. Cir. 2001)), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273733A1.pdf.

[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,¹⁸ and

[4] Even in the unlikely case there is actually one or two affected customers, the State agencies with current assessments that filed this petition have committed to adjusting the assessments for any adversely affected consumer.¹⁹

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 FCC sanctioned approach.

¹⁸ As of this filing, the limited record in this proceeding appears to only *suggest* that two States are currently positioned to enforce assessments against nomadic VoIP carrier. There is no evidence of any actual consumers positioned to pay overlapping assessments. NARUC expects to examine initial and reply comments filed in this record for credible threats of inconsistent State actions as well as for evidence, currently conspicuously absent, of actual consumers located in multiple jurisdictions that could be threatened with overlapping assessments. If, however, Vonage submits actual evidence of a credible number of such overlaps, the FCC might have to adjust the rationale for its interpretive rule. In submitting such evidence, Vonage will necessarily demonstrate 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 Vonage to sever the traffic and under its prior ruling – the company would be subject to State oversight and necessarily contribute to State programs. See also the discussion in note 15 supra.

¹⁹ 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 to avoid double assessment that could occur in exceedingly rare situations), available online at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916161.

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.

Any concerns that any customer might actually get assessed twice for the same service can also be easily handled in the requested interpretive rule by specifying that the FCC's clarification does not protect any State which issues a duplicative assessment and arbitrarily refuses to provide an appropriate credit, or perhaps by specifying either 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.

CONCLUSION

For the forgoing reasons, NARUC urges the FCC to immediately issue an interpretive rule clarifying that States may access nomadic VoIP providers to support State universal service programs based on the complement to the federal safe harbor established in the FCC's June 2006 rule.

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