



N A R U C  
National Association of Regulatory Utility Commissioners

March 24, 2010

**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 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 March 23, 2010, Washington Utilities and Transportation Commissioner Phil Jones, a member of NARUC Executive Committee and NARUC's General Counsel, Brad Ramsay met at 10:00 am with *Christi Shewman, Legal Advisor for Wireline, Universal Service, and Consumer Issues to Commissioner Baker*; at 10:30 am, with *Angela Kronenberg, Legal Advisor for Wireline and Broadband to Commissioner Clyburn*; and at 11:30 am, with *Jennifer Schneider, Legal Advisor for Broadband, Wireline and Universal Service to Commissioner Copps*. During these meetings, we discussed NARUC's arguments outlined at length in our September 9, 2009 comments filed in the WC Docket No.06-122 as well as NARUC's July 30, 2009 initial comments in the GN Docket No. 09-51 proceedings.

***THE NEBRASKA/KANSAS PETITION:***

The 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.

As of 2002, twenty-one States had universal service funds that enabled companies that received high-cost support to deploy broadband facilities in rural areas.<sup>1</sup>

Vonage,<sup>2</sup> the FCC,<sup>3</sup> and Petitioners all agree – the statute requires Vonage to pay into State universal service programs.

In June 2006, the Federal Communications Commission constructively severed nomadic VoIP providers' traffic into interstate and intrastate portions by requiring either the use of an interstate safe harbor or "contribute to the fund based on actual revenue allocations or by conducting a traffic study."<sup>4</sup>

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 and require contributions into the federal program, the application of § 254(f) logically (and necessarily) follows.

In the absence of this Petitioner request, the FCC could have acted *sua sponte*, without notice, to issue the requested interpretive rule clarifying its 2006 interim rule. But, given the petition was filed; it has, of course now sought comment on the request. It is clear the FCC has an adequate basis and record to take action.

There is no reason to delay action.

Vonage wants a rulemaking to delay its obligation to pay – as its competitors pay – to support State programs.

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1 See, GOV'T. ACCOUNTABILITY OFFICE, TELECOMMUNICATIONS: FEDERAL AND STATE UNIVERSAL SERVICE PROGRAMS AND CHALLENGES TO FUNDING, GAO-02-187, at 47 app.III, tbl.2 (2002), available online at <http://www.gao.gov/new.items/d02187.pdf>.

2 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](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.")

3 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](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916162)

4 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), at para. 54 (*2006 Interim Contribution Methodology Order*), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-94A1.doc](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&WAIAction=retrieve>

Vonage raises as an issue – the unlikely scenario that one or more consumers – in theory – might actually pay into two State programs – because in this circumstance – one State requires the in-state allocations to be based on billing addresses and the other State requires allocations based on E911 address (essentially – the service address). This unlikely scenario requires a Vonage customer to have a vacation home in Kansas or vice versa. But it in no case provides a basis for delay or a drawn out rulemaking.

First, there is no evidence in the record that this circumstance has actually occurred. 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). Note – if Vonage can supply reasonable evidence to this effect – it would be a strong indicia that Vonage is well positioned to pay into State programs based on actual allocations (and the FCC should point to its earlier determinations in the 2006 order at para. 56 that “to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls,” and require them to do so).

Second, the two States involved have already specified – in the unlikely case that such a circumstance does arise – they will work together to assure the consumer is not harmed. Indeed, the National Association of State Utility Consumer Advocates – which has a long and distinguished record protecting consumer interests – and whose members all have statutory obligations to do so – also agrees with NARUC that no further delay is needed.<sup>5</sup>

Third, if the FCC does as NARUC has suggested, and specifies one approach as presumptively valid, and indicates it will take up on a case – by- case basis other State approaches, it is more than likely that all States considering such assessments will revise their rules to align with the FCC sanctioned approach to avoid additional litigation/proceedings on assessments.

It is clear that States can “adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State.”<sup>6</sup> The *only* limitations Congress places on those

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5 See the September 9, 2009 filed *Initial Comments of the National Association of State Utility Consumer Advocates*, at 4, noting "There is certainly no need to open a rulemaking to address the unlikely issue of conflicts between state assessment mechanisms, such as Vonage’s example of a conflict between billing addresses and service addresses. As NARUC notes, the FCC could rule that state programs that assess based on billing addresses are proper, and then resolve problems with other mechanisms on a case-by-case basis. As NARUC also states, "if the FCC clarifies that States that assess based on the billing address . . . are definitely consistent with § 254, . . . other states considering rules to assess nomadic VoIP providers will adjust their rules to line up with the sanctioned approach." (footnotes omitted), available online at:

[http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7020037898](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7020037898)

6 47 U.S.C. § 254(f) (1996).

regulations is that they be “specific” and not “burden Federal universal service support mechanisms.”<sup>7</sup> The FCC *can easily* 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.”

During some of the discussions, we also pointed out, *inter alia*,

[1] Even if some discrete minority of consumers in the two States accessing nomadic VoIP providers today actually do pay twice – and there is NO evidence (in the record or outside of it) this has or will occur – it would in no way be a burden on the *interstate* program (within the meaning of the Statute).

[2] Safe harbors and other proxies for actual use have always been approved by the Courts. They do not have to be precise, only a reasonable approximation. If the FCC knew the actual percentage of intrastate use – it would not need to use a proxy. When it chose to do so, the complement to its chosen percentage is necessarily a reasonable approximation of the intrastate level of traffic.

[3] At least one nomadic VoIP carrier, not realizing it was impossible, and unaware of the potential “dire” consumer consequences of making the payments – has already done so. (This is based on a conversation with Kansas Corp. staff who indicated at least one nomadic VoIP company has made some payments into their state program).

#### ***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 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 has filed a petition based on the resolution. A draft proposal has already circulated on the eighth floor. 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,<sup>8</sup> as well as the express terms of the BDIA and the American

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7 Id.

8 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

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.

On July 30, 2009, based on the same resolution, NARUC filed comments urging the FCC to immediately:

- Provide States that so request with raw data from the relevant current Form 477 submissions by wireline and wireless broadband service providers;
- Require broadband service providers to simultaneously file future Form 477 reports with both the FCC and the requesting States; and
- Condition the aforementioned on a State's commitment to treat such Form 477 reports as privileged or confidential, as a record not subject to public disclosure except as otherwise agreed by the broadband service provider.

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: Carol Simpson, Legal Advisor for Wireline and Broadband  
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Jennifer Schneider, Legal Advisor for Broadband, Wireline & Universal Service.  
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“ [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.