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September 22, 2008

Chairman Tre Hargett
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

filed electronically in docket office on 09/22/08

Re: Rulemaking to Establish Requirements and Funding Mechanism to Support Telecommunications Services for Individuals with Hearing Loss and Speech Disabilities

Docket No. 05-00237

Dear Chairman Hargett:

Enclosed please find the original and four (4) copies of United Telephone Southeast LLC d/b/a Embarq's ("Embarq") Reply Comments in the above-referenced docket. This is the follow-up to the electronic submission made by Embarq on September 22, 2008.

Please do not hesitate to contact me with any questions you have concerning this filing.

Sincerely,

Edward Phillips

HEP:sm

Enclosures

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re:	)	
Rulemaking to Establish Requirements and Funding Mechanism to Support Telecommunications Services for Individuals with Hearing Loss and Speech Disabilities	)	Docket No. 05-00237

REPLY COMMENTS OF EMBARQ

I. INTRODUCTION

United Telephone Southeast LLC d/b/a Embarq ("Embarq") files these reply comments in support of the Tennessee Regulatory Authority's ("Authority") proposed rules to establish requirements and a funding mechanism to support telecommunications services for individuals with hearing loss and speech disabilities in the above-captioned docket. Embarq reiterates in these reply comments that it supports the establishment of a funding mechanism for the Tennessee Relay Service ("TRS") that is competitively neutral and is consistent with action at the federal level.

Further, Embarq supports the modifications and clarifications described in the comments filed by BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T") on September 2, 2008 only as those comments relate to (1) Intrastate Gross Receipts as the funding base; (2) wireless revenue determination; and (3) a 90 day implementation timeframe. Embarq disagrees with AT&T to the extent that AT&T asserts that VoIP providers should not be assessed contributions to the Tennessee TRS fund. However, to the extent AT&T's edits and

modifications include VoIP providers in the contribution pool and brings the state funding mechanism in line with the federal mechanism, Embarq agrees.[1] Furthermore, by making the Authority's rules consistent with the federal approach, the Authority will guarantee the survivability of the proposed rules during the review process by the Office of the Tennessee Attorney General and Reporter.

In addition to Embarq's support of the Authority's efforts and its limited support of the comments filed by AT&T, Embarq also notes that it files these reply comments to address concerns raised by some commentors regarding contributions to the Tennessee TRS fund by VoIP providers. Specifically, on September 5, 2008, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services (collectively, "Verizon") filed comments in which it asserts that the Authority lacks jurisdiction to require contributions to the state TRS fund by VoIP providers. Also, the VoIP providers, through their organization, "The VON Coalition" (the "Coalition"), filed comments on September 5, 2008 making similar allegations. To be clear, both Verizon and the Coalition assert that the Authority is attempting to exert regulatory jurisdiction over VoIP providers and is impermissibly seeking to regulate the provisioning of VoIP services. Those assertions are not true.

II. THE AUTHORITY SHOULD ASSESS CONTRIBUTIONS BY VOIP PROVIDERS FOR TRS FUNDING

A plain reading of the Authority's proposed rules indicates that it intends to seek contributions by VoIP providers to support an important social obligation. However, at page one of its Comments, the Coalition asserts that the Authority must not permit Tennessee to become

[1] *See* AT&T comments at p. 2.

"the first state in the nation to regulate this broad class of technologies . . ." This assertion is untrue, first because the Authority is not regulating the provision of VoIP services and secondly, Tennessee is not the first state to require contributions by VoIP providers to a state TRS fund. Contrary to the Coalition's assertion, the Public Utilities Commission of Ohio in Case No. 08-815-TP ordered VoIP providers to contribute to the state TRS fund. The decision of the Ohio Commission is based on recently enacted state legislation that requires such contributions. In addition, the Ohio Commission noted in its rules that VoIP providers whose services are competitive with, or are the functional equivalent of voice-grade, end user access lines should contribute to the state fund. This action is consistent with the federal funding requirements.[2]

Furthermore, the Authority's proposed rules make certain that the burden of meeting this important social obligation is spread equally among carriers that provide voice communications to customers with disabilities, or to carriers whose customers receive voice communications from persons with disabilities regardless of the technology employed to make the call. With this understanding, it is obvious that the Authority's actions are consistent with the decision of the Federal Communications Commission ("FCC") in the FCC's *Report and Order* released on June 15, 2007 in WC Docket No. 04-36.[3]

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[2] *See Finding and Order*, Public Utilities Commission of Ohio, Case No. 08-815-TP, entered August 27, 2008 at p. 2. The Ohio order is attached as Exhibit A.

[3] *See In the Matter of IP-Enabled Services, Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Report and Order, WC Docket No. 04-36, rel. June 15, 2007 ("*Report and Order*").

III. THE AUTHORITY HAS THE NECESSARY LEGAL SUPPORT TO REQUIRE ASSESSMENT OF TRS CONTRIBUTIONS FROM ALL PROVIDERS – INCLUDING VOIP PROVIDERS

Not only are the Authority's actions requiring TRS contributions by VoIP providers consistent with the FCC's *Report and Order*, the Authority's actions are also consistent with the FCC's view on a similar issue concerning USF contributions by VoIP providers. The FCC's position is set forth in an amicus brief that the FCC's General Counsel filed in *Vonage Holdings Corp., et al. v. Nebraska Pub. Serv. Comm.*, No. 08-1764, (8th Cir.) ("Vonage Appeal") on August 5, 2008.[4] In its brief, the FCC noted that it adopted rules requiring interconnected VoIP providers to contribute to the federal USF in 2006.[5] This requirement is similar to the FCC's requirement discussed in the *Report and Order*, and in more detail below, which requires VoIP providers to contribute to the federal TRS fund. The FCC's rationale as discussed in the Vonage Appeal also applies to the analysis supporting state TRS contributions by VoIP providers. That is, the FCC supports competitive neutrality and is in favor of state action that is consistent with federal action.

The FCC's *Report and Order,* as AT&T points out in its comments "makes clear . . . that interconnected VoIP providers are required to contribute to the federal interstate TRS fund."[6] While AT&T goes on further to discuss the basis of the contribution, it is important to note that interconnected VoIP providers are required to make federal TRS funding contributions. Specifically, the FCC states that the measures it takes "will ensure that, as more consumers

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[4] The issue in the Vonage Appeal concerns whether the Nebraska Commission is preempted from requiring USF contributions by VoIP providers. In its brief, the FCC stated that it had not preempted states from assessing such contributions, that VoIP providers benefit from universal service, and that contribution to the fund by VoIP providers promotes the principles of competitive neutrality. The FCC's brief is attached as Exhibit B.

[5] *See Universal Service Contribution Methodology,* 21 FCC Rcd 7518 at ¶ 34 (2006) (*VoIP USF Order*), aff'd *in part and rev'd in part, Vonage Holdings Corp. v. FCC,* 489 F. 3d 1232 (D.C. Cir. 2007).

[6] *See* AT&T Comments at p. 3.

migrate from traditional phone service to interconnected VoIP services, the disability access provisions mandated by Congress under sections 255 and 225 will apply to, and benefit users of, interconnected VoIP services and equipment."[7] The FCC further stated that "some IP-enabled services, to the extent that they are viewed as 'replacements for traditional voice telephony[,]' raised 'social policy concerns' relating to emergency services, law enforcement, ***disabilities access***, consumer protection and ***universal service***."[8] (Footnote omitted). (Emphasis added to original). It is clear from these findings that the FCC requires interconnected VoIP providers, which are replacements for traditional voice telephony to make contributions to the federal TRS program.

Moreover, 47 U.S.C. § 225, as noted by the FCC "creates cost recovery regime under which providers of TRS are compensated for their reasonable cost of providing TRS. Specifically, section 225 provides that the 'cost caused by' the provision of *interstate* TRS 'shall be recovered from all subscribers for every interstate service,' and the 'cost caused by' the provision of *intrastate* TRS 'shall be recovered from the intrastate jurisdiction'." Therefore, under the FCC's *Report and Order* and 47 U.S.C. § 225(d)(3)(B), intrastate funding mechanisms are appropriate.[9] Since the FCC places the burden on interconnected VoIP providers on a federal

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[7] *See Report and Order* at p. 2.

[8] *See Report and Order* at p. 6.

[9] 47 U.S.C. § 225(d)(3)(B) states as follows:

> (3) Jurisdictional separation of costs.
>
> (B) Recovering costs. Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

level, interconnected VoIP providers that act as replacements for traditional voice telephony should also be required to support *intrastate* TRS funding in Tennessee.

The FCC determined in its *Report and Order*, that "where interconnected VoIP service substitutes for traditional phone service, the same disability access protections that currently apply to telecommunications services and equipment ***must apply to interconnected VoIP service*** and equipment." [10] (Emphasis added to original). While the FCC established this regulatory framework by exercising the FCC's Title I ancillary jurisdiction, the Authority can also exert jurisdiction based on its ability to ensure universal service as competition flourishes in all telecommunications markets. See Tenn. Code Ann. § 65-5-107(a).

The Authority's efforts to include VoIP providers in the pool of contributors to the Tennessee TRS fund are appropriate. This is especially true when one considers the actions of the Tennessee General Assembly which supports the assessment of an emergency telephone service charge on VoIP providers by the Board of Directors of the Emergency Communications Board (Tenn. Code Ann. § 7-86-108(iv)) and includes VoIP providers in the definition of carriers that are capable of connecting users to PSAPs by dialing 9-1-1 (See Tenn. Code Ann. § 7-86-103(a). The provisioning of 911 services is essential, and both state and federal authorities have extended those obligations to VoIP providers. By including VoIP providers as part of this obligation the State is ensuring the fulfillment of an important social goal of requiring all communications providers to provide 911 services and to contribute to its financial support regardless of the technology employed to provide the voice communication. The approach taken in Tennessee with regard to 911 and the protection of consumers is in no way different from the social goal or obligation of providing services to Tennesseans that suffer from hearing loss and

[10] *See Report and Order* at p. 10. (Emphasis added to original).

speech disabilities. Thus, action by the Authority to include VoIP providers in the pool of TRS contributors is a legitimate act that protects all Tennessee consumers.

Furthermore, by including VoIP providers in the pool of contributors the Authority is not violating the prohibition against the regulation of retail interconnected VoIP services under Tenn. Code Ann. § 7-59-307(d). The Authority's proposed rules do not exert any regulatory jurisdiction over, or create any economic regulation of VoIP providers in Tennessee. Rather, the Authority is simply attempting to ensure the fulfillment of a social obligation that requires providers of all voice communications services to contribute to a fund that supports universal service for all Tennesseans regardless of whether such providers are regulated. This action is consistent with the public policy rationale expressed by the FCC in its *Report and Order* and is a sound basis upon which the Authority can guarantee "a broader-based and more stable TRS funding mechanism."[11]

IV. VOIP CUSTOMERS BENEFIT FROM THE USE OF TRS

It is important to note that the FCC in its *Report and Order* recognizes that as more consumers migrate from traditional telephony services to VoIP services, support for the TRS fund would diminish. The FCC remedied this situation by requiring that interconnected VoIP providers contribute to the federal TRS fund. The FCC's action according to FCC Commissioner Deborah Taylor Tate ensured that "all Americans . . . benefit from advances in telecommunications services and equipment . . . by stabilizing the funding base for TRS service and by extending accessibility requirements to the interconnected VoIP services which millions

[11] *See Report and Order* at p. 19.

of Americans are now substituting for traditional voice service."[12] Thus, any action by the Authority to include VoIP providers in the pool of contributors to the Tennessee TRS fund is consistent with recent action at the federal level and also recognizes the benefits derived by VoIP customers from the availability of TRS.

V. CONCLUSION

Embarq respectfully requests that the Authority adopt its proposed rules with the modifications outlined in AT&T's comments of September 2, 2008, and that the Authority continue to require that the pool of TRS contributors include VoIP and wireless providers in order to ensure a broader-based and more stable TRS funding mechanism.

Respectfully submitted this the 22nd day of September, 2008.

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[12] *Id.* at p. 65 – Statement of Commissioner Deborah Taylor Tate.

EXHIBIT A

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for the Telecommunications Relay Service Assessment Pursuant to Section 4905.84, Revised Code, as Enacted by House Bill 562.	)))))	Case No. 08-815-TP-ORD

FINDING AND ORDER

The Commission finds:

(1) On June 24, 2008, the governor of the state of Ohio signed into law House Bill 562, thereby enacting Section 4905.84, Revised Code. This section provides that the Commission shall, not earlier that January 1, 2009, impose on and collect from each service provider that is required under federal law to provide its customers access to telecommunications relay service (TRS) an annual assessment to pay for the costs incurred by the TRS provider for providing TRS in Ohio. Furthermore, Division (F) of Section 4905.84, Revised Code, provides that the Commission shall adopt rules under Section 111.15, Revised Code, to establish the assessment amounts and procedures.

(2) On February 12, 2008, the governor of the state of Ohio issued Executive Order 2008-04S, entitled "Implementing Common Sense Business Regulation," (executive order). This executive order sets forth factors to be considered in the promulgation of rules.

(3) By entry issued July 9, 2008, the Commission issued staff-proposed rules for comment. Initial comments were filed by: the AT&T Entities[1]; tw telecom of ohio llc (TWTC f/k/a Time Warner Telecom of Ohio, LLC); the Ohio Telecom Association (OTA); and Cincinnati Bell Telephone Company, LLC (CBT). The Ohio Cable Association, by letter filed July 28, 2008, reserved the right to file reply comments. Reply comments were filed by OTA on August 7, 2008.

1 The AT&T Entities are: The Ohio Bell Telephone Company d/b/a AT&T Ohio; AT&T Communications of Ohio, Inc.; TCG Ohio, Inc.; SBC Long Distance, LLC d/b/a AT&T Long Distance; New Cingular Wireless PCS, LLC; Cincinnati SMSA, LP; Dobson Cellular Systems, LLC; and American Cellular, LLC.

(4) Throughout this order, references or citations to comments will be designated as "initial" for initial comments and "reply" for reply comments. Rules proposed by staff and issued for comment on July 9, 2008, shall be referred to as "staff-proposed rules." Any recommended change that is not discussed below or incorporated into the amended rules attached to this order should be considered denied.

Rule 4901:1-6-24 TRS assessment procedures

(5) Staff-proposed paragraph (B) sets forth the service providers that will be assessed to pay for the costs incurred by the TRS provider for providing the service in Ohio. In addition, as proposed by staff, this paragraph stated that "[a]dvanced services and internet protocol-enabled services have the meanings ascribed to them by federal law, including federal regulation."

(a) As proposed by staff, this paragraph states that "providers of advanced services or internet protocol-enabled services that are competitive with or functionally equivalent to basic local exchange service as defined in section 4927.01 of the Revised Code" will be assessed. The AT&T Entities comment that, by referencing Section 4927.01, Revised Code, the term "basic local exchange service" is limited to the primary line serving the customer's premises. The AT&T Entities believe that, in order to provide a broad funding base of all access lines, or their equivalent, the funding source should not be limited to the primary access lines. Rather, the AT&T Entities advocate that the paragraph should reference the "retail customer access lines" (AT&T initial at 2-3).

The Commission agrees that the source of funding is not limited to the primary access lines. The funding base shall include voice-grade end user access lines, or their equivalent. Therefore, the Commission finds that this paragraph should be amended in order to reflect the intent. Accordingly, the reference to "basic local

exchange service as defined in section 4927.01 of the Revised Code" should be replaced with the phrase "voice-grade end user access lines."

In the July 9, 2008, entry, the Commission specifically requested comments from interested parties regarding the definition of advanced services and internet protocol-enabled services. OTA comments that the definition of these terms is not found in the Code of Federal Regulations (C.F.R.) (OTA initial at 5). However, OTA recommends, and the AT&T Entities agree, that the Commission should define "advanced services and internet protocol-enabled services" *using the definition employed at the federal level* to define interconnected voice over Internet protocol (VoIP), found in 47 C.F.R. 64.601(a)(9). According to OTA and the AT&T Entities, the use of this definition will make Ohio's treatment of TRS assessments consistent with the definition used at the federal level (OTA initial at 5; AT&T initial at 8). CBT believes that the Commission need not define providers of advanced services and internet protocol-enabled services or any other service providers required to be assessed under the Ohio statute. Rather, since the Ohio statute requires the Commission to mirror the federal law, CBT advocates that the Commission reference the federal rules regarding the provision of TRS service set forth in 47 C.F.R. 64.603 and the definition of providers set forth in 47 C.F.R. 64.601, and forgo attempting to develop a definition for Ohio TRS purposes (CBT initial at 2). TWTC agrees with the definition as proposed by the staff. TWTC explains that the federal law and regulations pertaining to advanced services and internet protocol-enabled services are unsettled and may change from time-to-time. Therefore, TWTC believes that, if there are changes to the federal regulations, the blanket reference to the federal law and regulations proposed by staff would not require a change to paragraph (B) of this rule. TWTC offers that there

is no countervailing benefit to including a citation to the C.F.R. in paragraph (B) of this rule (TWTC initial at 2).

Upon consideration of the comments submitted, the Commission agrees with TWTC that there is no benefit to including a citation to the C.F.R. in the rule, especially since, as pointed out by OTA, these terms are not found in the C.F.R. Therefore, we conclude that the definition of advanced services and internet protocol-enabled services proposed by staff which references "federal law, including federal regulation," without setting forth a specific citation would best serve the purpose of the statute in this regard. Accordingly, staff's proposal should be adopted.

(6) Staff-proposed paragraph (C) states that each provider shall be assessed according to a schedule established by the Commission.

(a) OTA recommends, and the AT&T Entities agree, that the rule should include a provision that requires that an entry will be issued annually by the Commission which will delineate the Commission's calculations and validate that the costs comport with the TRS provider's contract (OTA initial at 4; AT&T initial at 6-7). In addition, the AT&T Entities propose that the entry identify each provider's pro rata share of the annual assessment (AT&T initial at 7). OTA submits that the entry should provide interested parties an opportunity to object. According to OTA, this process is consistent with the practice of the Federal Communications Commission (FCC) and provides an essential check and opportunity for review that benefits all interested parties (OTA initial at 4).

The Commission envisions that the TRS assessment process will be similar to the process we have employed for decades in order to collect the annual assessment for our operating budget

from regulated companies. With regard to the annual operating budget, the Commission issues an entry annually directing regulated utilities to submit annual reports to the Commission, and the information in those reports is used to calculate the assessment for the operating budget. Likewise, with regard to the TRS assessment, the Commission intends to issue an entry on an annual basis setting forth the estimated costs to provide TRS for the upcoming year, including any reconciliation of the TRS assessment from the previous year, and directing the providers subject to the TRS assessment to submit their payments to the Commission in accordance with the schedule established in the entry.

(b) OTA and the AT&T Entities point out that the proposed rule provides no specificity as to the timeframe for implementing the assessment. Therefore, OTA and the AT&T Entities recommend that the Commission set forth a timetable in the rule for the reporting of data, the calculation of the assessment, the billing of the assessment, and the payment of the bills (OTA initial at 3; AT&T initial at 4-5). OTA submits that the permanent assessment and payment schedule should be based on Ohio's fiscal year, July 1 through June 30. OTA proposes an interim schedule to account for the assessment from January 1, 2009, through June 30, 2009, after which the permanent schedule would be followed (OTA initial at 3-4). CBT agrees that the assessment period should coincide with the federal TRS funding year, which happens to correspond with Ohio's fiscal year, July 1 through June 30 (CBT initial at 2). In addition, CBT agrees with OTA that an interim assessment process should be established to fund the first six months of 2009, and CBT set forth a proposed schedule for this interim assessment. CBT recommends that, in September 2008, each commercial mobile radio service (CMRS) provider should either provide the Commission with a copy of its

September 2008 FCC form 477 (which reflects data through June 30, 2008) or file a certified statement indicating the number of subscribers it reported in Ohio on the form, and each interconnected VoIP provider should submit a certified statement indicating the number of its end-user and resale subscribers in Ohio as of June 30, 2008. Since each incumbent local exchange carrier (ILEC) and competitive local exchange carrier (CLEC) is already required to submit a copy of its FCC form 477, CBT states that no further provisions are needed to obtain access line data from ILECs and CLECs. CBT then recommends that, no later than November 1, 2008, the Commission should estimate the costs of the TRS provider for the interim period, January 1, 2009, through June 30, 2009, and issue an entry explaining the methodology. Subsequently, CBT submits that, by November 20, 2008, the Commission should notify each provider of its assessment for the interim period (CBT initial at 6-7).

The Commission agrees with the commenters that the assessment period should correspond with Ohio's fiscal year, July 1 through June 30. We also agree that an interim assessment process for January 1, 2009, through June 30, 2009, should be established. However, as we stated previously, we will be processing the TRS assessment like we have been processing the assessment for the Commission's operating budget. To that end, we will be issuing an entry in the near future setting forth the estimated costs for the Ohio TRS for the first six months of 2009 and establishing a schedule for the payment of that assessment. After this interim period, we intend on issuing an entry on an annual basis setting forth a schedule that will cover the upcoming fiscal year. Accordingly, we find that paragraph (C), as proposed by staff, should be adopted.

(c) CBT next proposes that, if a provider's assessment amount is less than $600 for the interim period, January 1, 2009, through June 30, 2009, the provider should be required to make the payment in full by January 20, 2009; however, if the assessment is more than $600, the provider should be given the option of either paying the entire assessment on January 20 or making six monthly payments which will be due by day 20 of each month beginning in January 2009 (CBT initial at 6-7). OTA proposes that, similar to an option permitted for the federal TRS, the Commission permit providers to pay the TRS assessment on a monthly basis, if the monthly payment would exceed $100 (OTA initial at 4).

Similar to the Commission's annual assessment for our operating budget, it is our expectation that providers will submit payment in full by a date that will be established by the Commission's entry setting forth the TRS assessment schedule; however, we will consider payment plans on a case-by-case basis. Therefore, the Commission finds that the commenters' requests for an explicit provision for a monthly payment option should be denied.

(7) Staff-proposed paragraph (D) sets forth the information the Commission will use in determining the assessment amount owed by each provider.

(a) Staff-proposed paragraphs (D)(1) through (D)(3) establish that, for ILECs, CLECs, and CMRS providers, the number of retail "intrastate" customer access lines be used to determine the assessment amount owed by these providers. The AT&T Entities submit that reference to "intrastate" customer access lines might cause confusion, since it is not intended that the lines be only intrastate in nature. Therefore, the AT&T Entities recommend that the word "intrastate" be deleted (AT&T initial at 3). The Commission agrees that the reference to "intrastate" may be

confusing and, therefore, the request should be granted and the word "intrastate" should be deleted from these paragraphs.

(b) Staff-proposed paragraphs (D)(1) through (D)(4) provide that the information used to determine the assessment amounts will be: annual reports for ILECs; FCC form 477 for CLECs; reports submitted in accordance with Section 4931.64, Revised Code, for CMRS providers; and either FCC form 477 or a form prescribed by the Commission staff for all other providers. CBT comments that the staff proposal does not satisfy the statutory requirement that the assessment be allocated among providers using a competitively neutral formula based upon retail intrastate customer access lines or their equivalent because of the disparate sources of access line data staff proposes using to determine the assessment and the possibility that the data would be from different time periods for different contributors (CBT initial at 2-3). OTA advocates that the Commission work from a common set of principles for all contributors in measuring and reporting the data required (OTA initial at 2-3). Rather than utilize different reports to determine providers' access lines, OTA, CBT, and the AT&T Entities recommend that the Commission use the number of retail customer access lines, or their equivalent, as reflected in each provider's most recent FCC form 477 (OTA initial at 2-3; CBT initial at 3; AT&T initial at 4). The AT&T Entities and OTA point out that all providers, including CMRS providers, are required to file form 477 with the FCC on a state-by-state basis (AT&T initial at 4; OTA reply at 1). CBT explains that providers file FCC form 477 semiannually, on September 1 and March 1, reporting lines and subscribers as of June 30 and December 31, respectively (CBT initial at 3).

With regard to VoIP providers, the AT&T Entities note that, beginning with the FCC form 477 report

due in March 2009, all interconnected VoIP providers must file their subscriber counts with the FCC. Therefore, the AT&T Entities recommend that, with respect to the interconnected VoIP providers, the Commission refrain from implementing the Ohio TRS assessment requirements until after March 2009. In support of their proposal, the AT&T Entities maintain that using FCC form 477 reports will ensure that all providers are counting lines in a consistent manner, that the reporting will occur as of the same date, and that all providers will be assessed equitably and in a nondiscriminatory and competitively and technologically neutral manner (AT&T initial at 4). In addition, OTA points out that, by utilizing FCC form 477, the information will be current because, for example, the information on the form filed in March of each year reflects data from the preceding December, so the information is only 90 days old (OTA initial at 3). CBT and OTA point out that the ILECs and CLECs are already required, under Rule 4901:1-7-27, Ohio Administrative Code (O.A.C.), to submit a copy of their form 477 with the Commission (CBT initial at 3; OTA initial at 2). Therefore, CBT recommends that the Commission require CMRS and interconnected VoIP providers to file a copy of their FCC form 477. CBT states that, at a minimum the CMRS and interconnected VoIP providers should be required to file a certified statement indicating the number of wireless subscribers and interconnected VoIP subscribers that they report in their March FCC form 477 (CBT initial at 3).

The Commission agrees that it would be optimal to utilize the same report in order to determine providers' access lines for purposes of the TRS assessment. As pointed out by the commenters, all providers are required to file FCC form 477 with the FCC on a state-by-state basis, and VoIP providers will also be required to file FCC form 477 beginning in March 2009. Therefore, we find

that the commenters' requests should be granted and FCC form 477 should be used to determine the assessment amount owed by each provider. These paragraphs should be amended accordingly.

(c) CBT recommends that the Commission clarify that the liability for the assessment only applies to providers that had assessable lines or subscribers on December 31 of the preceding calendar year and that a new provider that begins operating on December 31 would not be assessed for the upcoming funding year. Furthermore, in case of a merger or acquisition, CBT advocates that the successor company should be responsible for paying the assessment based on any lines or subscribers that the acquired company had in service at year end (CBT initial at 3).

The Commission agrees with CBT, that a new provider that begins operation on December 31 should not be assessed for the upcoming funding year, if the provider does not have any subscribers at the point in time that the assessment is being measured. We also agree that it is the successor company in a merger or acquisition that would be responsible for the payment of the assessment based on any lines or subscribers that the acquired company had in service at year end.

(8) Staff-proposed paragraph (E) provides that, sixty days prior to the date each provider is required to make its payment, the Commission staff will notify the provider of its proportionate share of the costs to pay the TRS provider.

(a) CBT proposes that, based on the estimate of the Ohio TRS costs for the upcoming year and the reconciliation required under staff-proposed paragraph (F), the Commission should notify each provider by May 20 of its proportionate share of the annual assessment (CBT initial at 4).

The Commission appreciates CBT's comment, but, as stated previously, we will be issuing an entry setting forth the TRS assessment schedule for the upcoming fiscal year and, as stated in paragraph (E), each provider will be notified sixty days prior to the date the assessment payment is due regarding its proportionate share of the costs.

(b) According to CBT, consistent with the federal TRS assessment, providers with annual assessment amounts of $1,200 or more should have the option of either paying the assessment in one lump sum in July or paying in twelve equal monthly installments beginning in July. CBT states that installments should be due by day 20 of each month. However, CBT recommends that providers with an annual assessment of less than $1,200 should be required to make the full payment by July 20 (CBT initial at 4).

As we stated previously, while we will consider payment plans on a case-by-case basis, it is our expectation that providers will submit payment in full by a date that will be established by the Commission's entry setting forth the TRS assessment schedule. Accordingly, we find that CBT's request for an explicit provision for a monthly payment option should be denied.

(9) Staff-proposed paragraph (F) provides that the Commission staff shall annually reconcile the funds collected with the actual costs and shall either proportionately charge the providers for the amounts not sufficient to cover the actual costs or credit amounts collected in excess of the actual costs. CBT recommends that the Commission issue an entry 30 days prior to the date providers are notified of their proportionate share of the assessment, giving interested parties an opportunity to comment, explaining the methodology used to estimate the upcoming year's costs, providing data upon which the forecast is based, and documenting the annual reconciliation required by Section 4905.84(C), Revised Code (CBT initial at 5).

As mentioned earlier, an entry will be issued on an annual basis setting forth an estimation of how much the Ohio TRS will cost in the upcoming year, including any reconciliation of the TRS assessment from the previous year, and directing the providers subject to the TRS assessment to submit their payments to the Commission in accordance with the schedule established in the entry. We believe that this process is appropriate and in keeping with the Commission's current annual assessment process.

(10) Staff-proposed paragraph (G) provides that, in accordance with Section 4905.84(C), Revised Code, each service provider may recover the cost of the assessment by methods that may include, but are not limited to, a customer billing surcharge. Furthermore, the staff proposed that telephone companies, other than CMRS providers, that propose a surcharge or a change in the surcharge shall file a 30-day automatic approval application for tariff amendment with the Commission.

(a) The AT&T Entities submit that the Commission should clarify that the surcharge contemplated in this paragraph need not begin at the same time as the assessment is paid. According to the AT&T Entities, this clarification is needed because some of the entities will need to make programming and system changes in order to implement a customer surcharge. Further, because some providers may need additional time to implement a billing surcharge initially, the AT&T Entities state that the rule should be clarified to allow providers to have a one-time catch-up billing to recover the costs of assessments they have already paid. According to the AT&T Entities, the telephone companies that are required to describe billing and collection mechanisms in their tariffs could explain the details in their tariffs. The AT&T Entities advocate that it should be clarified that the providers have the option to bill the surcharge one time, on an annual basis, in arrears or in advance, or to spread the surcharge out over multiple billing periods (AT&T initial at 5-6).

Initially, the Commission would point out that the surcharge permitted by Section 4905.84, Revised Code, is the result of a federally mandated program, is strictly voluntary on the part of each provider, and that neither the Ohio statute or the Commission are mandating that providers implement a surcharge. Furthermore, if a carrier chooses to implement a surcharge, it may only pass-through its proportionate share of the TRS assessment. Since the surcharge is not a mandated charge, the Commission will not dictate in what increment, monthly or yearly, it could be assessed. However, we do emphasize that any pass through surcharge can not be for a period greater than one year and that the provider may not charge customers in advance for an assessment that the provider has not yet paid to the Commission. Finally, we note that, a standard of reasonableness will be applied to any surcharge imposed by a provider and any such surcharge is subject to review by the Commission.

(b) OTA, CBT, and the AT&T Entities advocate that, in order to provide greater parity between the providers that file tariffs and those that do not, the paragraph be modified to require a zero-day, notice-only filing (OTA initial at 5; CBT initial at 6; AT&T initial at 6). The Commission finds that the commenters' request is reasonable and, therefore, the paragraph should be amended accordingly.

(c) The AT&T Entities propose, and CBT and OTA agree, that, consistent with Rule 4901:1-6-16(D), O.A.C., all providers imposing a surcharge on their customers be required to provide notice to customers a minimum of fifteen days prior to the effective date of the surcharge (AT&T initial at 6; CBT initial at 6; OTA initial at 5). The Commission agrees that all regulated providers that choose to pass through the TRS costs must provide notice to their customers. The Commission encourages those providers that are

not rate-regulated by the Commission to give their customers reasonable notice prior to imposing a surcharge. Therefore, the commenters' request is granted and the notice requirement should be added to the rule.

(11) Staff-proposed paragraph (H) provides that, in accordance with Section 4905.84(D), Revised Code, the Commission shall take such measures as it considers necessary to protect the confidentiality of information provided pursuant to this rule. The AT&T Entities state that this paragraph merely mirrors the statutory language and does not take the necessary steps to implement the statutory language. Therefore, the AT&T Entities aver that the Commission should specify, in this paragraph, that the providers may request confidential treatment of nonpublic information, such as the competitively sensitive nonpublic access line count information contained in FCC form 477. In addition, the AT&T Entities propose that such information for which confidential treatment is requested should be automatically protected from public disclosure. Finally, the AT&T Entities submit that such information should be protected indefinitely and the protection should not expire in 18 months, which is the time frame set forth in Section 4901-1-24(F), O.A.C., and the burden should be on the party seeking public release to demonstrate that the information should no longer be protected (AT&T initial at 7).

Consistent with the statute, the Commission will automatically treat all information that providers are required to submit in order for the Commission to determine the assessment amount as confidential. Since the information required by this rule will be submitted to the Commission's staff and will not be filed, the 18-month expiration time frame set forth in Section 4901-1-24(F), O.A.C., and referred to by the AT&T Entities, does not apply. With regard to the information that will be submitted to the staff, the Commission has a longstanding process which we will follow, if we receive a public records request from an outside entity for the information submitted by the providers. Therefore, we conclude that it is unnecessary to amend the rule to include further explanation of the well-established measures that will be taken to protect the information submitted by the providers.

(12) Upon consideration of the staff proposal and the initial and reply comments, the Commission concludes that existing Rule 4901:1-6-01, O.A.C., should be amended and new Rule 4901:1-6-24, O.A.C., should be adopted.

It is, therefore,

ORDERED, That attached amended Rule 4901:1-6-01, O.A.C., and new Rule 4901:1-6-24, O.A.C., should be adopted and should be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission in accordance with divisions (D) and (E) of Section 111.15, Revised Code. It is, further,

ORDERED, That the final rules be effective on the earliest date permitted by law. Unless otherwise ordered by the Commission, the review date for Chapter 4901:1-6, O.A.C., shall be May 31, 2012. It is, further,

ORDERED, That a copy of this finding and order, with the attached rules, be served upon all telephone companies under the Commission's jurisdiction, all interested persons of record in Case No. 03-950-TP-COI, the Ohio Telecom Association, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/vrm
Entered in the Journal
AUG 27 2008

Reneé J. Jenkins
Secretary

*** DRAFT – NOT FOR FILING ***

4901:1-6-01 **Definitions.**

As used within this chapter, these terms denote the following:

(A) "Alternative operator services (AOS)" means any intrastate operator-assisted services, other than inmate operator service (IOS), in which the customer and the end user are totally separate entities. The AOS provider contracts with the customer to provide the AOS; however, the AOS provider does not directly contract with the end user to provide the services even though it is the end user who actually pays for the processing of the operator-assisted calls. AOS does not include coin-sent calls.

(B) "Basic local exchange service" means end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area, and that consist of the following:

(1) Local dial tone service.

(2) Touch tone dialing service.

(3) Access to and usage of 9-1-1 services, where such services are available.

(4) Access to operator services and directory assistance.

(5) Provision of a telephone directory and a listing in that directory.

(6) Per call, caller identification blocking services.

(7) Access to telecommunications relay service.

(8) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.

Basic local exchange service also means carrier access to, and usage of, telephone company-provided facilities that enable end user customers originating or receiving voice grade, data, or image communications, over a local exchange telephone company network operated within a local service area, to access interexchange or other networks.

(C) "Commercial mobile radio service (CMRS)" is specifically limited to include mobile telephone, mobile cellular telephone, paging, personal communication services (PCS), and specialized mobile radio service (SMRS) providers when serving as a common carrier in Ohio. Fixed wireless service is not considered as CMRS.

(D) "Commission" means the public utilities commission of Ohio.

(E) "Competitive local exchange carrier (CLEC)" means, with respect to a service area, any facilities-based and nonfacilities-based local exchange carrier that was not an incumbent local exchange carrier on the date of enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor or assignee of an incumbent local exchange carrier.

(F) "Facilities-based CLEC" means, with respect to a service area, any local exchange carrier that uses facilities it owns, operates, manages or controls to provide basic local exchange services to consumers on a common carrier basis; and that was not an incumbent local exchange carrier on the date of the enactment of the 1996 act. Such carrier may partially or totally own, operate, manage or control such facilities. Carriers not included in such classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier's local exchange services.

(G) "Flat rate usage" means unlimited number of local calls at a fixed charge.

(H) "Incumbent local exchange carrier (ILEC)" means any facilities-based local exchange carrier that: (1) on the date of enactment of the 1996 act, provided basic local exchange service with respect to an area; and (2)(a) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. 69.601(b); or (2)(b) is a person or entity that, on or after such date of enactment, became a successor or assignee of a member described in clause (2)(a).

(I) "Inmate operator services (IOS)" means any intrastate telecommunications service initiated from an inmate telephone, i.e., a telephone instrument set aside by authorities of a secured inmate facility for use by inmates.

(J) "Large ILEC" means any ILEC serving fifty thousand or more access lines within Ohio.

(K) "Local exchange carrier" means any facilities-based and nonfacilities-based ILEC and CLEC that provides basic local exchange services to consumers on a common carrier basis. Such term does not include an entity insofar as such entity is engaged in the provision of a commercial mobile radio service under section 47 U.S.C. 332(C), effective in accordance with paragraph (G) of rule 4901:1-6-02 of the Administrative Code, except to the extent that the federal communications commission finds that such service should be included in the definition of such term.

(L) "Local service" means any service in which calls made by an end user customer are not intraLATA or interLATA toll.

(M) "Long-run service incremental cost (LRSIC)" represents the forward-looking economic cost for a new or existing product that is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all

other product and service volumes constant. LRSIC does not include any allocation of forward-looking common overhead costs. Forward-looking common overhead costs are costs efficiently incurred for the benefit of a firm as a whole and are not avoided if individual services or categories of services are discontinued. Further, forward-looking joint costs, which are the forward-looking cost of resources necessary and used to provide a group or family of services shall be added to or included in the LRSIC of the products or services.

(N) "Nonresidential service" means a telecommunication service primarily used for business, professional, institutional or occupational use.

(O) "Operator services" means any intrastate operator-assisted services, other than IOS, in which the end user has a customer relationship with the provider, the provider contracts with the customer/end user to provide the services, and the customer/end user pays for the actual processing of the operator-assisted calls.

(P) "Providers of competitive telecommunication services" means a telephone company, as defined in division (A)(2) of section 4905.03 of the Revised Code, (including, but not limited to, interexchange service providers, interexchange switchless rebillers, interexchange resellers, and nonswitched data providers) that exclusively provides competitive tier two telecommunication services and that does not offer basic local exchange service as defined herein.

(Q) "Regulated services" means services under the jurisdiction of the commission.

(R) "Residential service" means a telecommunications service provided primarily for household use.

(S) "Small ILEC" means any ILEC serving less than fifty thousand access lines within Ohio.

(T) "Tariff" means a schedule of rates, tolls, rentals, charges, classifications, and rules applicable to services and equipment provided by a telephone company that has been filed or posted in such places or in such manner as the commission orders. Detariffed services are regulated telecommunications services that are not required to be filed in a telephone company's tariffs.

(U) "Telecommunications relay service (TRS)" means intrastate transmission services that provide the ability for an individual who has a hearing or speech impairment to engage in a communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual, who does not have a hearing or speech impairment, to communicate using voice communication services by wire or radio. TRS includes services that enable two-way communication between an individual who uses a telecommunications device for the deaf or other nonvoice terminal device and an individual who does not use such a device.

~~(U)~~(V) "Telephone company" means a telephone company, for purposes of this chapter, shall have same meaning as defined in division (A)(2) of section 4905.03 of the Revised Code.

~~(V)~~(W) "Toll service" means any service in which calls made by an end user customer are intraLATA or interLATA toll.

~~(W)~~(X) "Traditional service territory" means the area in which an ILEC provided basic local exchange service on the date of enactment of the 1996 act.

*** DRAFT – NOT FOR FILING ***

4901:1-6-24 **Telecommunication relay services assessment procedures.**

(A) This rule is limited to the commission's administration and enforcement of the assessment for the intrastate telecommunications relay service (TRS) in accordance with section 4905.84 of the Revised Code.

(B) For the purpose of funding the TRS, the commission shall collect an assessment to pay for the costs incurred by the TRS provider for providing the service in Ohio, from each service provider that is required under federal law to provide its customers access to TRS, including telephone companies, commercial mobile radio service (CMRS) providers, and providers of advanced services or internet protocol-enabled services that are competitive with or functionally equivalent to voice-grade, end user access lines. Advanced services and internet protocol-enabled services have the meanings ascribed to them by federal law, including federal regulation.

(C) Each service provider indentified in paragraph (B) of this rule shall be assessed according to a schedule established by the commission.

(D) The commission staff shall allocate the assessment proportionately among the appropriate service providers using a competitively neutral formula. To determine the assessment amount owed by each provider the commission staff shall use the number of voice-grade, end user access lines, or their equivalent, as reflected in each provider's most recent federal communications commission (FCC) form 477 submitted to the commission staff. All local exchange carriers shall submit their FCC form 477 to the commission staff in accordance with rule 4901:1-7-27 of the Administrative Code. All other providers subject to the TRS assessment shall submit to the commission staff, on a semi-annual basis and at the same time it is filed with the FCC, the Ohio-specific relevant parts of their most recent FCC form 477 which contains the number of the voice-grade, end user access lines or their equivalent.

(E) Sixty days prior to the date each service provider is required to make its assessment payment in accordance with paragraph (C) of this rule, the commission staff shall notify each service provider of its proportionate share of the costs to compensate the TRS provider.

(F) The commission staff shall annually reconcile the funds collected with the actual costs of providing TRS when it issues the assessment in accordance with paragraph (E) of this rule and shall either proportionately charge the service providers for any amounts not sufficient to cover the actual costs or proportionately credit amounts collected in excess of the actual costs.

(G) In accordance with division (C) of section 4905.84 of the Revised Code, each service provider that pays the assessment shall be permitted to recover the cost of the assessment. The method of the recovery may include, but is not limited to, a customer billing surcharge. Any telephone company, other than a CMRS provider,

that proposes a customer billing surcharge or a change in the surcharge shall file a zero-day tariff application (ZTA) with the commission, in accordance with the application process rule 4901:1-6-06 of the Administrative Code. The ZTA will be subject to the approval time frames found in paragraph (B) of rule 4901:1-6-08 of the Administrative Code. Each regulated provider imposing a surcharge on its customers must provide notice to its customers a minimum of fifteen days prior to the effective date of the surcharge in accordance with paragraph (D) of rule 4901:1-6-16 of the Administrative Code..

(H) In accordance with division (D) of section 4905.84 of the Revised Code, the commission shall take such measures as it considers necessary to protect the confidentiality of information provided pursuant to paragraph (D) of this rule.

(I) The commission may direct the attorney general to bring an action for immediate injunction or other appropriate relief to enforce commission orders and to secure immediate compliance with this rule.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 08–1764

VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC.,

Plaintiffs-Appellees,

v.

NEBRASKA PUBLIC SERVICE COMMISSION ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

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IN THE UNITED STATES COURT OF
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No. 08–1764

VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC.,

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NEBRASKA PUBLIC SERVICE COMMISSION ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR AMICI CURIAE UNITED STATES AND
FEDERAL COMMUNICATIONS COMMISSION SUPPORTING
APPELLANTS' REQUEST FOR REVERSAL

STATEMENT OF INTEREST

The district court in this case issued a preliminary injunction that bars Defendant-Appellant Nebraska Public Service Commission (NPSC) from requiring Plaintiffs-Appellees Vonage Holdings Corporation and Vonage Network, Inc. (collectively, Vonage) to contribute to Nebraska's universal-service program. The district court granted such relief on the basis of its determination that Vonage was likely to prevail on its claim that the Federal

Communications Commission (FCC) had preempted the NPSC's state universal service contribution requirement.

The district court's decision raises several issues of substantial interest to the FCC. First, the FCC has an important interest in ensuring that the courts correctly interpret the agency's precedents, especially where, as here, that precedent is construed to overturn a state's exercise of regulatory authority. Second, the FCC has a substantial interest in promoting universal service in an equitable and nondiscriminatory manner, as Congress directed in the Communications Act of 1934. *See* 47 U.S.C. § 254(b)(4). Third, the FCC has an interest in preventing the regulatory uncertainty that would result if the courts were to address in the first instance important legal and policy questions that are the subject of pending agency rulemaking proceedings—such as the question of how Internet telephony services such as Vonage's should be classified and regulated under the Communications Act.

For these reasons, and because we believe this Court would benefit from the FCC's considered views regarding federal and state authority over Internet telephony services, the United States and the FCC submit this amicus brief to urge the Court to reverse the district court's preliminary injunction in this case. The government is authorized to participate as amicus curiae by Rule 29(a) of

the Federal Rules of Appellate Procedure and has filed with this Court a motion for leave to file this amicus brief out of time.

STATEMENT OF ISSUE

This amicus brief addresses the following issue: Whether the district court erred when it concluded that FCC precedent likely preempted the application of the NPSC's state universal-service contribution requirements to Vonage, a provider of interconnected Voice-over-Internet-Protocol service.

STATEMENT

1. Voice-over-Internet-Protocol (or VoIP, for short) refers to a technology that allows end users to engage in voice communications over a broadband Internet connection. *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007) (*MPUC*). Some VoIP services are "fixed," which means that the end user can use the service from only one location (such as the end user's home). *Id.* at 575. Vonage, however, provides a VoIP service that is "nomadic": its customers can place and receive VoIP calls from any broadband Internet connection anywhere in the world. *Ibid.* Vonage's VoIP service is also "interconnected," which means that its customers can place calls to, and receive calls from, anyone with a telephone connected to the traditional public switched telephone network (PSTN). *Id.* at 574; *see also* 47 C.F.R. § 9.3 (defining "interconnected VoIP service").

The development and growth of interconnected VoIP service present difficult regulatory issues under the Communications Act. One such issue is how this service should be classified and regulated. Under the Communications Act, it has been argued that interconnected VoIP service could be regarded as a "telecommunications service" – which is subject to common-carrier regulation under Title II of the Communications Act, 47 U.S.C. §§ 201-276 – because it is often viewed by consumers as a substitute for traditional telephone service. Or, it has been argued, interconnected VoIP service could be classified as an "information service" – which is subject to minimal regulation – because it employs Internet technology. *See* 47 U.S.C. § 153(20), (47) (defining "information service" and "telecommunications service"); *see also MPUC*, 483 F.3d at 575, 577-78. The FCC has an open rulemaking proceeding in which it is considering the regulatory classification issue. *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

Another important issue concerns the extent to which the states can regulate the intrastate component of a nomadic VoIP service, such as the one provided by Vonage. The Communications Act generally grants the FCC exclusive jurisdiction over interstate (and international) communications, while leaving the regulation of intrastate communications to the states. *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004); *see* 47 U.S.C. § 152(b). But the

FCC may preempt state regulation under the so-called "impossibility exception" in situations where "(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." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In the case of nomadic VoIP, at least one side of the communication always takes place "in cyberspace," *MPUC*, 483 F.3d at 574, making it difficult for providers to pinpoint the exact geographic location of one or both ends of a call for purposes of determining whether that call originated and terminated in the same state (and is therefore subject to state jurisdiction) or in different states (and is therefore subject to federal jurisdiction). Consequently, the FCC has the authority to preempt state regulation under the impossibility exception to ensure that valid federal regulatory objectives applicable to VoIP services are not frustrated. *Id.* at 576.

The FCC exercised that preemption authority in 2004 with respect to Minnesota's attempt to impose "traditional 'telephone company' regulations" to Vonage's VoIP service. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*), *aff'd*, *MPUC*, 483 F.3d 570. The state regulations at issue in that case required

Vonage to obtain a state certificate and meet other entry conditions before providing intrastate service in Minnesota, and then to provide such service pursuant to tariff. *Id.* at 22408-09 ¶¶ 10-11 & n.30, 22430-31 ¶ 42 & n.148, 22432 ¶ 46.

The FCC found that those regulations conflicted with important federal policies applicable to the interstate component of Vonage's service. As the FCC explained, if interconnected VoIP service were to be classified as a telecommunications service, the state's certification and tariffing requirements would frustrate the FCC's policy of removing entry barriers and tariffing requirements in competitive telecommunications markets; on the other hand, if Vonage were to be considered an information-service provider, Minnesota's requirements would frustrate the FCC's policy of minimizing regulation of information services. *Id.* at 22415-18 ¶¶ 20-22. The FCC also found that "[t]here is, quite simply, no practical way to sever [Vonage's service] into interstate and intrastate communications that enables [Minnesota] to apply [its laws] only to intrastate calling functionalities without also reaching the interstate aspects" of the service. On the basis of those two findings – inseverability *and* frustration of federal purpose – the FCC concluded that preemption was necessary. *Id.* at 22423-24 ¶ 31. On review, this Court affirmed the FCC's preemption decision. *MPUC*, 483 F.3d 570.

2. The Communications Act establishes "the preservation and advancement of universal service" as an important federal policy goal. 47 U.S.C. § 254(b). To promote that goal, the Act requires "[e]very telecommunications carrier that provides interstate telecommunications services [to] contribute, on an equitable and nondiscriminatory basis" to the federal universal-service program. 47 U.S.C. § 254(d). The Act also authorizes the FCC, in its discretion, to extend the contribution requirement to "[a]ny other provider of interstate telecommunications … if the public interest so requires." *Ibid.*

In 2006, the FCC adopted rules requiring interconnected VoIP providers to contribute to the federal universal-service fund. *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 ¶ 34 (2006) (*VoIP USF Order*), *aff'd in part and rev'd in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007). Because the FCC has not yet determined whether interconnected VoIP service should be classified as a telecommunications service (and thereby subject to the Act's mandatory contribution obligation), the FCC invoked its permissive authority under § 254(d) over "provider[s] of interstate telecommunications" and concluded that requiring interconnected VoIP providers to contribute to universal service was in the public interest. The Commission explained that interconnected VoIP providers, like other fund

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." *Id.* at 7540-41 ¶ 43. 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." *Id.* at 7541 ¶ 44.

Contributions to the federal universal-service fund are calculated on the basis of the end-user revenues that contributors earn from their provision of interstate (and international) telecommunications; revenues from intrastate communications are not used to calculate federal contribution amounts. Because of the difficulty that nomadic interconnected VoIP providers have in identifying interstate calls, the FCC established a "safe harbor" under which an interconnected VoIP provider may presume that 64.9 percent of its revenues arise from its interstate operations. *VoIP USF Order*, 21 FCC Rcd at 7544-45 ¶ 53. In the alternative, an interconnected VoIP provider also may conduct a traffic study to estimate the percentage of its revenues that derive from interstate traffic and use that percentage to calculate its contribution amount.

Id. at 7547 ¶ 57.[1] Finally, VoIP providers that are able to track the jurisdiction of their calls may calculate their federal contribution amounts using actual revenue allocations. *Id.* at 7544-45 ¶ 53.

3. The Communications Act provides that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). Consistent with that provision, and like many other states, Nebraska has established its own state universal-service fund. *In re 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 (April 17, 2007) (*NPSC USF Order*), at 3-4. Contributions to the Nebraska state universal-service fund are calculated solely on the basis of telecommunications companies' intrastate revenues. *Id.* at 4.

In the order at issue in this case, the NPSC concluded that interconnected VoIP providers were among the entities required to contribute to the state's universal-service fund. *NPSC USF Order* at 2. To determine the revenue base

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[1] The FCC initially required interconnected VoIP providers to obtain the agency's approval of their traffic studies before using them to calculate universal-service payments. *VoIP USF Order*, 21 FCC Rcd at 7547 ¶ 57. The D.C. Circuit, however, vacated the agency's preapproval requirement. *Vonage Holdings Corp.*, 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 FCC's prior approval.

for calculating contributions to the state fund, the NPSC provided that "[i]nterconnected VoIP service providers can elect the same options provided by the FCC" in the *VoIP USF Order*: They can use (1) the safe harbor set forth in the *VoIP USF Order* under which 35.1 percent of their revenues are allocated to the intrastate jurisdiction (calculated by subtracting the federal safe-harbor amount (64.9 percent) from 100 percent); (2) their actual intrastate revenues; or (3) intrastate revenues determined through an FCC-approved traffic study. *Id.* at 13. Under the NPSC's rules, "the customer's billing address should be used to determine [the] state with which to associate telecommunications revenues of an interconnected VoIP service provider." *Id.* at 14.

4. On December 20, 2007, Vonage filed a complaint in the U.S. District Court for the District of Nebraska to challenge the validity of the *NPSC USF Order*. On March 3, 2008, the district court granted Vonage's request for a preliminary injunction prohibiting the NPSC from enforcing its contribution requirements against Vonage. *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008).

The district court concluded that Vonage was entitled to a preliminary injunction because it was likely to succeed on the merits of its argument that the rationale of the *Vonage Preemption Order* preempted the *NPSC USF Order*. The district court acknowledged that the *Vonage Preemption Order* had not

"expressly addressed" the states' authority to impose state universal-service contribution requirements on interconnected VoIP providers. 543 F. Supp. 2d at 1067. The district court nonetheless concluded that the *NPSC USF Order* was preempted because "it is impossible [for Vonage] to distinguish between interstate and intrastate calls." *Id.* at 1068. Citing this Court's decision in *MPUC* affirming the *Vonage Preemption Order*, the district court stated that "[t]here is not a shred of evidence that takes this case outside the 'impossibility exception.'" *Id.* at 1068.

The district court gave no weight to the FCC's decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund; the district court simply stated that the *VoIP USF Order* "does not negate the fact that there is no way to distinguish between interstate and intrastate [VoIP] service." *Id.* at 1067. In addition, although the district court recognized that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service," *id.* at 1065, the court dismissed the relevance of the *VoIP USF Order* by stating that it does not "affect the characterization of VoIP service as an information service," *id.* at 1067.

SUMMARY OF ARGUMENT

The district court erred when it concluded that Vonage was likely to succeed on its claim that the *NPSC USF Order* was preempted under the rationale of the *Vonage Preemption Order*. Unlike the state regulations at issue in the *Vonage Preemption Order*, Nebraska's decision to require interconnected VoIP providers to contribute to the state's universal-service fund does not frustrate any federal rule or policy. Rather, the *NPSC USF Order* is fully consistent with the FCC's conclusion in the *VoIP USF Order* that requiring interconnected VoIP providers to contribute to the federal universal-service fund would serve the public interest.

Moreover, the NPSC's methodology for calculating the amount of interconnected VoIP revenue that is intrastate in nature does not conflict with the FCC's contribution rule. Rather, the NPSC's methodology mirrors the FCC's rule, thereby ensuring that Vonage will not be required to classify as intrastate any revenue that would be classified as interstate under the FCC's contribution rule.

Finally, this Court need not – and should not – address the regulatory classification of Vonage's VoIP service in this case. The FCC is currently considering the classification issue in the context of a comprehensive rulemaking proceeding, which is a far more appropriate forum for resolving the

technical and highly complex regulatory questions presented by interconnected VoIP service. Nor is it necessary for the Court to address the classification of Vonage's service in this case. The FCC's determination that interconnected VoIP providers should contribute to the federal universal-service fund shows that the *NPSC USF Order* is consistent with federal policy regardless of how VoIP services are classified under the Communications Act.

ARGUMENT

THE FCC HAS NOT PREEMPTED THE NPSC USF ORDER

In the *Vonage Preemption Order*, the FCC relied on the "impossibility exception" to preempt Minnesota's regulation of Vonage's VoIP service. Under the impossibility exception, the FCC may preempt state regulation of intrastate communications if "(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." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n*, 476 U.S. 375 n.4. With respect to the specific state regulations at issue in the *Vonage Preemption Order*, the FCC concluded that both components of this test had been met, and in *MPUC*, this Court affirmed the FCC's preemption analysis. The district court in this case concluded that this precedent compelled the conclusion that the *NPSC USF Order* was also

preempted under the impossibility exception, because Vonage still cannot accurately determine whether particular VoIP calls are interstate or intrastate in nature. *See* 543 F. Supp. 2d at 1068 ("There is not a shred of evidence that takes this case outside the 'impossibility exception.' ").

The fundamental error in the district court's preemption analysis is that it fails to consider the critical question of whether preemption is necessary to prevent the state regulation at issue from frustrating a valid federal policy objective. It is not enough to simply conclude that it is impossible to separate the interstate and intrastate aspects of the service – that is a necessary, but not a sufficient, finding to support preemption. *MPUC*, 483 F.3d at 578. A finding that state regulation would conflict with federal regulatory policies is also required. *Ibid.* In the *Vonage Preemption Order*, the FCC found that Minnesota's entry and tariff regulations of Vonage's service conflicted with the FCC's deregulatory policies applicable to the interstate component of Vonage's service. The FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional "economic regulation." *See*, *e.g.*, *Embarq Broadband Forbearance Order*, 22 FCC Rcd 19478, 19481 ¶ 5 (2007) (distinguishing "economic regulation" from universal service obligations and other "non-economic regulations designed to further important public policy

goals"). In contrast to the *Vonage Preemption Order*, the *NPSC USF Order* does not present a conflict with the FCC's rules or policies. Rather, the NPSC's decision to require interconnected VoIP providers to contribute to the state's universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC's rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska's state universal-service contribution requirement.

1. The NPSC's decision to require interconnected VoIP providers to contribute to the state universal-service fund does not frustrate federal policy objectives, but, in fact, promotes them. In the *VoIP USF Order*, the FCC explained that it would be in the public interest to require interconnected VoIP providers to contribute to 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." *VoIP USF Order*, 21 FCC Rcd at 7540-41 ¶ 43. The Commission also found that requiring such contributions would promote competitive neutrality by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Id.* at 7541 ¶ 44. Both of these considerations apply with equal

force to the NPSC's decision in this case. Vonage benefits from the state's universal-service program because its customers in Nebraska (and elsewhere) undoubtedly value the ability to place calls to and receive calls from those in Nebraska who continue to rely on the PSTN for their telephony services. The *NPSC USF Order* also promotes competitive neutrality by ensuring that the burden of supporting universal service in Nebraska does not fall solely on Vonage's voice telephony competitors.

The NPSC's rule for determining the revenue base upon which the state's contribution requirements are assessed is also consistent with the FCC's contribution rules. The NPSC does not assess universal-service charges on any revenue deemed interstate; payments into the state fund are based solely on revenue deemed intrastate (which is, in turn, excluded from the interstate revenue base under the FCC's contribution rules). Nor does the NPSC require interconnected VoIP providers to classify as intrastate any revenue that the provider classifies as interstate under the FCC's rules. If an interconnected VoIP provider relies on the FCC's safe-harbor and presumes that 64.9 percent of its revenues flow from its interstate operations, under the *NPSC USF Order* it may use the equivalent presumption that 35.1 percent of its revenues are intrastate in nature. If an interconnected VoIP provider prepares a traffic study for the purpose of calculating its federal universal-service contribution, under

the *NPSC USF Order* it may use the same traffic study to calculate its corresponding state universal-service payment.[2] The third possibility – that an interconnected VoIP provider develops the ability to accurately distinguish interstate from intrastate calls – similarly ensures that interstate and intrastate revenue bases remain distinct. Thus, this is not a case in which preemption is necessary because the state has adopted an "allocation of [revenue] different from the allocation set forth" in the FCC's rules. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986). Rather, here, there is no possibility that an interconnected VoIP provider will be forced to pay into

[2] After the NPSC issued the *NPSC USF Order*, the D.C. Circuit invalidated the requirement that an interconnected VoIP provider obtain the FCC's preapproval before relying on a traffic study to calculate its federal universal-service contribution. *Vonage Holdings Corp. v. FCC*, 489 F.3d at 1243-44. Accordingly, the FCC no longer enforces the preapproval requirement against interconnected VoIP providers. For purposes of the conflict analysis in this brief, we assume that the NPSC would interpret the *NPSC USF Order*'s reference to an "FCC-approved traffic study" to mean a traffic study that the FCC allows an interconnected VoIP provider to use to calculate its federal universal-service contribution, regardless of whether the FCC has "preapproved" the traffic study.

Nebraska's universal-service fund on the basis of the same revenues that the provider uses to calculate its federal universal-service contribution.[3]

In sum, because the *NPSC USF Order* is not "inconsistent with the Commission's rules to preserve and advance universal service," 47 U.S.C. § 254(f), the district court erred in concluding that Vonage was likely to prevail on the merits of its preemption argument in this case.

2. The district court suggested that Vonage's preemption argument would likely prevail because interconnected VoIP service should be classified as an information service under the Communications Act. 543 F. Supp. 2d at 1067. The district court acknowledged that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service." *Id.* at 1065. The district court suggested, however, that the information-service classification was compelled by this Court's decision in *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (*Vonage*).

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[3] The assertion by Vonage that our 2006 letter to the Court undermines the NPSC's rule, *see* Vonage Br. at 26-27, is wrong. The letter means what it says. A safe-harbor percentage proxy is useful for approximating the interstate (and hence intrastate) revenues needed to calculate universal-service contributions; it is not in and of itself useful for classifying particular traffic, which would be necessary for state and federal entry and tariffing policies to coexist.

Contrary to the district court's view, this Court did not consider the classification of Vonage's VoIP service in *Vonage*. In that case, this Court reviewed a Minnesota district-court decision that had concluded that Minnesota's regulation of Vonage's VoIP service – the same regulations at issue in the *Vonage Preemption Order* – was preempted because Vonage provided an information service under the Communications Act. *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. Civ. 03-5287 (MJD/JG), 2004 WL 114983 (D. Minn. Jan 14, 2004) . After the district court had issued its decision, the FCC released the *Vonage Preemption Order*, which preempted Minnesota's regulations under the impossibility exception without regard to the regulatory classification of VoIP service. Because the "the FCC's order preempting [Minnesota's regulation] dispositively support[ed] the District Court's [judgment]," and was immune from "collateral attack[]" in an appeal from that judgment, this Court "affirmed the judgment of the district court on the basis of the FCC Order." 394 F.3d at 569. The Court accordingly had no occasion to address the merits of the district court's characterization of Vonage's service as an information service under the Communications Act.

Nor should the Court attempt to resolve the regulatory classification of Vonage's service in this case. Questions of regulatory classification are inherently "technical, complex, and dynamic," and the "Commission is in a far

better position to address these questions than [the courts] are." *National Cable and Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005). Premature adjudication of this issue by the courts would impinge on the FCC's statutory responsibility to interpret and implement the Communications Act and could create significant confusion and uncertainty in the regulated community.

Moreover, it is unnecessary for this Court to address the classification of interconnected VoIP service in order to resolve the preemption question presented in this case. The FCC's decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund did not turn on the regulatory classification of VoIP services. Accordingly, even if interconnected VoIP services are information services under the Communications Act, the *NPSC USF Order* would be consistent with federal policy for the reasons discussed above. The regulatory classification of interconnected VoIP service simply has no bearing on the conflict analysis at issue in this case.

CONCLUSION

The Court should reverse the district court's preliminary injunction in this case.

Respectfully submitted,

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IN THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC.,	)	
PLAINTIFFS-APPELLEES,	)	
V.	)	
NEBRASKA PUBLIC SERVICE COMMISSION ET AL.,	)	NO. 08–1764
DEFENDANTS-APPELLANTS.	)	

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1. This brief complies with the type volume limitation in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 3989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2003.

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