

Telecommunications Alert: Two State PSCs Ask FCC to Formally Rule That State Universal Service Fund Assessments on VoIP Services Are Legitimate

8/7/2009

The Nebraska Public Service Commission and the Kansas Corporation Commission (the PSCs) recently filed a joint petition asking the FCC to declare that states are not preempted from assessing state universal service fund (USF) fees on providers of nomadic voice over Internet protocol (VoIP) services.¹ The petition follows closely behind a May 2009 Eighth Circuit ruling that applied the FCC's 2004 *Vonage Order*² to preempt the Nebraska PSC's attempt to apply a state USF charge to Vonage's nomadic VoIP service.³

The Eighth Circuit ruling upheld a preliminary injunction, issued by the district court, prohibiting the Nebraska PSC from assessing state USF fees on Vonage.⁴ The district court this week granted a petition to convert the preliminary injunction to a permanent injunction, with an understanding that the permanent injunction does not preclude the PSC from seeking "relief from the permanent injunction order ... by requesting modification or dissolution in the event of changed circumstances"—likely a reference to a future FCC ruling on the Nebraska and Kansas petition for declaratory ruling. In its May ruling, the Eighth Circuit stated that the FCC, "and not state commissions, has the responsibility to decide if such regulations will be applied."⁵ The Nebraska and Kansas petition now asks the FCC to so decide.

An *amicus curiae* brief filed by the FCC General Counsel's Office with the Eighth Circuit court prior to its decision in May asserted that there was no conflict between the FCC's *Vonage Order* and state assessment of USF fees on intrastate VoIP service revenues. Vonage argued that the FCC brief did not necessarily reflect the position of the full Commission, merely its General Counsel, and the Eighth Circuit did not mention the General Counsel's brief in its decision.

The two PSCs ask the FCC to affirm officially the opinion expressed in its General Counsel's *amicus* brief that there is no conflict between *state* assessment of USF fees on *intrastate* revenues of nomadic VoIP services and *federal* assessment of USF fees on *interstate* revenues of the same VoIP service. Because the Eighth Circuit recognized the FCC's authority to decline to preempt state USF assessments, the PSCs claim that their requested declaratory ruling would not conflict with the circuit court's order. The PSCs also claim the FCC "need not and should not limit the requested declaratory ruling to prospective only effect."

Broader Ruling on State Flexibility in USF Assessments Sought

In addition to a ruling rejecting preemption, the PSCs ask the FCC to declare that states have discretion to adopt any mechanism for state USF assessments that does not assess *interstate* revenues, and that ensures no VoIP service provider is assessed by more than one state on the same *intrastate* revenues. At the same time, Nebraska and Kansas ask the FCC to establish a “safe harbor” assessment mechanism that states could elect to use “without fear of preemption litigation.” Should their request on assessment methods require a rulemaking proceeding, the PSCs ask the FCC to act separately to issue, right away, a declaratory ruling allowing assessment of state USF fees, so as not to delay clarity for states on that issue.

The FCC will likely seek comments from interested parties prior to any ruling on this petition, but it has yet to establish a schedule for such comments.

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Please contact your Mintz Levin telecommunications attorney, or any attorney listed in the left column of this Alert, for more information as we continue to follow these developments.

Endnotes

¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122, Petition for Declaratory Ruling of the Nebraska Public Service Commission and the Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues (filed July 16, 2009).

² *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004), *aff'd sub nom*, *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

³ *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009).

⁴ See our [prior Telecommunications Alert](#) dated May 5, 2009.

⁵ *Id.* at 905.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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