

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners

Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

In the Matter of the Investigation to)
Address Obligations of VoIP Providers) Docket No. 07-GIMT-432-GIT
With Respect to the KUSF)

COMMENTS OF THE VON COALITION

The VON Coalition¹ hereby files these comments in the above-captioned proceeding. In the *Order Opening Docket, Assessing Costs, and Soliciting Comments* (“*Order*”), the State Corporation Commission of the State of Kansas (the “Commission”) opened an investigation to consider whether providers of interconnected Voice over Internet Protocol (“VoIP”) service should be required to contribute to the Kansas Universal Service Fund (“KUSF”). Because the Commission is considering applying its rules to VoIP services, which the Federal Communications Commission (“FCC”) has declared to be inherently interstate services, the VON Coalition urges the Commission to carefully consider whether its considered extension of KUSF contribution obligations to VoIP providers would be consistent with federal law.

¹ The Voice on the Net, or VON Coalition consists of leading VoIP companies on the cutting edge of developing and delivering voice innovations over the Internet. The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the full promise and potential of VoIP. The Coalition believes that with the right public policies, Internet-based voice advances can make talking more affordable, businesses more productive, jobs more plentiful, and the Internet more valuable. More information on the VON Coalition is available at www.von.org. The following VON Coalition members were identified on Attachment A to the Commission’s *Order*: AT&T, Inc., Covad Communications Company, EarthLink, Inc., Skype, and Yahoo!, Inc. The VON Coalition makes no representations as to the accuracy of Attachment A.

In addition, the Commission should refrain from attempting to regulate VoIP services by imposing KUSF obligations on them until the resolution of pending court proceedings addressing issues of federal preemption of state VoIP regulation. If the Commission nonetheless decides to adopt rules extending KUSF contribution obligations on VoIP providers before the issues of federal preemption are resolved, the VON Coalition urges the Commission to maximize consistency between federal and state regulatory regimes and apply its rules *only* to “interconnected VoIP services,” as that term is defined by the FCC.² And even then, consistent with the Commission’s jurisdiction over intrastate telecommunications services, KUSF should be extended only to the *intrastate* portion of a provider’s “interconnected VoIP” revenues from such services that permit users to receive call from and terminate calls to the PSTN offered to the public for a fee, and only where providers have deployed technologies that can track actual traffic VoIP calls – interstate vs. intrastate.³

² See 47 C.F.R. §§ 9.3, 54.5.

³ This is consistent with the limited exemption to federal jurisdiction that the FCC seemed to imply for interconnected VoIP services in its *VoIP USF Order* for those VoIP providers who have developed the technology to track interstate vs. intrastate VoIP calls. As the FCC stated:

Alternatively, 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. Under this alternative, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.

Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7158, ¶ 36 (2006), appeal pending sub. nom. Vonage Holdings Corp. v. FCC, Case No. 06-1276 (D.C. Cir.) (“VOIP USF Order”) (emphasis added).

I. THE COMMISSION SHOULD REFRAIN FROM ATTEMPTING TO REGULATE VOIP SERVICES PENDING THE OUTCOME OF ONGOING COURT PROCEEDINGS ADDRESSING FEDERAL PREEMPTION OF VOIP

It would be prudent for the Commission to refrain from applying state telephone regulation to VoIP pending the outcome of ongoing court proceedings addressing federal preemption of state regulation of VoIP, or further guidance from the FCC on the universal service obligations of VoIP services.⁴ Doing otherwise would be an inefficient use of resources on the part of the Commission and the various parties with interests in the Commission's proposals, and could lead to significant customer confusion, since any steps taken to regulate providers of VoIP services will be affected by these judicial proceedings as well as any subsequent FCC proceedings that may occur in response to the judicial proceedings. While there are no ongoing court proceedings in the Tenth Circuit that would directly impact Kansas state regulations⁵, there is no good policy reason for the Commission to stray from the legal decisions arrived at in other jurisdictions.

II. THE COMMISSION LACKS SUFFICIENT AUTHORITY TO EXTEND KUSF CONTRIBUTION REQUIREMENTS TO VOIP

The Commission seeks comments on, “[t]he Commission’s statutory authority to require VoIP providers to contribute to the KUSF.”⁶ The VON Coalition believes that the Commission lacks statutory authority to do so based both on state and federal law. At

⁴ See, e.g., *Minnesota Pub. Utils. Comm’n v. FCC*, (Case No. 05-1069) (8th Cir.); *IP-Enabled Services*, Notice of Proposed Rulemaking, FCC 04-28, 19 FCC Rcd 4823, ¶ 41 (2004) (seeking comment on state role in regulating IP-enabled services).

⁵ *Id.* The VON Coalition also calls the Commission’s attention to pending litigation over the Missouri Public Service Commission’s jurisdiction over VoIP providers. See *Comcast IP Phone, LLC, et al. v. The Missouri Public Service Comm’n, et al.*, Case No. 2:06-cv-04233-NKL (Western Mo. D. Ct.) (filed Oct. 10, 2006). A decision in that litigation would be appealed to the Eighth Circuit.

⁶ Order Opening Docket, Assessing Costs, and Soliciting Comments at 4 (Nov. 2, 2006) (“Order”).

the outset, the Kansas Telecommunications Act does not contain any explicit reference to the extension of the KUSF to VoIP providers.⁷ Further, VoIP does not fall within the categories of entities or services subject to the KUSF contribution scheme. More specifically, section 9(b) of the Kansas statute extends KUSF contribution eligibility to “telecommunications carriers,” “telecommunications public utilities,” and “wireless telecommunications service providers” providing “intrastate telecommunications services.”⁸ The FCC has not resolved the threshold question of whether VoIP services are “telecommunications services.” Indeed, even in extending the federal USF regime to interconnected VoIP providers, the FCC declined to find that VoIP services are telecommunications services. It relied instead on its so-called “ancillary jurisdiction” and section 254(d) of the Communications Act, as amended, which permissively extends the federal USF scheme to “other providers of interstate telecommunications.”⁹ The Kansas statute does not contain a similar opportunity to evade the threshold classification issue.

Extending the KUSF to VoIP is also prohibited under federal law. In November 2004, the FCC released the *Vonage Order* in which it preempted an order of the Minnesota Public Utilities Commission applying its traditional “telephone company” regulations to VoIP services offered by Vonage.¹⁰ The *Vonage Order* recognized that

⁷ See K.S.A. 66-2008 (1996).

⁸ See *id.* (b).

⁹ See *VOIP USF Order* ¶ 35.

¹⁰ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd 22404 (2004) (“*Vonage Order*”).

innovative and evolving services such as VoIP should not be subject to a patchwork of state regulations such as those proposed by the Minnesota PUC that would directly conflict with the goals of the Act and the FCC's pro-competitive deregulatory rules. The FCC also made clear that preempting state regulation of VoIP services was essential to "increase investment and innovation in [VoIP services] to the benefit of American consumers."¹¹ The FCC has recently indicated that nothing in its subsequent decisions to apply limited federal rules to VoIP services undermines its holding in the *Vonage Order*.¹²

The FCC's decision has been appealed by the Minnesota PUC, and the United States Court of Appeals for the Eighth Circuit is currently considering the appeal.¹³ The outcome of this legal proceeding undoubtedly will address significant issues relating to the continued federal preemption of state regulation of VoIP services. Therefore, the Commission should refrain from applying any of its regulations (including extending KUSF contribution requirements) to providers of VoIP services until the Eighth Circuit releases its decision, or, at the very least, stay any action with respect to VoIP until such time. This course of action would be most prudent because the Eighth Circuit's decision may render the Commission's actions inconsistent with that court's eventual decision. On the other hand, waiting until the ongoing Eighth Circuit litigation is decided (the decision is considered imminent) would be an efficient use of the Commission's resources.

¹¹ *Vonage Order*, ¶ 2.

¹² See Letter from Nandan M. Joshi, Federal Communications Commission counsel, to Michael E. Gans, Clerk, U.S. Court of Appeals for the Eighth Circuit, *Minnesota Pub. Util. Comm'n et al. v. FCC*, No. 05-1069, at 1 (July 11, 2006).

¹³ See n. 4, *supra*.

The dicta in the FCC's order extending the federal USF contribution scheme to interconnected VoIP does not provide a sufficient source of authority to extend the KUSF contribution scheme to VoIP. In the *VoIP USF Order*, the FCC suggested that interconnected VoIP providers with the ability track the jurisdictional confines of customer calls could be subject to state regulation.¹⁴ Commission reliance on this suggestion as a basis for exercising jurisdiction here would be imprudent. First, the FCC reached no conclusions on the actual ability of VoIP providers to discern the jurisdictional confines of customer calls. Although the Commission is attempting to do so here, it is likely to find that there is no consistent across-the-board answer that would suffice to justify immediate extension of the KUSF to VoIP providers as a class. Second, the FCC did not make a mandatory determination regarding VoIP providers being subject to state authority. Even if a VoIP provider had the ability to know the jurisdictional confines of its customers' calls, under the FCC's *VoIP USF Order*, that provider could still elect to participate in the federal USF program using the "safe harbor" or a traffic study and avoid state regulation. This would result in a situation where VoIP providers would be treated disparately and in an arbitrary and capricious manner.

III. THE COMMUNICATIONS ACT RESTRICTS THE COMMISSION'S JURISDICTION OVER INHERENTLY INTER-STATE VOIP SERVICES

Section 2 of the Communications Act of 1934 gives the FCC exclusive jurisdiction over all "interstate and foreign communication" and limits to the states jurisdiction over intrastate services.¹⁵ This bedrock jurisdictional principle has been an integral part of communications regulation, and recognizes that while states do maintain

¹⁴ See *VoIP USF Order* at ¶ 56; n. 3, *supra*.

¹⁵ 47 U.S.C. § 152.

an important role in regulating public utilities, many communications services are inherently interstate in nature and are better addressed at the federal level. Consistent and predictable federal regulation, rather than a patchwork of 50 different state regulations, gives affected companies the regulatory certainty needed to plan and invest in their networks and provide innovative services to customers.

IV. THE FCC CONCLUDED THAT VOIP PROVIDERS CANNOT TELL WHETHER A PARTICULAR CALL IS INTERSTATE OR INTRASTATE

The Commission asks for comments on, “[t]he ability of VoIP providers to identify local and interstate traffic.”¹⁶ In the *Vonage Order*, the FCC correctly concluded that VoIP is inherently interstate in nature¹⁷ and that VoIP providers have “no means of directly or indirectly identifying the geographic location” of the party using their service via an Internet connection. Thus, under the FCC’s traditional “end-to-end” analysis – which defines calls as interstate or intrastate based on the location of the two parties to the call – given the uncertainty of nomadic endpoints, any allocation of traffic to the intrastate or interstate jurisdiction would be arbitrary and capricious and at odds with the “inherently interstate” nature of nomadic VoIP traffic.¹⁸

While it is of course true that VoIP may be used to initiate intrastate communications, this fact alone is not dispositive or even particularly useful when determining the appropriate jurisdiction for VoIP. Numerous factors, such as the routing of packets, mobility of users, concurrent access to applications residing on servers in other jurisdictions, and multi-participant communications make it next to impossible, and

¹⁶ *Order* at 4.

¹⁷ *Vonage Order*, ¶¶ 23-32.

¹⁸ *See id.* ¶¶ 15-21.

certainly unworkable, for VoIP providers to determine whether communications are intrastate or interstate. A significant difference between many VoIP applications and traditional telephone communications, both with respect to utility to users and jurisdictional classification, is that VoIP services are often nomadic in nature. For example, VoIP products, such as Skype, are nothing more than software which resides on a user's computer, making the "service" as nomadic as the user, accessible from coffee shops, airport WiFi networks, and internet cafes around the world without the use of any centralized resources.

The FCC's factual conclusion that VoIP providers cannot determine the location of their customers is consistent with a long line of prior FCC reports and orders addressing IP-based communications, judicial decisions addressing the Internet, and the record in the *Vonage Order*. For example, in a Notice of Proposed Rulemaking issued eight months before the *Vonage Order*, the FCC carefully summarized its prior findings regarding VoIP services and explained why the Internet is fundamentally different than traditional telephone networks.¹⁹ As the FCC explained, the Internet is actually a global "network of networks," and the "hundreds of thousands" of networks that make up the Internet are "owned and operated by hundreds and thousands of people" (e.g., universities, corporations, and communications providers such as AT&T and Comcast).²⁰ When an Internet user moves to a new geographic location, he or she reconnects to a different local network. The new network, which is "constantly communicating with the other" networks that make up the Internet, informs the other networks that it will now

¹⁹ See *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863, ¶¶ 8-22, 28-34 (2004) ("*IP-Enabled Services NPRM*").

²⁰ See *id.*, ¶ 8 n.23.

accept packets intended for that user.²¹ But this updated information does not reveal to the VoIP provider the user's new physical location – only that he or she is connected to a new network.²² In many cases, the operator of the specific network will not even know the physical location of the end user, only which transmission path to send the packet down in order to reach that end user. As ably summarized by a district court in the Second Circuit, the net result is that:

The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have “addresses,” they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even where an Internet address provides such a clue, it may be misleading.²³

Even if the operator of the local network has some indication of the physical location of the end user, the VoIP provider itself does not have any way to acquire this information.²⁴ This point was made especially clearly in the FCC's *Pulver Order*, which explained that Internet-based services are inherently “portable” and that VoIP providers cannot “determine the actual physical location of an underlying IP address.”²⁵ Customers can use applications to conduct voice conversations only because they have independent access to transmission capabilities provided by the separate networks that constitute the

²¹ *Id.* (describing “routing configuration tables”).

²² *Id.*

²³ *American Libraries Ass'n v. Pataki*, 969 F.Supp 160, 170-171 (S.D.N.Y. 1997) (cited by *Vonage Order* at n. 94).

²⁴ See *IP-Enabled Services NPRM*, ¶ 15.

²⁵ *Petition for a Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, ¶¶ 21-22 (2004) (“*Pulver Order*”).

Internet. But that does not change the fact that the VoIP provider may offer a nomadic services without fixed endpoints.²⁶

Moreover, a VoIP user's telephone numbers cannot be used to determine the jurisdictional endpoints of a call because VoIP providers often allow customers to pick a telephone number from a variety of area codes across the United States. As VoIP technology and applications continue to evolve, additional features and services will make geographic distinctions even more irrelevant, and state regulation of "intrastate" VoIP communications that much more inappropriate. Given the nomadic nature of many VoIP applications, telephone numbers are an arbitrary and inaccurate proxy for intrastate jurisdiction.

As discussed above, the FCC's *VoIP USF Order* does not provide a basis for conclusively determining that some or all VoIP providers are readily able to accurately identify the jurisdictional nature of their traffic. In its *VoIP USF Order*, the FCC did not make any broad conclusions regarding the ability of VoIP providers to track the jurisdictional confines of customer calls; it merely opined on what might happen "to the extent that" it occurred. Indeed, the FCC currently has an open proceeding addressing the issue.²⁷ The Commission should not duplicate efforts. Further, to the extent that the FCC has not made any conclusive determinations, and to the extent that the FCC's USF scheme theoretically allows each VoIP provider to essentially opt in or opt out of state regulation depending on whether or not they use the FCC's "safe harbor" or a traffic study, the Commission should not make determinations regarding the extension of its

²⁶ *Id.*

²⁷ See *VoIP USF Order* ¶ 69 (asking the very same question in the Notice of Proposed Rulemaking accompanying the Order).

KUSF contribution scheme to VoIP providers due to the potentially inequitable and arbitrary results that would occur.²⁸

V. TO THE EXTENT THE COMMISSION ATTEMPTS TO REGULATE VOIP, IT SHOULD NOT ESTABLISH REGULATORY CATEGORIES DIFFERENT FROM THOSE ESTABLISHED BY THE FCC

In opening its investigation to consider whether providers of interconnected VoIP service should be required to contribute to the Kansas Universal Service Fund, the Commission used the same definition of “interconnected VoIP service” as that used by the FCC.²⁹ Specifically since issuing the *Vonage Order*, the FCC has applied limited federal rules to “interconnected VoIP” which the FCC defined as those services that:

- (1) enable real-time, two-way voice communications;
- (2) require a broadband connection from the user’s location;
- (3) require IP-compatible customer premises equipment; and
- (4) permit users to receive calls from *and* terminate calls to the PSTN.³⁰

The FCC’s definition of “interconnected VoIP” recognizes that a variety of different VoIP products and services are available to consumers, and seeks to apply federal rules only to those that are more similar to “traditional” telephone service. For example, VoIP products such as Skype, Yahoo! Messenger, and Google Talk are software products more akin to an Instant Messaging program, and fall outside the definition of “interconnected VoIP.” However, The Commission listed each of these companies in Attachment A to the *Order*. The Commission acknowledged that it had not verified whether Attachment A accurately represented the list of providers subject to the

²⁸ The VON Coalition does not believe that the FCC’s extension of E911 requirements to interconnected VoIP provides an adequate basis for concluding that the jurisdictional nature of VoIP calls can be readily ascertained for KUSF or other state regulatory purposes.

²⁹ *KCC Order* at 1.

³⁰ *VoIP USF Order* ¶ 36.

Commission's jurisdiction. None of these companies provide “interconnected VoIP service,” as defined by the Commission and the FCC, because, *inter alia*, they do not provide a service that permits users to receive calls from *and* terminate calls to the PSTN.

The FCC has acknowledged that non-interconnected communications that exist entirely on the Internet or provide only limited, one-way service to the PSTN, fall outside the definition of “interconnected VoIP service.”³¹ This position is supported by an earlier FCC order regarding pulver.com’s free world dial-up service – which enables users to make VoIP calls and send text messages between PCs that do not originate/terminate on the PSTN – in which the FCC held that this type of VoIP was “an unregulated information service that is subject to Commission jurisdiction.”³² Specifically, the FCC held that the Internet application provided by pulver.com that enabled users to transmit voice or text over the Internet was not a “telecommunications service” nor “telecommunications” under the Communications Act, and was subject to its jurisdiction as an information service.³³ Thus, Internet applications provided by Yahoo, Skype, Google, and others that permit PC-to-PC VoIP and text communications are information services subject to exclusive federal jurisdiction, and the Commission has no authority to assess state universal service fees on such services. Non-interconnected VoIP providers are not subject to FCC rules applicable to providers of interconnected VoIP service and

³¹ The FCC has pending proceedings asking whether it should subject one-way PSTN interconnected VoIP services to E-911 and CALEA. Its current orders do *not* do so. *See In re Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First R&O and Further NPRM, 20 FCC Rcd 14989 ¶ 48 (2005); *IP-Enabled Services NPRM* at ¶ 58. Thus, it would be improper for the Commission to consider subjecting one-way VoIP services to any state mandates, including universal service, before the FCC has acted in these proceedings.

³² *Pulver Order* at ¶¶ 1, 8.

³³ *See id.*

are also not subject to the Commission's jurisdiction. The VON Coalition believes that the Commission did not intend to change settled law by exercising jurisdiction over providers of non-interconnected VoIP service.

On the other hand, providers of "interconnected VoIP" service have taken and continue to take steps to comply with applicable FCC regulation of their service offerings. The VON Coalition believes that the FCC has preempted state telecommunications regulation of "interconnected VoIP" services.³⁴ Nevertheless, to the extent that the Commission decides to rely on its jurisdiction over intrastate telecommunications services to adopt regulations applying to VoIP services before the issues of federal preemption are resolved, it should maximize consistency between federal and state regulatory regimes and apply its rules only to the intrastate portion of a provider's "interconnected VoIP services" to the extent a provider is capable of identifying such intrastate portion of its service. That means only intrastate interconnected VoIP services that are substitutes for traditional telephone services offered to the public for a fee that permit users to receive calls from and terminate calls to the public switched telephone network. Doing otherwise would create a crazy quilt of federal and state regulation in which the same service would be subject to regulation in some jurisdictions but would be exempt in others, would also potentially improperly infringe upon FCC jurisdiction to regulate such VoIP services, and would result in significant customer confusion.

³⁴ See generally *Vonage Order*.

VI. USE OF THE FCC'S 64.9% SAFE HARBOR DOES NOT PROVIDE STATE JURISDICTION FOR THE NON-SAFE HARBOR TRAFFIC

The Commission also seeks comments on “[w]hether any decision by the Commission to require contributions should differ based on whether a provider adopts the FCC’s safe harbor or utilizes another method to calculate traffic.”³⁵ The FCC’s *VOIP USF Order* provided interconnected VoIP providers with three alternatives for reporting their interstate telecommunications revenues³⁶: (1) reliance on pre-approved traffic studies; (2) reliance on a safe harbor to calculate its traffic; or (3) only “*to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls,*” an interconnected VoIP provider may contribute based on actual revenues, in which case an Interconnected VoIP provider may “*no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.*” Only scenario #3, and where a VoIP provider has developed the capability to track the jurisdictional confines of a call, and contribute based on actual revenues rather than the use of a safe harbor or traffic study, are the preemptive effects of the *Vonage Order* potentially lifted. According to the FCC, under this scenario, only those individual providers who have the capability to track *intrastate* call revenues would potentially be subject to state jurisdiction, and even for such providers, their other interstate and international revenues would *not* be subject to state jurisdiction.³⁷ So, the Commission does not have the authority to require all VoIP providers to contribute to the KUSF. Only where the technology has developed and where a provider can measure actual intrastate

³⁵ *Order* at 4.

³⁶ *See VOIP USF Order*, ¶ 56 (emphasis added).

³⁷ *See supra* n. 3.

traffic call flows, can the Commission attempt to assert jurisdiction to impose state universal service fees for that class of provider.³⁸

The Commission should not consider the inverse of the FCC’s “safe harbor” (*i.e.*, 35.1%) to be an accurate indication of intrastate VoIP traffic for purposes of the KUSF. The VON Coalition notes that the FCC is already in the process of considering changes to its VoIP “safe harbor”.³⁹ Also, the VON Coalition is currently a party to the appeal of the FCC’s *VOIP USF Order* and believes that the safe harbor established by the FCC is arbitrary and capricious. Accordingly, the VON Coalition believes that the Commission should not rely upon the FCC’s safe harbor as any gauge of jurisdiction or any basis for developing a state USF contribution framework. With the “safe harbor” in such a state of flux, it would be clearly unwise for the Commission to adopt a KUSF contribution scheme using the inverse of the FCC’s “safe harbor” as its basis. Also, as discussed above, allowing KUSF contribution obligations to differ based on technological capability and whether a provider adopts the FCC’s safe harbor or utilizes another method would create inequitable and likely arbitrary results.

In the event that the Commission elects to move forward with imposing KUSF contribution obligations on VoIP providers, however, the Commission should not impose any requirement, contribution methodology, or contribution calculation that would be inconsistent with the framework imposed by the FCC.

³⁸ Given the FCC’s *VoIP USF Order*, including its authority to subject interconnected VoIP to federal USF, is under appeal, it would be premature for the Commission to act in this proceeding until the court proceedings have been completed.

³⁹ *See id.* ¶ 69.

