

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission) Application No. NUSF-1
on its own motion, seeking to)
establish guidelines for) PROGRESSION ORDER NO. 18
administration of the Nebraska)
Universal Service Fund.) Entered: September 26, 2006

BY THE COMMISSION:

O P I N I O N A N D F I N D I N G S

The Nebraska Public Service Commission (Commission) initiates this proceeding, pursuant to *Neb. Rev. Stat. § 75-118.01* (Reissue 2003) to interpret the scope of existing Commission rules and regulations as they pertain to telecommunications carriers in Title 291, Chapter 10, Nebraska Universal Service Fund (NUSF) Rules and Regulations. State law provides that,

Except as otherwise provided in the Administrative Procedures Act, the commission shall have original exclusive jurisdiction to determine the validity of a rule or regulation and the scope of meaning of a certificate, permit, tariff, rule, or regulation.¹

The Commission has adopted definitions for telecommunications, telecommunications service and telecommunications companies in its NUSF rules and regulations.²

On March 22, 2005, the Commission issued its Findings and Conclusions in NUSF-40. The Commission found that facilities-based VoIP providers were subject to the Commission's contribution requirements. The Commission found VoIP providers provided a telecommunications service as defined in *Neb. Rev. Stat. § 86-323* (2004 Cum. Supp.) and the Commission's NUSF rules and regulations in Neb. Admin. Code Title 291, Chapter 10, Section 1.01X. The Commission further found that such VoIP providers may utilize the FCC safe harbor, used for wireless carriers to determine the intrastate/interstate allocation for determining how much revenue should be considered intrastate.

The Commission's findings in that proceeding were appealed by Qwest Corporation. The Commission and the parties to the appeal entered into a stipulation which modified in part, the Commission's findings in NUSF-40 as it relates to the

¹ *Neb. Rev. Stat. § 75-118.01* (Reissue 2003).

² See Neb. Admin. Code Title 291, Chapter 10, Sections 01.001V, 01.001W, and 01.001X.

Commission's specific finding that Qwest Corporation offered facilities-based VoIP service. The stipulation also provided that the Commission's Order in NUSF-40 would remain in effect pending a contemplated investigation by the Commission to determine the extent to which facilities-based VoIP providers should be required to contribute to the NUSF.

On June 27, 2006, the Federal Communications Commission (FCC) released an interim order finding in pertinent part that interconnected VoIP service providers provide "telecommunications."³ The interim order became effective July 10, 2006. The FCC did not specifically classify VoIP providers as telecommunications carriers or as information service providers in its order. Rather, that question has been reserved and is the subject of further proceedings.

In addition, the FCC determined that it should establish a safe harbor for universal service fund contributions. Interconnected VoIP providers as defined by FCC rules⁴ are by virtue of the FCC's order required to contribute to the federal universal service fund. Interconnected VoIP providers may use a safe harbor established by the FCC which is 64.9 percent, thereby considering 64.9 percent of their calls interstate in nature. Or, in the alternative, interconnected VoIP providers may develop a means to specifically determine the interstate/intrastate nature of calls. The FCC's order has been appealed to the D.C. Circuit Court of Appeals.

In the present investigation, the Commission seeks carrier input on a proposal to adopt the FCC's finding that interconnected VoIP providers provide "telecommunications" and are therefore required to contribute to universal service mechanisms, and specifically, to the NUSF. *Neb. Rev. Stat. § 86-323* states that "all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."

³ See In the Matter of Universal Service Contribution Methodology, WC Docket No. 06-122, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) ("Contribution Order").

⁴ Interconnected VoIP provider is defined in 47 C.F.R. § 54.5 as an entity that provides interconnected VoIP service, as that term is defined in section 9.3 of the FCC's rules. 47 C.F.R. § 9.3 provides that an interconnected VoIP service is "a service that (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network."

The Commission proposes to apply its definition of "telecommunications service" used in Neb. Admin. Code Title 291, Chapter 10, Section 01.01X, to interconnected VoIP carriers. Further, although the FCC declared that interconnected VoIP service was interstate in nature,⁵ the Commission interprets the FCC's adoption of the safe harbor mechanism as similar to that adopted for wireless carriers who currently contribute to the NUSF using the FCC safe harbor allocation factor for wireless carriers.

The Commission therefore seeks input on a proposed requirement that interconnected VoIP providers offering service in Nebraska to contribute to the NUSF based on the FCC's safe harbor allocation factor adopted in the Contribution Order. In its rules and regulations, the Commission adopted an allocation rule which provides in part that

002.01D1b: When the intrastate portion of a joint use service charge cannot be determined or if such determination would result in an undue administrative burden, a telecommunications company may request that the Commission approve an allocation factor to determine the intrastate portion of the service or may adopt any relevant FCC safe harbor provisions.

Testimony for the hearing on this matter should be filed on or before October 30, 2006. Persons filing testimony must file five (5) paper copies along with one (1) electronic copy. Electronic copies may be sent to Brandy.Zierott@psc.ne.gov. A hearing in this matter will be held on **December 5, 2006 at 1:30 p.m.** in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that testimony in this investigation may be filed on or before October 30, 2006 in the manner prescribed above.

⁵ The FCC declared the interconnected VoIP service of Vonage, known as "DigitalVoice" was interstate in nature because it determined it was practically incapable of separating intrastate traffic for compliance with Minnesota's requirements without negating the FCC's federal policies. Contribution Order, ¶ 15. However, in the Contribution Order, the FCC recognized that an interconnected VoIP provider could have or could develop the capability to track the jurisdictional nature of a call. *Id.* ¶ 57.

IT IS FURTHER ORDERED that a hearing on this investigation will be held on **December 5, 2006** at 1:30 p.m. in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska.

MADE AND ENTERED at Lincoln, Nebraska this 26th day of September, 2006.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director