

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. NUSF-1
Public Service Commission, on) Progression Order No. 18
its own motion, seeking to)
establish guidelines for) OPINION AND FINDINGS
administration of the Nebraska)
Universal Service Fund.)
) Entered: April 17, 2007

BY THE COMMISSION:

On September 26, 2006, the Nebraska Public Service Commission (Commission) entered Progression Order No. 18 seeking input from interested parties regarding the Commission's proposal to adopt a finding that interconnected VoIP service providers provide "telecommunications" and therefore are required to contribute to the state universal service mechanism and whether to require "interconnected VoIP service" providers offering service in Nebraska to contribute to the Nebraska Universal Service Fund (NUSF) based on the Federal Communications Commission's (FCC) safe harbor allocation factor adopted in the Contribution Order.

Interested parties filed testimony or comments in response to Progression Order No. 18 on or before November 17, 2006. Testimony was filed by Qwest Corporation (Qwest), the Rural Independent Companies (RIC), United Telephone Company of the West d/b/a Embarq (Embarq), Level 3 Communications LLC (Level 3), CommPartners Holding Corporation and the Commission Staff. Comments were filed by the Rural Telephone Coalition of Nebraska (RTCN), and Time Warner Cable. A public hearing was held on December 5, 2006. The pre-filed testimony and all comments were received into the record and sworn testimony was presented.

Post-hearing briefs were filed on January 19, 2007 by the RIC, Embarq, Qwest and the RTCN. Reply briefs were filed on February 2, 2007 by the Rural Independent Companies and Embarq.

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

In this Order we determine that pursuant to *Neb. Rev. Stat.* § 75-118.01, the Commission has the authority to interpret the scope and meaning of its rules and regulations and definitions found therein. We determine that the term "telecommunications" and "telecommunications service" as defined in Title 291 Neb. Admin. Code, Chapter 10 includes "interconnected Voice over the Internet Protocol" (interconnected VoIP) service providers as the term is used by the FCC. Based on our review of relevant FCC orders and case law, we determine the Commission is not preempted from requiring interconnected VoIP service providers

to contribute to the Commission's state universal service fund. We therefore conclude that interconnected VoIP service providers must contribute equitably to the state-established universal service fund. The Commission further finds that using the reciprocal of the safe harbor percentage set forth in the FCC's *USF Contribution Order* along with alternative contribution options to establish Nebraska intrastate interconnected VoIP service provider revenues subject to the NUSF surcharge does not impose a burden on the federal universal service mechanism. We therefore conclude that interconnected VoIP service providers may choose among three options for separating interstate and intrastate revenues for purposes of assessing the NUSF surcharge which are:

- 1) Use an interim safe harbor allocation of 35.1 percent of VoIP traffic as intrastate;
- 2) Use actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.

We also conclude that the customer's billing address should be used to determine the state with which to associate intrastate revenues of an interconnected VoIP service provider.

Background

In 1996 Congress altered the telecommunications landscape by opening the local exchange service market to competition. While promoting competitive markets, Congress also sought to preserve the goal of universal service as defined in 47 U.S.C. § 254. Congress directed the FCC to establish a Federal-State Joint Board to assist in implementing the universal service principles of the Telecommunications Act. These principles, in summary form, include 1) quality services should be available at just, reasonable and affordable rates 2) access to advanced telecommunications and information services should be provided in all regions of the Nation 3) consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; 4) all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service and 5) there should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service. 47 U.S.C. § 254(b).

States are provided the authority to support universal service in the 1996 Telecommunications Act (the Act). Specifically, states are permitted to "adopt regulations not inconsistent with the Commission's [FCC's] rules to preserve and advance universal service."¹ The complete text of 47 U.S.C. § 254(f) provides:

Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the state, to the preservation and advancement of universal service in that state. A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden the universal service support mechanisms.

The Nebraska Telecommunications Universal Service Fund Act (NUSF Act) authorizes the Commission to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans have comparable accessibility to telecommunications services at affordable prices.²

The NUSF Act directs the Commission to require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law.³ The term "telecommunications company" is defined in the NUSF Act as "any natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier from the commission."⁴

¹ 47 U.S.C. § 254(f).

² *Neb. Rev. Stat. § 86-317 (Cum. Supp. 2004).*

³ *Neb. Rev. Stat. § 86-324(2)(d) (Cum. Supp. 2004).*

⁴ *Neb. Rev. Stat. § 86-322 (Cum. Supp. 2004).*

Neb. Rev. Stat. § 86-325 authorizes the Commission to adopt and promulgate rules and regulations "as reasonably required" to implement and operate the NUSF. Consistent with this authority, the Commission has adopted rules to implement the NUSF Act.⁵ In doing so, the NUSF Rules define various terms including "telecommunications service" and "telecommunications." Telecommunication service is defined in the NUSF Rules as "the offering of telecommunications for a fee."⁶ Telecommunications is defined as the "transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received."⁷

The NUSF Rules also provide that the NUSF surcharge shall not be assessed on interstate telecommunications services such as the subscriber line charge.⁸ However, in cases where a charge is made to a subscriber which has both intrastate and interstate telecommunications service components, and the interstate service is not charged separately or cannot be readily determined, the NUSF surcharge applies to the total charge, unless such a determination would result in an undue administrative burden, then Commission may establish an allocation factor to determine the intrastate portion of the service or may adopt relevant FCC safe harbor provisions.⁹

By virtue of *Neb. Rev. Stat.* § 75-118.01, the Commission has the authority to interpret the scope and meaning of its rules and regulations. The Commission has exclusive jurisdiction to interpret the meaning or extent of existing rules and regulations and may do so after notice and hearing.¹⁰

The Commission has, on a previous occasion with regard to Application NUSF-40/PI-86, interpreted the terms "telecommunications" and "telecommunications service" to apply to facilities-based VoIP service.¹¹ That decision was appealed by Qwest and ultimately a stipulation was entered into between

⁵ See generally, 291 NAC Chap. 10 (the "NUSF Rules").

⁶ 291 NAC § 10.001.01X.

⁷ 291 NAC § 10.001.01V.

⁸ 291 NAC § 10.002.01D1.

⁹ 291 NAC § 10.002.01D1a and 10.002.01D1b.

¹⁰ See *In re Proposed Amendment to Title 291, Chapter 3 of Motor Carrier Rules and Regulations*, 264 Neb. 298, 646 N.W.2d 650 (2002).

¹¹ In the Matter of the Nebraska Public Service Commission, on its own motion, to determine the extent to which Voice Over Internet Protocol Services should be subject to the Nebraska Universal Service Fund requirements, Application No. NUSF-40/PI-86.

the parties and filed with the Lancaster County District Court.¹² Pursuant to the terms of the Stipulation the Commission was required to open a docket and seek comment on specific questions related to the Commission's definition of facilities-based VoIP providers. The instant docket is the Commission's compliance with the terms of the Stipulation.

Last June, the FCC released the *USF Contribution Order* requiring "interconnected VoIP service" providers to contribute to the federal universal service mechanism.¹³ The FCC found that interconnected VoIP service providers furnish telecommunications. Accordingly, the FCC used permissive authority found in 47 U.S.C. § 254 to find that interconnected VoIP service providers should contribute to the federal universal service support mechanism to advance the public interest. Following the issuance of the FCC's *USF Contribution Order*, on September 26, 2006, this Commission initiated the instant proceeding and requested carrier input with regard to a proposal to require interconnected VoIP service providers providing service in Nebraska to contribute to the NUSF based on the FCC's safe harbor allocation factor.

Discussion

Commission Authority to Determine the Scope and Meaning of Telecommunications and Telecommunications Service

Level 3 and Qwest assert that the FCC has the exclusive jurisdiction concerning the characterization of interconnected VoIP service and that the Commission is preempted from requiring Nebraska interconnected VoIP service providers to contribute to the NUSF. In its testimony and at the hearing, Level 3 contended the *Vonage Order*¹⁴ preempts state commissions from asserting separate jurisdiction over interconnected VoIP services.¹⁵ Qwest argued in its post-hearing brief that the FCC used the Commerce Clause to preempt the entire field of VoIP.¹⁶ RIC, RTCN, Embarq and, the Commission Staff all disagreed

¹² *Qwest Corporation v. Nebraska Public Service Commission, et al.*, Case No. CI 05-1721.

¹³ *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) (the "*USF Contribution Order*").

¹⁴ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (FCC rel. Nov. 12, 2004) ("*Vonage Order*").

¹⁵ *Testimony of Greg L. Rogers on Behalf of Level 3 Communications, LLC*, Exhibit No. 3, pg. 3.

¹⁶ *Qwest Corporation's Post-Hearing Brief* (January 22, 2007) at 2 ("*Qwest Brief*").

stating the *Vonage Order* does not support these claims of preemption.

The *Vonage Order* was a declaratory ruling made by the FCC in 2004 regarding Vonage Holding Corporation's VoIP offering called Digital Voice. The Minnesota Commission entered an order requiring Vonage to submit to its traditional certification requirements. The FCC found that with respect to Vonage's Digital Voice service, that the service was jurisdictionally mixed and practically inseparable. Accordingly, the FCC preempted the Minnesota order requiring certification. Some other companies have relied on dicta in the *Vonage Order* which states that the FCC would likely preempt similar VoIP services from traditional state certification requirements. However, we agree with RIC, Embarq, RTCN and the Commission Staff that the *Vonage Order* does not preempt the Commission's authority to require interconnected VoIP service providers from contributing to the NUSF. Rather, the FCC carved out a distinction for E911, universal service, CALEA and other issues by stating:

We do not determine the statutory classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future. These issues are currently the subject of our IP-Enabled Services Proceeding where the Commission is comprehensively examining numerous types of IP-enabled services, including services like Digital Voice. See generally IP-Enabled Services Proceeding, 19 FCC Rcd 4863. That proceeding will resolve important regulatory matters with respect to IP-enabled services generally, including services such as Digital Voice, concerning issues such as the Universal Service Fund, and the extent to which the states have a role in such matters. (emphasis added)¹⁷

The FCC also stated:

By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and

¹⁷ *Vonage Order* at footnote 46.

other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry.¹⁸

Later, in paragraph 44 of the *Vonage Order*, the FCC yet again stated:

[W]e have yet to determine final rules for a variety of issues discussed in the IP-Enabled Services Proceeding. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as Universal Service . . . in that proceeding. (Emphasis added)¹⁹

Upon consideration of the language in the *Vonage Order*, the Commission disagrees with the interpretation thereof by Level 3 and Qwest regarding preemption. The Commission finds that the FCC has specifically reserved ruling on the issue of universal service and a state's ability to assess state universal service contributions by interconnected VoIP service providers. The clear language in the *Vonage Order* states that such issues may be considered in the FCC's *IP-Enabled Services Proceeding*.

In addition, a recent federal court opinion interpreting the scope of the *Vonage Order* supports the foregoing conclusion by the Commission. In *Comcast IP Phone of Missouri, LLC v. MPSC*, 207 WL 172359 (W.D. MO., Jan. 18, 2007) ("*Comcast*"), the federal court declined to enjoin the Missouri Public Service Commission (MPSC) from proceeding with an action pending against Comcast before the MPSC regarding certification of its VoIP service offering. Comcast requested the federal court to find, as a matter of law that the MPSC is without legal authority to classify as a telecommunications service Comcast's VoIP service. Comcast had further argued that the MPSC could not classify its Digital Voice offering as a telecommunications service unless and until the FCC determined that its Digital Voice is a telecommunications service. The court found the MPSC had the authority to decide whether the VoIP service offered by Comcast was a telecommunications service subject to state regulation. The Court further found that the FCC has not preempted the entire field of VoIP services and that in at least one case, it has determined that a VoIP service was a telecommunications service.

¹⁸ *Id.*

¹⁹ *Vonage Order* at para. 44, citing footnote 46.

In sum, we find that the *Vonage Order* has not preempted the Commission's ability to classify VoIP service offerings for the purpose of universal service. Further, we find pursuant to the persuasive authority in the *Comcast* decision that the Commission has not been precluded by federal law from determining whether interconnected VoIP service falls within the scope and meaning of "telecommunications" and "telecommunications service" pursuant to this Commission's NUSF Rules.

In the *VoIP 911 Order*,²⁰ the FCC determined that "interconnected VoIP service" permits users to receive calls from and terminate calls to the public switched telephone network (PSTN).²¹ Interconnected VoIP services were defined by the FCC in the *VoIP 911 Order* as "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."²² Thus, providers of interconnected VoIP services must provide access to the PSTN, either by relying on their own facilities or by using others' facilities, and transmission of user information necessarily occurs over such access facilities. The *VoIP 911 Order* requires interconnected VoIP service providers to provide customers with access to 911 services, and to provide a disclaimer of any limitations in their ability to provide 911 service and location information to public safety answering points.

A year later, on June 27, 2006, the FCC released the *USF Contribution Order*²³ which required providers of interconnected VoIP services as defined by the FCC to contribute to the federal universal service fund. In that Order, the FCC concluded that such transmission constitutes the offering of "telecommunications" by interconnected VoIP service providers.²⁴ The FCC found that interconnected VoIP service providers provide interstate telecommunications and therefore could be subject to the permissive authority in Section 254 of the 1996 Act.²⁵ To

²⁰ *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245(2005) ("VoIP 911 Order").

²¹ See *Post-Hearing Brief of the Rural Independent Companies* (January 19, 2007) at 10 ("RIC Brief").

²² *VoIP 911 Order*, 20 FCC Rcd 10245, 10257-58, ¶ 24 (2005).

²³ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-11, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) ("*USF Contribution Order*").

²⁴ See RIC brief at 10.

²⁵ Time Warner argues in its comments that the Commission has not identified any ancillary jurisdiction that would authorize it to require interconnected VoIP service providers to contribute to the NUSF. See Comments of Time Warner

make the finding that interconnected VoIP service is interstate telecommunications, the FCC found interconnected VoIP services were jurisdictionally mixed, and because it was difficult to determine the origin and termination points of voice calls, decided that the service was, for practical purposes, inseparable. In the *USF Contribution Order*, the FCC remained silent on states' ability to assess a universal service surcharge on the intrastate portion of revenues derived from interconnected VoIP service. However, the FCC established a safe harbor provision, similar to its approach on wireless traffic, in order to allocate a percentage of calls to the interstate jurisdiction.²⁶

Upon review of the *USF Contribution Order*, the Commission agrees with the argument provided by RIC that by expressly comparing the choice of a safe harbor or traffic measurement for use by interconnected voice service providers which is similar to the choice available to commercial mobile radio service (CMRS) providers, the Commission could reasonably assume that the FCC anticipated and tacitly approved assessment of the NUSF surcharge on the Nebraska intrastate portion of interconnected VoIP service provider revenues.²⁷ CMRS providers are similarly considered to provide interstate telecommunications, and have been and continue to be properly subject to state universal service surcharge assessment.

We further find there is nothing in the NUSF Act that limits the Commission's ability to determine whether interconnected VoIP service providers provide telecommunications or telecommunications services. The Nebraska Constitution grants general power to the Commission to regulate telecommunications except where limited by specific legislation.²⁸ Further, the Commission finds that interconnected VoIP service falls within the Legislature's statutory delegation of authority to the Commission. Recently, in *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006) the Nebraska Supreme Court, approving the delegation of authority to the Commission, found:

Regulation of the telecommunications industry
is a complex field as to which the PSC has

at 11. However, the Commission agrees with Embarq that it need not rely on any ancillary jurisdiction. The Commission needs only to look to Nebraska law for authority as long as there is no conflicting federal law. *Post-Hearing Brief of United Telephone Company of the West d/b/a Embarq* (January 19, 2007) at 4 ("Embarq Brief").

²⁶ See *USF Contribution Order*, paras. 52-57.

²⁷ RIC brief at 8.

²⁸ *Neb. Const. Art. IV, § 20.*

special expertise and constitutional authority. The fact that the standards set forth in the NTUSFA permit the exercise of discretion by the PSC in its implementation reflects this reality.

272 Neb. 369-70. The Court further stated that,

The NTUSFA is specific legislation on a subject which the state Constitution generally entrusts to the PSC, namely the regulation of communications rates and services. It authorizes the PSC to establish a new means of achieving a long-standing goal of universal service by replacing subsidies which had previously been implicit in rates set by the PSC with explicit subsidies administered through the Fund.

272 Neb. 366. Accordingly, the Commission concludes that it has the authority to regulate communications services including the authority to classify and define "Nebraska interconnected VoIP service" provider.

Classification of Interconnected VoIP service Providers and the Requirement to Contribute to the NUSF

The RIC, RTCN, Embarq and the Commission Staff supported a proposed finding that Nebraska interconnected VoIP service providers are telecommunications companies offering telecommunications services in the State of Nebraska. Embarq, RIC and RTCN argued that the interconnected VoIP service providers are required by law to contribute to the NUSF.

The terms "interconnected VoIP services" and "interconnected VoIP service providers" were recently developed by the FCC. The FCC imposed on providers of "interconnected VoIP service" the obligation to provide 911 services and the obligation to contribute to the federal universal service mechanism. The FCC defines "interconnected VoIP services" as "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." ²⁹ In creating this term, the FCC developed a subset of IP-Enabled service providers and placed

²⁹ 47 C.F.R. § 9.3.

certain requirements upon this subset as appropriate to further public interest.

We find, consistent with the federal definition, that the classification "interconnected VoIP service" provider should be used to determine whether such providers provide "telecommunications" in Nebraska and whether such providers offer "telecommunications service." The Commission interprets the terms "telecommunications" and "telecommunications service" pursuant to the authority to define the scope and meaning of the NUSF Rules as they pertain to carriers.³⁰

In Neb. Admin. Code, Title 291, Chapter 10, section 001.01V, the NUSF Rules define "telecommunications" as "the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received." The FCC found that interconnected VoIP service providers provide the transmission, between or among points specified by the user, of information of the user's choosing, without a change in the form or content of the information sent and received.³¹ Similarly, based on the comments and testimony filed in this proceeding, we find that the Commission's definition of telecommunications would encompass interconnected VoIP service providers despite the use of the term "subscriber" versus the term "user" in the Commission's definition. The Commission finds that for the purposes of defining the term "telecommunications" the term subscriber should have the same meaning and effect as the term user. We also agree with the commenters that interconnected VoIP service providers by definition provide the "transmission" to permit users or subscribers of this service to receive calls from and terminate calls to the public switched telephone network. Further, we find that such providers provide the information of the subscriber's choosing without a change in the form or content of the information as sent or received. No party offered any evidence which would dispute the finding that Interconnected VoIP service providers provide "telecommunications" as defined by the federal Act or by the NUSF Rules.³²

³⁰ See Neb. Rev. Stat. § 75-118.01.

³¹ *USF Contribution Order*, ¶ 39.

³² As stated *supra*, Qwest claimed in its post-hearing brief that the FCC declared interconnected VoIP service as an information service. However, we reject that argument. Should the FCC later decide in its generic *IP-Enabled Services* docket that interconnected VoIP providers are information service providers, the Commission will open a proceeding to revisit this decision.

In section 001.01W, the NUSF Rules define "telecommunications service" as "[t]he offering of telecommunications for a fee." The federal Act defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."³³ The federal Act's definition focuses on the end user while the NUSF Rules make no distinction as to the user of telecommunications. The FCC in its *USF Contribution Order* draws a distinction between the terms "offer" and "provide" for the purposes of establishing permissive authority over interconnected VoIP service providers.³⁴ As a result, the FCC finds that interconnected VoIP service providers provide telecommunications but that they do not necessarily provide "telecommunications service." This Commission has not had the occasion to determine whether "offering" or "providing" telecommunications is meaningfully different in the context of NUSF Rule 10.001.01X. Based on the comments and testimony received, we find that there is no such difference. Although the FCC declares that the term "provide" is more inclusive than the term "offer" the Commission finds that its rule defining "telecommunications service" includes the telecommunications transmission service provided by interconnected VoIP service providers.³⁵ We find such providers to be offering telecommunications for a fee within the scope of NUSF Rule 10.001.01X.

As we conclude for the purpose of the definition in NUSF Rule 10.001.01X that interconnected VoIP service providers offer telecommunications for a fee, we further conclude that interconnected VoIP service providers are "telecommunications companies." Interconnected VoIP service providers offer a service for a fee that includes the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing without a change in the form or content of the information as sent or received. Thus, Nebraska interconnected VoIP service providers offer "telecommunications service" as that term is defined in the NUSF Rules. The term "telecommunications company" is defined in NUSF Rule 10.001.01W as "any natural person, firm, partnership, limited liability company, corporation, or association entity offering telecommunications service for hire in Nebraska intrastate

³³ 47 U.S.C. § 153 (46).

³⁴ The FCC also declares that they have used the terms synonymously. See *USF Contribution Order* ¶ 40, n. 139.

³⁵ We note that the American Heritage Dictionary defines the term "offer" to mean "to provide or furnish." Several variations of the term "offer" and "offering" include terms synonymous with "provide" and "providing."

commerce without regard to whether such company holds a certificate or permit from the Commission." Based on this definition, we conclude that interconnected VoIP service providers are telecommunications companies as the term is defined in NUSF Rule 10.001.01W. The definition of "telecommunications company" in the NUSF Rules, mirrors the definition found in the NUSF Act. The NUSF Act requires the Commission to require all telecommunications companies to contribute to the mechanism created by the Commission. As such, we find interconnected VoIP service providers must contribute to the NUSF in a manner consistent with other telecommunications companies in this state.

Contribution and Allocation Methodologies

The Commission finds that interconnected VoIP service providers should be permitted to choose among three options for separating interstate/international telecommunications revenues from Nebraska intrastate telecommunications revenues. We adopt the following three options:

- 1) Use the interim safe harbor allocation factor set forth in the FCC's USF Contribution Order, the intrastate portion of such allocation factor being 35.1 percent intrastate;
- 2) Use the actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.

Interconnected VoIP service providers can elect the same options provided by the FCC in the USF Contribution Order. Nebraska Interconnected VoIP service providers, however, should use the same option for purposes of reporting to the Commission as they have chosen for purposes of reporting to the FCC on Forms 499-A and 499-Q for the same reporting period.

Pursuant to Universal Service rules, the NUSF surcharge shall not be assessed on wholesale services. More specifically, "[t]he NUSF surcharge shall not be assessed on intermediate telecommunications services, such as access service, that are provided by one telecommunications company to another as long as the company receiving such service collects the NUSF surcharge from the retail services that it provides to its subscribers through the use of the intermediate service."³⁶

³⁶ Neb. Admin. Code, Title 291, Ch. 10 § 2.01D3.

Qwest argues in its post-hearing brief that state commissions must have some methodology for determining the state to which interconnected VoIP service belongs.³⁷ Qwest states in its brief that wireless service is considered an interstate service and as such the federal and state sourcing acts needed to properly coordinate the assessment of surcharges on wireless services. The state Telecommunications Mobile Sourcing Act (TMSA) was passed long after the Commission began assessing the NUSF surcharge on wireless telecommunications services. The Commission disagrees with Qwest that such an act must exist for the Commission to begin assessing interconnected VoIP service for state universal service purposes. The Commission has long used billing address as an appropriate means for determining the relevant jurisdictional allocation. This approach pre-dated the TMSA and the "primary place of use" definition in *Neb. Rev. Stat. § 77-2703.04* (2003) which essentially relies on the billing address of the customer as a default. The Commission finds the customer's billing address should be used to determine which state with which to associate telecommunications revenues of an interconnected VoIP service provider.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the findings and conclusions made herein are adopted.

IT IS FURTHER ORDERED that interconnected Voice over the Internet Protocol service providers begin billing, collecting and remitting the NUSF surcharge as provided herein commencing July 1, 2007.

MADE AND ENTERED at Lincoln, Nebraska this 17th day of April, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

³⁷ Qwest Brief at 3-4.