BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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)))) FINDINGS AND CONCLUSIONS)))) Entered: March 22, 2005

APPEARANCES:

For: AT&T Communications of the Midwest, Inc.
Loel P. Brooks
984 Wells Fargo Center
1248 "O" Street
Lincoln, NE 68508

For: NICE-BCS
Timothy F. Clare
Troy S. Kirk
Rembolt, Ludtke & Berger, LLP
1201 Lincoln Mall, Suite 102
Lincoln, NE 68508

For: Cox Nebraska Telcom, L.L.C.
Deonne L. Bruning
2901 Bonacum Drive
Lincoln, NE 68502

For: Qwest Communications Corporation
Timothy J. Goodwin
1801 California, Suite 4900
Denver, CO 80202

For: Nebraska Public Service Commission
Shanicee L. Knutson
300 The Atrium
1200 "N" Street
P.O. Box 94927
Lincoln, NE 68509-4927

For: The Rural Independent Companies
Paul M. Schudel
James A. Overcash
Woods & Aitken LLP
301 South 13th Street, Suite 500
Lincoln, NE 68508

For: Nebraska Telecommunications Business Users Coalition, Inc.
Charles D. Humble
Erickson & Sederstrom, P.C.
310 South 13th Street, Suite 400
Lincoln, NE 68508

For: Vonage Holdings Corp.
Ronald W. Del Sesto, Jr.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007

BY THE COMMISSION:

B A C K G R O U N D

1. The Nebraska Public Service Commission ("Commission"), on its own motion, opened the above-captioned investigation to determine the extent to which Voice over Internet Protocol ("VoIP") services should be subject to Nebraska Universal Service Fund ("NUSF") contribution requirements. Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 24, 2004.

2. The initial order opening this docket was entered by the Commission on August 24, 2004. In that order, the Commission requested that interested persons submit written comments on or before September 30, 2004. Written comments were filed by: AT&T Communications of the Midwest, Inc. ("AT&T"); Cox Nebraska Telcom, L.L.C. ("Cox"); Nebraska Telecommunications Business Users Coalition, Inc. (the "Business Coalition"); The Nebraska Independent Companies for Embedded-Based Cost Support ("NICE-BCS")[1]; The Nebraska Rural Independent Companies ("RIC")[2]; Qwest Corporation ("Qwest"); and Vonage Holdings Corp. ("Vonage").

3. The Commission held a hearing on this matter on December 8, 2004, after due notice to all interested parties. Mr. Tom Bullock testified on behalf of RIC; Mr. Timothy J. Goodwin testified on behalf of Qwest; and Mr. Jeffrey L. Pursley testified on behalf of the Commission Staff.

---

[1] The NICE-BCS Group is comprised of: Arapahoe Telephone Company, Benkelman Telephone Co., Inc., Cozad Telephone Company, Curtis Telephone Company, Diller Telephone Company, Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hooper Telephone Company d/b/a WesTel Systems, Keystone-Arthur Telephone Company, Mainstay Communications, Plainview Telephone Company and Wauneta Telephone Company.

[2] The Rural Independent Companies in this context are comprised of: Arlington Telephone Company, Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco Inc., Consolidated Telcom, Inc., Eastern Nebraska Telephone Company, Elsie Telecommunications, Inc., Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc, Hemingford Cooperative Telephone Company, Hershey Cooperative Telephone Company, K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Southeast Nebraska Telephone Company, Stanton Telecom, Inc., and Three River Telco.

E V I D E N C E

4. The Commission's August 24, 2004 Order invited interested persons to respond to the following questions:

1: Can the NUSF surcharge only be assessed on telecommunication services?

2: Can the NUSF surcharge be assessed on information services?

3. If the NUSF surcharge can only be assessed on telecommunication services, does VoIP service contain a portion or portions that is a telecommunication service subject to the NUSF surcharge?

a. If so, what portions of which services?

b. Who is or would be the provider of these services?

c. Who should be required to bill, collect, and remit the NUSF surcharge?

4: Can NUSF only be assessed on intrastate services?

5: If the answer to question 4 is yes, is a portion of the services used to provide VoIP an intrastate service? If so, what portions or services?

6: Is VoIP subject to Neb. Rev. Stat. §§ 86-316 through 86-329 either generally or in part; and if in part, which statutory section(s) applies?

7: In the event VoIP services are provided by an NETC in an area that receives support, should those services, in some manner, be eligible as supported services?

The Commission also invited interested persons to comment on any other issue germane to this proceeding. At the hearing, the comments submitted by the persons identified in paragraph 2 above, were marked as Exhibit 3 and were offered and received into evidence. The positions of the parties as expressed in the Comments and in testimony at the hearing are summarized below.

AT&T Comments:

5. AT&T's position is that the NUSF surcharge may only be assessed on telecommunications service offered by a "telecommunications company" as such term is defined in *Neb. Rev. Stat.* § 86-322 (2002 Cum. Supp.). AT&T further argues that the NUSF surcharge cannot properly be assessed on information services because the Nebraska Legislature did not expressly provide for such assessment in the Nebraska Telecommunications

Universal Service Fund Act *Neb. Rev. Stat.* §§ 86-316 et seq. (the "NUSF Act").

6. AT&T contends that VoIP does not include a component that is telecommunications service. However, AT&T does recognize that information services utilize telecommunications. AT&T further argues that information service may not be segmented or separated and defined as telecommunications service. AT&T asserts that no portion of a service utilizing VoIP may be categorized as intrastate, that the NUSF surcharge may only be assessed on intrastate service, and thus, the NUSF surcharge cannot be applied to VoIP. In summary, AT&T urges a "hands-off" approach to regulation of VoIP, including no imposition of the NUSF surcharge on VoIP services.

Cox Comments:

7. Cox takes the position in its comments that the Legislature's policy statements in *Neb. Rev. Stat.* § 86-323 lead to the conclusion that the NUSF surcharge may only be imposed on telecommunications service, and not on information services. Cox further refers to § 86-324(2)(d) to support this conclusion.

8. With regard to the issue as to whether the NUSF surcharge may be imposed on any portion of VoIP service, Cox urges deference to the Federal Communications Commission ("FCC") in its Docket No. WC-04-36. Further, Cox states that the NUSF surcharge may only be assessed on intrastate services based upon consideration of applicable provisions of state and federal laws.

Business Coalition Comments:

9. The Business Coalition also offered the opinion in its comments that under the NUSF Act, the NUSF surcharge may only be applied to telecommunications service and not to information services. The Business Coalition takes the position that VoIP services do not constitute telecommunications services. Similar to AT&T's position, the Business Coalition maintains that the NUSF surcharge may not be assessed on any portion of VoIP service. The Business Coalition urges the Commission not to impose the NUSF surcharge on interstate telecommunications service.

NICE-BCS Comments:

10. NICE-BCS takes the position that VoIP services are telecommunications services for the purpose of assessment of the NUSF surcharge. NICE-BCS maintains that Section 253(b) of the Telecommunications Act of 1996 (the 1996 Act) preserves the right of states to impose requirements to preserve and advance universal service. NICE-BCS directs the Commission to Section 254(f) of the Act which provides that "[e]very 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 the State." In light of this authority, NICE-BCS states that the issue as to whether the NUSF surcharge can only be assessed on telecommunications service is a state law question governed by the terms of the NUSF Act. Accordingly, no provision of the NUSF Act limits the assessment of the NUSF surcharge to telecommunications service, rather the NUSF Act delegates the authority to the Commission to determine those services that should be assessed the NUSF surcharge.

11. In regard to the assessment of the NUSF surcharge on information services, NICE-BCS takes the position that the Commission has the authority to determine which services will be assessed the NUSF surcharge, subject to the requirement that such determination cannot be inconsistent with FCC Rules. NICE-BCS states that it is unaware of any FCC Rule that prohibits a state universal service surcharge assessment on information services.

12. NICE-BCS describes VoIP as the delivery of voice services using Internet Protocol ("IP") for one or more segments of the transmission of a call. Several types and combinations of facilities can be used to provide VoIP services. However, the common denominator of all such services, according to NICE-BCS, is that at some point in the transmission of a call IP technology is used. Further, NICE-BCS' position is that the transmission of a call using IP technology does not change the form or content of the voice information of the call. Relying on the definition of "telecommunications" in *Neb. Rev. Stat.* § 86-117, NICE-BCS concludes that VoIP services are telecommunications service, and telecommunications service is subject to assessment of the NUSF surcharge.

Qwest Comments:

13. Qwest, in its comments, defines VoIP as an IP-enabled service that originates in IP over a broadband facility, requires unique consumer premises equipment and terminates in either IP or Time Division Multiplexing ("TDM"). Qwest asserts that based on such definition, VoIP is an interstate, information service and not a telecommunications service. Unless and until the FCC classifies VoIP as a telecommunications service, Qwest states that VoIP is not subject to state regulatory jurisdiction and may not be subject to state USF assessments.

14. While Qwest states in its comments that the NUSF surcharge may be assessed only on telecommunications service and not on information services, based on the positions outlined in the preceding paragraph, Qwest takes the position that VoIP does not contain a telecommunications service element subject to the NUSF surcharge. This position is based primarily on Qwest's conclusion that all IP-enabled services are properly classified as information services under the Act. Qwest also states that IP-voice applications cannot be viewed in isolation from other IP-enabled services that are a part of the overall IP package marketed to and used by the customer. Therefore, IP-voice is properly viewed as information service. As such, VoIP may not be subject to the NUSF surcharge.

15. Qwest's comments further state that the NUSF surcharge may only be assessed on intrastate services. Qwest primarily relies on the Fifth Circuit's opinion in *AT&T Corp. v. Public Utility Commission of Texas,* 373 F.3d 641 (5th Cir. 2004) to support this position. Qwest suggests that any attempt by this Commission to assess the NUSF surcharge on interstate telecommunications service would unfairly burden providers of multi-jurisdictional telecommunications service, and would likely be reversed on judicial review.

RIC Comments:

16. The RIC comments contain a review of prior Commission proceedings in which the assessment of the NUSF surcharge on IP-enabled services was analyzed. In Application No. C-1628, the Commission specifically sought comment on the question as to whether service providers using IP should contribute to the support of universal service and whether the Commission has authority to require such contribution. All commenters except for MCI, including AT&T and Qwest's predecessor, U S West, in some manner supported the assessment of the NUSF surcharge on IP-enabled services. In its January 13, 1999 Findings and

Conclusions in Application No. C-1628, the Commission concluded "The surcharge will be assessed on all interstate and intrastate telecommunication services regardless of the underlying technology used in the provisioning of these services."[3]

17. The RIC comments also contain a review of FCC decisions and pending dockets relating to VoIP, including the *Pulver Decision* and the *AT&T Decision.*[4] Reference is also made to the *IP-Enabled Services NPRM* that is pending before the FCC.[5] The RIC comments also provided a brief review of relevant judicial decisions, most notably *FCC v. Brand X Internet Services,* 345 F.3d 1120 (9th Cir. 2003), on which *certiorari* was granted by the United States Supreme Court subsequent to the filing of the comments in this matter.[6]

18. RIC takes the position that every VoIP service requires and involves the provision of telecommunications service to end users because the essential characteristic behavior of all VoIP services is that information of the users' choosing is being transmitted between or among points specified by the user without change in the form or content of the information as sent and received. RIC's further position is that not only can a portion of VoIP service be identified as intrastate in nature, but further the Act requires such classification of VoIP communications between end points within a state. Opinions as to those portions of the VoIP service offerings by Pulver, AT&T, Qwest, Time Warner and Vonage that involve intrastate telecommunications service were provided by

[3] By Order entered in Application C-1628 on February 2, 1999, the Commission held that the NUSF surcharge should be assessed only on retail intrastate telecommunications service revenues and not on interstate revenues.

[4] *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004) ("*Pulver Decision*"), in which the FCC determined that the Free World Dialup service offered by Pulver is an interstate information service. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, Order, FCC 04-97 (rel. April 4, 2004) ("*AT&T Decision*"), in which the FCC determined that AT&T's VoIP service is little more than a substitute for its traditional IXC services and should not be exempt from access charges.

[5] *IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) ("IP-Enabled Services NPRM").

[6] *FCC v. Brand X Internet Services,* 125 S.Ct. 655 (Dec. 3, 2004).

RIC. Similar to the position taken by the NICE-BCS group in its comments, RIC contends that the Commission has the authority to assess the NUSF surcharge to the extent that a carrier provides intrastate telecommunications services within Nebraska.

Vonage Comments:

19. Vonage, in its comments, urges the Commission to await the FCC's decision of the *Vonage Petition*[7] as well as issuance of the FCC's Order in connection with the *IP-Enabled Services NPRM.* Vonage's position is that its VoIP service is an information service, and that its service is available only to customers who have broadband Internet connections, such as cable modem or DSL service. Vonage states that it offers no transmission services itself. Further, as a consequence of the definitions of "telecommunications service" and "telecommunications" in the Nebraska statutes, Vonage contends that it is not a telecommunications company providing telecommunications service, and therefore is not subject to assessment of the NUSF surcharge.

20. As to whether a portion of the VoIP services provided by Vonage constitutes intrastate service, Vonage states that the Internet has no system for determining the geographic location of users of jurisdiction of calls. Further, Vonage states that its VoIP service is not able to accurately separate all Nebraska-originated or terminated calls from non-Nebraska related call. Thus, Vonage concludes that its service is interstate information service and is not subject to assessment of the NUSF surcharge.

Testimony by RIC Witness, Tom Bullock:

21. Mr. Bullock testified that RIC's general position is that portions of VoIP are properly classified as intrastate telecommunications service and are subject to assessment of the NUSF surcharge. Mr. Bullock's testimony focused on four threshold questions: (1) Is VoIP service a telecommunications service or is it an information service? (2) Should a portion of VoIP service be classified as intrastate? (3) Which entities involved in the delivery of VoIP traffic are actually providing

[7] *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* Petition for Declaratory Ruling, WC Docket No. 03-211 (filed Sept. 22, 2003) (the "*Vonage Petition*"). Subsequent to the filing of the Comments, the FCC released its *Memorandum Opinion and Order* in response to the *Vonage Petition* on November 12, 2004.

a telecommunications service? and (4) What is the Commission's authority to assess the NUSF surcharge on VoIP services?

22. In his analysis of the first issue, Mr. Bullock pointed out that it is important to consider three types of networks. Enhanced services networks were prevalent before the ascendancy of the Internet and were built for the purpose of allowing users to connect to a central computer so that the information residing on such computer could be accessed. The Internet is the second network type and consists of hundreds of separately owned and operated, but interconnected networks that use Internet Protocol and a uniform addressing scheme. The third network type is a network that uses Internet Protocol but is not part of the Internet, with facilities-based networks operated by VoIP service providers generally falling into this category. Mr. Bullock testified that the enhanced services networks with their central computers formed the basis of the FCC's *Computer Inquiry* dockets[8] that established that certain "enhanced" services utilized "basic" telecommunications service to create a total service package delivered to the end user in which basic service was inseparable from enhanced service. Mr. Bullock noted that the AT&T and Vonage comments contend that this "inseparability" concept should apply to the delivery of voice information over an IP network. However, Mr. Bullock asserted that the foregoing position is misconceived because in an IP network, the proposition that the information sent over the network by an application should be inseparable from the network transport contradicts the end-to-end principle that is the essence of the Internet Protocol. The Ninth Circuit, in the *Brand X* decision rejected the inseparability concept with regard to cable modem service.

23. Mr. Bullock also contended that the existence of protocol conversion in the operation of IP networks does not trigger the treatment of the services provided on such networks as information services. In the context of voice service and the definition of "telecommunications" under the Act and Nebraska law, Mr. Bullock asserted that the information of the user's choosing that is being sent and received is the sound as spoken by one party and as heard by the other party as opposed to whether IP packets or TDM format are used in the voice transmission. As such, he concluded that VoIP service should be

[8]*See In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 9, 2004) ("*Vonage Decision*"), footnote 77, for a review of the *Computer Inquiry* dockets and the FCC's holdings therein.

properly classified as telecommunications service and not as information service.

24. With regard to the jurisdictional nature of VoIP service, Mr. Bullock testified that the ultimate end points of a call should be controlling. He disputed claims that it is difficult, or impossible to determine the location of the end-points of a VoIP call, particularly with regard to facilities-based networks operated by VoIP service providers. Mr. Bullock did not argue for recording every VoIP call as interstate or intrastate, but rather stated that a periodic sampling should occur to establish reasonable proportional jurisdictional estimates. As an interim measure, Mr. Bullock urged the adoption of the Safe Harbor jurisdictional split established by the FCC for CMRS traffic – 28.5% interstate and 71.5% intrastate.

25. Because multiple entities are often involved in the provision of VoIP service, Mr. Bullock discussed the importance of identifying the entity that is the provider of telecommunications service. The guiding principle, according to Mr. Bullock, is to identify the entity that is offering transmission of user information to the public for a fee. Facilities-based VoIP providers such as Qwest and Time Warner are providing such transmission and thus, should be classified as telecommunications service providers, according to Mr. Bullock.

26. The fourth issue that Mr. Bullock testified to relates to the Commission's authority to assess NUSF surcharge on VoIP service. Section 254(f) of the Act preserves this authority according to Mr. Bullock and none of the FCC's VoIP-related orders entered to date preempt the Commission from continuing to execute its statutory mandate to preserve and advance universal service in Nebraska. The issue of universal service support and VoIP services has been reserved for discussion in the FCC's *IP-Enabled Services NPRM.* Mr. Bullock referenced the recent passage of Section 1107 of the Internet Tax Nondiscrimination Act, which explicitly preserves the authority of state regulators to impose universal service surcharges on telecommunications services.

27. In summary, Mr. Bullock's testimony supported the propositions that the transmission component of any VoIP service constitutes a telecommunications service, and that the Nebraska intrastate percentage of such transmission component is properly subject to assessment of the NUSF surcharge.

Testimony of Qwest Witness, Timothy J. Goodwin:

28. Mr. Goodwin explained that the type of VoIP service for which U S West, Qwest's predecessor, supported assessment of the NUSF surcharge, resembles the current AT&T model that involves the public switched telephone network at both ends of the call and IP routing and switching in the middle. He stated that this type of VoIP service would be properly subject to assessment of the NUSF surcharge. However, he disputed that the VoIP services currently offered by Qwest, Vonage and Time Warner are properly subject to such assessment.

29. Further, Mr. Goodwin described problems with the Commission's assessment of the NUSF surcharge on VoIP services. First, he stated that the Commission lacks jurisdiction to require a VoIP provider to obtain state certification based on the FCC's ruling on the *Vonage Petition,* and therefore lacks authority to enforce an order that a VoIP provider should collect and remit NUSF surcharges. Mr. Goodwin also contended that imposition of the NUSF surcharge on interstate service would burden the interstate universal service fund contrary to the holding in *AT&T Corp. v. Public Utility Commission of Texas, supra.* Mr. Goodwin also disputed the appropriateness of using an allocation proxy for VoIP providers such as the FCC has approved in connection with the imposition of state universal service assessments on CMRS traffic.

Testimony of Commission Staff Witness, Mr. Jeffrey L. Pursley:

30. Mr. Pursley clarified that the focus of this proceeding is on whether assessment of the NUSF surcharge on VoIP service is proper. Mr. Pursley observed that preservation of universal service is a joint effort between the FCC and state commissions, and this is the intent of the Act. He stated that there is a telecommunications component in VoIP service, that routers and switches cannot exist in a vacuum, and as such there should be contribution to the support of universal service by VoIP service based on this telecommunications component.

31. Mr. Pursley took exception to the four-part test that the FCC has developed in connection with its analysis as to whether a particular service is telecommunications service or information service.[9] He stated, the elements of this test are not a part of the statutory definitions of telecommunications

[9] *See In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) ("Report to Congress").

service and information service found in 47 U.S.C. § 153(20) and (46), respectively. Mr. Pursley particularly disagreed with the FCC's position that classification of service is determined based upon conversion of user content due to the technology utilized by a service provider, i.e. user information that may enter a network in TDM circuit switched digital format and exit at a packet switched level. Rather, he maintained that if a voice message is sent by a user and is received by the called party as a voice message, there has not been a "change in the form or content of the information as sent and received" and such a call is therefore within the definition of "telecommunications" as found in 47 U.S.C. § 153(43).

32. Mr. Pursley further stated that the routing of calls carried over IP networks outside of the state of origin and even internationally does not determine the jurisdiction of the call. If the call originates and terminates in the same state, it is intrastate and not interstate, and Mr. Pursley referenced previous instances in which the FCC has found that simply routing traffic across jurisdictional boundaries does not change the fundamental jurisdictional nature of the traffic. Mr. Pursley acknowledged that calls carried over IP networks are jurisdictionally mixed and he therefore supported the application of a percentage factor similar to the factor developed by the FCC for application of state universal service surcharges to CMRS traffic.[10]

33. Even with the deployment of IP technology, Mr. Pursley stated he envisioned little if any change in universal service considerations as users in high cost, sparsely populated areas will continue to require connections to a service provider's network, and the costs associated therewith will require support in order to maintain universal service. Mr. Pursley stated that since VoIP providers use telecommunications service and because VoIP providers can and do connect their service to users in rural and high-cost areas, it is proper, as a policy matter, for users of VoIP services to support universal service. Further, he stated, state and federal law requires service comparability in urban and rural areas as well as comparability for low-income persons. Universal service support is required to maintain such comparability. In Mr. Pursley's view, if users of VoIP services are not required to contribute to the support of universal service, the funding base for universal service will shrink to a point that services in high-cost and rural areas will have to be

[10] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002).

priced at actual cost, violating rate comparability requirements of state and Federal law and violating the universal telecommunications service policy that has existed in this country since the passage of the Communications Act of 1934.

34. Mr. Pursley emphasized that this proceeding does not concern issues of market entry certification or service quality regulation. Rather, it is for the purpose of determining those services directly or indirectly related to the provision of VoIP services that should contribute to the NUSF. If an entity is a provider of telecommunications, in Mr. Pursley's view, that entity should have a universal service support obligation. The provision of such support should be competitively neutral, should be sustainable and should not be for the purpose of generating additional NUSF funds.

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

A. State Regulatory Authority Regarding Universal Service

35. Section 254(f) of the Act provides that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. 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 the 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 Federal universal service support mechanisms."

36. The authority of the states with regard to universal service is also supported by the terms of Section 253(b) of the Act that provides, in pertinent part: "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service . . ." The FCC may preempt state actions to preserve and advance universal service only in accordance with Section 253(d) of the Act which provides: "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the

Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

37. Further, on December 3, 2004, the President signed into law the "Internet Tax Nondiscrimination Act."[11] Section 1107 of that Act provides: "Nothing in this Act shall prevent the imposition or collection of any fees or charges used to preserve and advance Federal universal service *or similar State programs – (1) authorized by section 254 of the Communications Act of 1934* (47 U.S.C. § 254); or (2) in effect on February 8, 1996." (emphasis added) The Commission believes Congress' inclusion of this provision in the Internet Tax Nondiscrimination Act is an important statement of congressional intent that the states are not only permitted to implement universal service support programs, but further that such programs may require contributions to support universal service from services that utilize Internet Protocol as long as the state universal service support program is authorized by Section 254 of the Act.

B. The NUSF Act and Commission Regulations

38. In 1997, the Nebraska Legislature passed the NUSF Act.[12] The NUSF Act is now codified in *Neb. Rev. Stat.* §§ 86-316 - 86-329 (2002 Cum. Supp.). The purpose of the NUSF Act "is to authorize the Commission to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices."[13] The Legislature specifically directed that the Commission, to the extent not prohibited by federal law, "shall require every telecommunications company to contribute to any universal service mechanism established by the Commission pursuant to state law."[14] "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

[11] Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, § 1107, 118 Stat. 2615, 2617 (2004).
[12] 1997 Neb. Laws, LB 686.
[13] *Neb. Rev. Stat*. § 86-317.
[14] *Id*., § 86-324(2)(d).

telecommunications contract carrier from the commission."[15] Additionally, the Legislature authorized the Commission to adopt and promulgate rules and regulations as reasonably required to develop, implement and operate the NUSF.[16]

39. In accordance with this legislative authorization, effective September 16, 2002, the Commission implemented Neb. Admin. Code Title 291, Chapter 10 (the "NUSF Rules"). The NUSF Rules provide *inter alia* that the NUSF surcharge shall be assessed on all end-user telecommunications services provided in Nebraska intrastate commerce.[17] "Telecommunications service" is defined as "the offering of telecommunications for a fee."[18] "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."[19]

40. The NUSF Rules provide that the NUSF surcharge shall not be assessed on interstate telecommunications services.[20] However, in cases where a charge is made to the subscriber for both intrastate and interstate telecommunications service, and the interstate telecommunications service is not charged separately or cannot be readily determined, the NUSF surcharge is to be applied to the total charge, except in those instances in which the intrastate portion of such joint use service charge cannot be determined, or if such determination would result in an undue administrative burden, the Commission may establish an allocation factor to determine the intrastate portion of the service or may adopt any relevant FCC safe harbor provisions.[21]

C. FCC VoIP-Related Decisions and Universal Service Funding

41. As many of the commenters discussed, the FCC has released three significant orders recently concerning the regulatory treatment of VoIP-related services and VoIP service providers. In the first such order, generally referred to as the "Pulver Decision", the FCC determined that the Free World Dialup service offered by Pulver is an interstate information service.[22] In the second order, generally referred to as the

---

[15] *Id.*, § 86-322.
[16] *See id.*, § 86-325.
[17] Neb. Admin. Code Title 291, Chapter 10, § 002.01.
[18] *Id.*, § 001.01X.
[19] *Id.*, § 001.01V
[20] *See id.*, § 002.01D1.
[21] *See id.*, §§ 002.01D1a and 002.01D1b.
[22] *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,*

"AT&T Decision", the FCC determined that AT&T's VoIP service is little more than a substitute for its traditional interexchange service and should not be exempt from access charges.[23] Most recently, the FCC announced its "Vonage Decision"[24] in which the FCC found Vonage's DigitalVoice VoIP service to be jurisdictionally interstate and preempted the Minnesota PUC's authority to impose entry regulation on Vonage[25].

42. More importantly, it is relevant for the Commission's purpose in this proceeding to determine what the FCC did not decide in its three VoIP orders. First, in the *Vonage Decision* the FCC did not make a decision with regard to the definitional classification of Vonage's DigitalVoice as either telecommunications or information service under the Act.[26] Second, and specifically with regard to issues regarding universal service funding, in the *Vonage Decision* the FCC expressly stated that "important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, *concerning issues such as the Universal Service Fund . . . and the extent to which states have a role in such matters*"[27] would be addressed in the "IP-Enabled Services Proceeding". (Emphasis Added). Thus, based on the *Vonage Decision,* it is clear to the Commission that the FCC has not addressed the central issue of this proceeding as identified by Mr. Pursley, namely, whether assessment of the NUSF surcharge on VoIP service is proper.[28]

WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004) ("*Pulver Decision*").

[23] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, Order, FCC 04-97 (rel. April 4, 2004) ("*AT&T Decision*").

[24] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 9, 2004) ("*Vonage Decision*").

[25] The Commission confirms Mr. Pursley's testimony (see paragraph 34 supra) that this proceeding does not concern issues of market entry certification or service quality regulation for VoIP service providers. Rather, it is for the purpose of determining those VoIP service providers that should contribute to the NUSF.

[26] *Id.* at para. 14.

[27] *Id.* footnote 46, referencing *IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) ("*IP-Enabled Services Proceeding*").

[28] *See* para. 30 *supra.*

D. Assessment of the NUSF Surcharge on Facilities-Based VoIP Service Providers

43. In order to determine whether VoIP providers are required to contribute to the NUSF, a determination must be made whether such providers are "telecommunications companies" as defined in NUSF Act § 86-322.[29] Such status exists only if the VoIP provider is offering "telecommunications service". In § 86-318, the Legislature provided "the definitions found in sections 86-319 to 86-322 apply." Although "telecommunications service" is not defined in such sections, § 86-321 refers to the 1996 Act, which contains a definition of such term, as does Neb. Admin. Code, Title 291, Chapter 10, § 001.01X.[30] Section 153(46) of the 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." Section 153(43) of the 1996 Act, in turn, defines "telecommunications" as ". . . the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." This definition of telecommunications is essentially identical to that provided in Neb. Admin. Code, Title 291, Chapter 10, § 001.01V.[31] Thus, the question is whether VoIP providers offer a service to end users for a fee that transmits information of the user's choosing between points specified by the user without change in the form or content of the information as sent and received.

44. As illustrated by the FCC's three VoIP related orders referenced above, there are important differences among the service providers using Internet Protocol in the delivery of voice service to subscribers. For the purposes of this Order, the principal characteristic distinguishing such providers is whether the VoIP provider or an affiliate owns the physical network that transmits the user's voice information. We define the term "facilities-based VoIP providers" as those providers that either own or operate networks that utilize Internet Protocol in the delivery of voice services,[32] but do not share

---

[29] *See* para. 38 *supra*.

[30] *See* para. 39 *supra.*

[31] The only difference in the definition in Section 153(43) of the 1996 Act and § 001.01V is that the latter uses the word "subscriber" rather than the term "user" in the 1996 Act's definition.

[32] On the basis of the records established in Application Nos. C-3201 and C-3228, facilities-based VoIP providers would include Qwest Communications Corporation and Time Warner Cable Information Services (Nebraska), LLC d/b/a Time Warner Cable, respectively.

addressing space with the public Internet[33] and therefore, are not part of the Internet.[34] . We find facilities-based VoIP providers do transmit information of the user's choosing between points specified by the users.

45. We next examine whether VoIP service effects a change in the form or content of the information as sent and received. It may be suggested that because facilities-based VoIP providers use protocol processing to convert messages from asynchronous IP packets into synchronous TDM format used by the PSTN and vice versa, their VoIP service is an information service[35], not a telecommunications service, and thus not subject to assessment of the NUSF surcharge. The Commission rejects the notion that protocol conversions that occur in connection with the completion of a voice call carried by a facilities-based VoIP provider constitute a "change in the form or content of the information as sent and received" so as to remove the call from the definition of telecommunications, and thus render the call not to be telecommunications service. We believe that it is more reasonable to regard the information chosen to be transmitted by the user or subscriber to be the information comprised of the words or sounds spoken and intended to be received by the called party, rather than mode of transmission or digital bit stream that facilitates the exchange of such information. We further believe that this conclusion best reflects Congress' and the Legislature's intentions in providing the definitions referenced above to be applied in this context. Based on the comments and testimony in the record, the Commission finds that facilities-based VoIP providers offer telecommunications service for hire in Nebraska intrastate

---

[33] Networks that share addressing space are networks in which the addresses of all connected devices remain unique when the networks are interconnected. For example, the Internet, being a collection of interconnected networks, requires that the addresses defined on each constituent network be confined to a space that excludes the address space of all other constituent networks. Networks that do not share addressing space cannot be interconnected without risking address duplication. (For a helpful tutorial on Internet addressing, see http://www.tcpipguide.com/free/t_IPAddressing.htm.).

[34] We note that entities such as Vonage provide VoIP services over the public Internet. We make no findings in this Order related to Vonage-like VoIP services. Rather we reserve consideration regarding potential assessment of NUSF surcharge on such services for a future date.

[35] "Information services" are defined in Section 153(20) of the 1996 Act as ". . . the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

commerce, and are therefore telecommunications companies, as defined in § 86-322 that this Commission may require to contribute to the NUSF.

46. We find that services offered by facilities-based VoIP providers may also contain information service components, such as voice mail or web-based message management services. To the extent that such information services are present in facilities-based VoIP providers' service offerings, facilities-based VoIP providers may establish separate prices for the information service and telecommunications service components of a bundled service offering provided that such separated prices are supported by cost information provided to the Commission. Upon Commission approval, facilities-based VoIP providers may use such prices in reporting telecommunications service revenue subject to assessment of the NUSF surcharge. In the absence of Commission approval of such separate pricing and supporting cost data, each facilities-based VoIP provider offering service in Nebraska shall report the entire price of its VoIP service offering as telecommunications service revenue, subject to assessment of the NUSF surcharge.[36]

47. Finally, we make no distinction among facilities-based VoIP providers based on the transmission media utilized to transport users' voice information. Requiring contributions to the NUSF by all facilities-based VoIP providers is consistent with maintaining a competitively neutral environment among all telecommunications companies offering telecommunications service for hire in Nebraska intrastate commerce.

E. Limiting Assessment of NUSF Surcharge to Intrastate Service

48. As pointed out above, the NUSF Rules and this Commission's decision in Application No. C-1628 establishes that the NUSF surcharge should be assessed only on intrastate telecommunications service.[37] By so limiting assessment of the NUSF surcharge, the Commission believes that it is acting consistently with the principles established by the Fifth Circuit Court of Appeals in *AT&T Corp. v. Public Utility Comm'n of Texas,* 373 F.3d 641 (5th Cir. 2004).

49. Consistent with well-established precedent, the ultimate end points of a call determine the jurisdictional

[36] Such price shall be subject to division between intrastate and interstate revenue as well. See paragraphs 50-52, *infra.*
[37] *See* paras. 40 and 49 *supra.*

nature of the call.[38] The facilities-based VoIP providers may contend that it is difficult or impossible to determine the location of the end-points of VoIP calls. In the Commission's view, such a determination is comparable to determining the jurisdiction of CMRS calls. The FCC has established a "safe harbor" for CMRS traffic based on a 28.5% interstate and 71.5% intrastate allocation.[39] In response to the Fifth Circuit's decision in *AT&T Corp., supra,* the Texas PUC has established several safe harbor percentages, depending upon the type of carrier, including the CMRS safe harbor adopted by the FCC.[40]

50. The Commission finds the intrastate service portion of total services furnished by facilities-based VoIP providers shall be established based upon: (a) The rebuttable presumption of a safe harbor allocation of 28.5% interstate and 71.5% intrastate; or (b) an allocation based upon a reasonable sampling of a facilities-based VoIP provider's actual call data that will be reviewed by the Commission and if approved, will be accepted if different than the safe harbor percentage; or (c) actual measurement of call data. The Commission further finds that the foregoing methods for establishing interstate-intrastate allocation will avoid imposition of greater burdens on multi-jurisdictional facilities-based VoIP providers as compared to purely interstate or intrastate carriers, will not competitively disadvantage facilities-based VoIP providers, and will result in contributions on an equitable and non-discriminatory basis to the preservation and advancement of universal service in Nebraska that is consistent with the requirements of Section 254 of the 1996 Act.

O R D E R

---

[38] *See* GTE Telephone Operators GTOC Tariff No. 1 GTE Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79 ¶¶ 17-19 (October 30, 1998), *recon. denied* (February 26, 1999) (*GTE DSL Order*), in turn citing *Teleconnect Co. v. Bell Telephone Co. of Penn.,* E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619, 1621 (1992) (*BellSouth MemoryCall*)); Southwestern Bell Telephone Company, CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) (*Southwestern Bell Telephone Company*); *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); *New York Telephone Company*, 76 FCC 2d 349, 352 (1980).

[39] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 F.C.C.R. 24952 (rel. Dec. 13, 2002).

[40] *See Order Regarding TUSF Assessment of Intrastate Telecommunications Services Receipts,* 2004 WL 1790871 (Tex. P.U.C. July 29, 2004).

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the foregoing Opinion and Findings are hereby adopted in their entirety, and that facilities-based VoIP providers shall contribute to the NUSF, and the NUSF surcharge shall be assessed on the intrastate portion of facilities-based VoIP providers' VoIP-related services in accordance with the foregoing Opinion and Findings commencing effective June 1, 2005.

MADE AND ENTERED in Lincoln, Nebraska on this 22nd day of March, 2005.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director