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Briefing
Before the Senate Utilities Committee
January 25, 2007

Regarding
Voice Over Internet Protocol (VoIP) Services

Chairperson Emler and members of the Senate Utilities Committee:

Thank you for allowing me to appear before you this morning on behalf of the Kansas Corporation Commission (KCC) to provide you with information you may find useful in your consideration of SB 49. My name is Janet Buchanan. I am the Commission's Chief of Telecommunications.

SB 49 amends K.S.A. 2006 Supp. 66-2008(a) to add interconnected VoIP service providers to the list of entities that are required to contribute to the KUSF. In recent years, there has been concern over the sustainability of universal service funding at the state and federal level. The Commission and the FCC have acknowledged that assessable revenues have been declining over the years. There are several factors contributing to the decline in revenues. One of those factors is the migration of customers to VoIP providers' communication services. VoIP providers, until recently, have not been subject to universal service funding requirements at the state or federal level. On June 27, 2006, the FCC issued an order requiring interconnected VoIP providers to contribute to the federal fund on an interim basis. The KCC recently opened a proceeding to investigate whether interconnected VoIP providers should also be required to contribute to the KUSF. Parties have filed comments addressing legal and policy issues for the KCC to consider. I will provide you with background information regarding VoIP service, a summary of decisions of the FCC and a summary of the current proceeding before the Commission.

Background

The FCC has described VoIP as follows:

VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks. VoIP can be provided over the public internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless). Unlike traditional circuit-switched telephony, which

establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Thus, VoIP uses available bandwidth more efficiently than circuit-switched telephony and allows providers to maintain a single IP network for both voice and data.¹

In March 2004, the FCC initiated its Notice of Proposed Rulemaking concerning IP-enabled services to address, among other things, the regulation of VoIP; however, the FCC has not issued final rules regarding the regulation of such services. While there have been no final rules issued, the FCC has issued several orders which provide guidance regarding the regulation of several types of VoIP service. One issue in these proceedings is whether VoIP services are “telecommunications”, “telecommunications services”, or “information services” under federal statute. 47 U.S.C. 153 defines these terms as follows:

Telecommunications – The term “telecommunications” means 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.

Telecommunications Service – The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.

Information Service – The term “information service” means 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.

The classification of VoIP service will then determine what type of regulation, if any, the service should be subject to.

Pulver Decision

Prior to opening the IP-enabled services proceeding, the FCC ruled on a particular internet-based service offered by pulver.com (Pulver). Pulver petitioned the FCC to declare its Free World Dialup offering to be neither telecommunications nor telecommunications service as defined by statute. Free World Dialup allows “. . . users of broadband Internet access services the opportunity to join other such users in becoming members of [a] community in order to

¹ *In the Matter of the Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97, Released April 21, 2004, paragraph 3. (AT&T Order)

communicate directly with one another over the internet.”² Pulver’s service required end users to have broadband access, register for Free World Dialup Service and obtain consumer premises equipment that would permit communications through broadband internet access. Registered users could only communicate with others registered for Free World Dialup services and such communication took place entirely over internet facilities. The FCC determined that this service was an unregulated information service subject to its jurisdiction. The FCC stated:

. . . Pulver is offering [Free World Dialup] members the capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information in a way contemplated by the Act to qualify as an information service. We also acknowledge that after performing these specific functions, Pulver no longer plays a role in the exchange of information between its members (except for relaying a “SIP bye” message generated by one of the users when the communication is terminated) – it merely facilitates peer-to-peer communication. The fact that the information service Pulver is offering happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service. . . .³

The FCC stated that any state regulations that would treat Free World Dialup as a telecommunications service subject to public utility regulation would be in conflict with federal policy.⁴ Further, the FCC concluded that:

[u]nless an information service can be characterized as “purely intrastate,” or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive [FCC] jurisdiction has prevailed.⁵ (footnotes omitted)

AT&T Decision

On April 21, 2004, the FCC released an order addressing a petition by AT&T. AT&T requested that the FCC declare that its phone-to-phone internet protocol telephony services were exempt

² *In the Matter of the Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Memorandum Opinion and Order*, WC Docket No. 03-45, FCC 04-27, Released February 19, 2004, paragraph 2. (*Pulver Decision*)

³ *Pulver Decision*, paragraph 12.

⁴ *Pulver Decision*, paragraph 15.

⁵ *Pulver Decision*, paragraph 20.

from the payment of access charges which are applicable to circuit-switched long distance calls.⁶ AT&T's service began and ended on the public switched network, just as traditional long distance calls. However, when the call entered AT&T's network, it was converted into an IP format and transported over AT&T's Internet backbone. It was then converted back to its original format when it entered the public switched network to terminate at the called party.⁷ The FCC determined that this type of service was a telecommunications service. Important to the FCC's decision was the fact that this service did not require special customer premises equipment (CPE) different than that necessary to place an ordinary call, that AT&T represented to consumers that it was providing voice telephony, and no enhanced functionality was provided to customers through the use of IP telephony. The FCC stated:

. . . End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be telecommunications services. . . .⁸ (footnotes omitted)

Vonage Decision

Vonage Holdings Corporation (Vonage) petitioned the FCC for a Declaratory Ruling preempting an order of the Minnesota Public Utilities Commission (Minnesota PUC) on September 22, 2003.⁹ Vonage also requested that the FCC find that it is a provider of information services and is not a telecommunications carrier.¹⁰ The Minnesota PUC had asserted jurisdiction over Vonage and ordered the company to comply with telecommunications regulations.

Vonage was offering a VoIP service it branded as DigitalVoice. To utilize DigitalVoice, subscribers are required to have access to a broadband Internet connection and to obtain specialized CPE.¹¹ The DigitalVoice service is portable which allows subscribers to use the service in any location where a broadband connection is available.¹² Thus, while a DigitalVoice user has a conventional phone number; it is not necessarily tied to the physical location of the customer as with traditional wireline service. The phone number is associated with the CPE

⁶ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97, released April 21, 2004, paragraph 1. (*AT&T Decision*)

⁷ *AT&T Decision*, paragraph 1.

⁸ *AT&T Decision*, paragraph 12.

⁹ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267, released November 12, 2004, paragraph 3. (*Vonage Decision*)

¹⁰ *Vonage Decision*, paragraph 12.

¹¹ *Vonage Decision*, paragraphs 5, 6.

¹² *Vonage Decision*, paragraph 5.

required for DigitalVoice service.¹³ A subscriber to Vonage's service can make and receive calls to and from anyone with a phone number.

The FCC granted Vonage's petition to preempt the order of the Minnesota PUC. However, the FCC declined to determine whether the service offered by Vonage was an information service. The FCC found that, regardless of whether DigitalVoice is an information service or telecommunications service, it was a jurisdictionally mixed service for which it was impractical or impossible to separate the service into intrastate and interstate components. In such instances, the FCC can preempt state regulation when such regulations "would thwart federal objectives."¹⁴ The FCC determined that the Minnesota PUC's regulations would do just that.¹⁵

The FCC also stated that social policy issues would need to be resolved. In particular, Minnesota requires a carrier to obtain approval of a 911 service plan prior to entry. At the time, Vonage could not meet this requirement.¹⁶ While the FCC preempted the requirement to provide a 911 service plan as a condition of entry, the FCC did acknowledge that Vonage would need to develop a public safety solution. The FCC stated that it would address the social policy issues in the IP-enabled Services proceeding.¹⁷

E911 Decision

On June 3, 2005, the FCC released an order requiring interconnected VoIP service providers to provision E911 capabilities to their customers.¹⁸ However, the FCC again declined to make a determination regarding whether such service was an information service or telecommunications service.

In determining whether E911 requirements should be placed on particular carriers, the Commission began by looking at consumer expectations. The FCC stated:

The record clearly indicates, however, that consumers expect that VoIP services that are interconnected with the [public switched telephone network] will function in some ways like a "regular telephone" service. At least regarding the ability to provide access to emergency services by dialing 911, we find these expectations to be reasonable. If a VoIP service subscriber is able to receive calls from other VoIP service users *and* from telephones connected to the [public switched telephone network], a customer reasonably could expect to be able to dial 911 using that service to access appropriate emergency services. Thus, we believe that a service that enables a customer to do everything (or nearly everything) the

¹³ *Vonage Decision*, paragraph 9.

¹⁴ *Vonage Decision*, paragraph 17.

¹⁵ *Vonage Decision*, paragraph 20.

¹⁶ *Vonage Decision*, paragraph 42.

¹⁷ *Vonage Decision*, paragraph 44.

¹⁸ *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, WC Dockets No. 04-36 and 05-196, FCC 05-116, released June 3, 2005, paragraph 1. (*E911 Decision*)

customer could do using an analog telephone, and more, can at least reasonably be expected and required to route 911 calls to the appropriate destination.¹⁹ (footnotes omitted, emphasis in original)

Here, the FCC developed an informal definition of “interconnected VoIP services.” The FCC stated an interconnected VoIP service would have the following characteristics:

- (1) the service enables real-time, two-way voice communications;
- (2) the service requires a broadband connection from the user’s location;
- (3) the service requires IP-compatible CPE; and,
- (4) the service offering permits users generally to receive calls that originate on the [public switched network] *and* to terminate calls to the [public switched network].²⁰ (footnotes omitted, emphasis in original)

The service provided by Vonage would be considered an interconnected VoIP service. That is, both portable and fixed VoIP services could be considered “interconnected VoIP service” if they otherwise meet the criteria listed above.

The FCC determined it had authority to impose the E911 requirement under Title I of the Federal Telecommunications Act.²¹ Regardless of the classification of VoIP as either an information service or a telecommunications service, the FCC found that it had ancillary jurisdiction to promote public safety through establishment of E911 rules for interconnected VoIP service providers.

CALEA Decision

In an order issued September 23, 2005, the FCC found that the Communications Assistance for Law Enforcement Act (CALEA) applies to interconnected VoIP service providers.²² In doing so, the FCC found that Congress intended that the scope of the definition of a “telecommunications carrier” under CALEA be broader than it is under the Federal Telecommunications Act.²³ Additionally, the FCC found that while a service might be considered an “information service” under the Federal Telecommunications Act, it does not necessarily mean that it will be found to be an “information service” as defined in CALEA.²⁴

The FCC issued another order in this proceeding on May 12, 2006. The FCC noted that industry and law enforcement had made progress toward implementation of CALEA requirements. The

¹⁹ E911 Decision, paragraph 23.

²⁰ *E911 Decision*, paragraph 24.

²¹ *E911 Decision*, paragraph 26.

²² *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking*, ET Docket No. 04-295, RM-10865, FCC 05-153, released September 23, 2005, paragraph 1. (*CALEA Decision*)

²³ *CALEA Decision*, paragraphs 10 – 14.

²⁴ *CALEA Decision*, paragraphs 23.

FCC determined that interconnected VoIP providers must be in compliance with CALEA by May 14, 2007.

Universal Service Decision

On June 27, 2006, the FCC issued an Order and Notice of Proposed Rulemaking regarding “interim” modifications to the current method of assessing contributions to the federal universal service fund.²⁵ The FCC determined that an interim solution was necessary to provide stability to the fund. Among its interim solutions, the FCC required interconnected VoIP service providers to contribute to the federal Universal Service Fund.²⁶ Again the FCC did not make a determination regarding the classification of interconnected VoIP service as either an information service or a telecommunications service. Instead, the FCC required contribution based on the ancillary jurisdiction provided under Title I of the Federal Telecommunications Act.²⁷ The Commission also found that interconnected VoIP service providers are providers of interstate telecommunications under section 254(d) of the Federal Telecommunications Act.²⁸ This section addresses universal service and those carriers required to contribute to the universal service fund. The FCC found that it could, in addition to its ancillary jurisdiction, utilize its permissive authority under this section of the Federal Telecommunications Act to require contribution to the fund.

The FCC concluded that the public interest required interconnected VoIP providers to contribute to the fund for the preservation and enhancement of universal service. The FCC stated that it had previously required other classes of providers to contribute to the universal service fund because those providers benefit from universal service through their interconnection with the public switched network. Since interconnected VoIP service providers can make use of the public switched network, the FCC concluded it was in the public interest to require these providers to assume contribution obligations.²⁹ The FCC also noted that it was consistent with the concept of competitive neutrality, and thus the public interest, to require such providers to contribute to the universal service fund.³⁰

The FCC determined that interconnected VoIP service providers could contribute to the universal service fund based on a safe harbor estimate of 64.9 percent of revenues as interstate revenues. The FCC stated that while its *Vonage Decision* could allow it to reasonably conclude that 100 percent of revenues were interstate revenues, they decided to base a safe harbor on the measure

²⁵ *In the Matters of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review-Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; and, IP-Enabled Services, Report and Order and Notice of Proposed Rule Making*, WC Dockets No. 06-122 and 04-36, CC Dockets No. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, and 98-170, FCC 06-94, released June 27, 2006, paragraph 1. (*Universal Service Decision*)

²⁶ *Universal Service Decision*, paragraph 34.

²⁷ *Universal Service Decision*, paragraph 35.

²⁸ *Universal Service Decision*, paragraph 35.

²⁹ *Universal Service Decision*, paragraph 43.

³⁰ *Universal Service Decision*, paragraph 44.

of wireline toll revenue that is interstate.³¹ Interconnected VoIP service providers could also base their contributions on actual interstate revenues or through estimates based on a traffic study. Interestingly, the FCC stated:

Indeed, a fundamental premise of our decision to preempt Minnesota’s regulations in the [*Vonage Decision*] was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries. . . . 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 Decision*] and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the [*Vonage Decision*] would no longer be applicable to such an interconnected VoIP provider.³²
(footnotes omitted)

In addition, the FCC provided some clarification of its Vonage Decision in footnote 166. Here the FCC states that:

[o]ur actions today are not in conflict or otherwise inconsistent with any other provision of the Act. We acknowledge that section 230 of the Act provides that “[i]t is the policy of the United States – to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). We do not, however, believe that this policy statement precludes us from adopting universal service contribution rules for interconnected VoIP providers here. We note that the Commission’s discussion of section 230 in the [*Vonage Decision*] as cautioning against regulation was limited to “traditional common carrier economic regulations.” [*Vonage Decision*], 19 FCC Rcd at 22426, para. 35.³³

The FCC also sought comment on whether there were ways in which to improve its new requirements on interconnected VoIP providers. It requested comment on whether to eliminate or change the interim safe harbor it established for interconnected VoIP service providers.

Several of the FCC decisions discussed above have been appealed. In some instances, those appeals are pending.

³¹ *Universal Service Decision*, paragraph 53.

³² *Universal Service Decision*, paragraph 56.

³³ *Universal Service Decision*, footnote 166.

Recent Decision from the United States District Court for the Western District of Missouri
Central Division

Comcast IP Phone of Missouri, LLC, Comcast IP Phone, LLC and Comcast Phone of Missouri (Comcast) filed for injunctive relief from action of the Missouri Public Service Commission (MoPSC) to move forward with regulation of the company's VoIP services. The federal court denied Comcast's motion. The court states that:

Comcast asks the Court to find that state regulation of VoIP services are preempted by the FCC. But, as discussed below, Congress' intent to allow states to regulate intrastate telecommunications services is clear. Furthermore, state agencies, such as MoPSC, are capable of interpreting federal statutes necessary to classify communications services as either telecommunications or information services. Finally, the FCC did not preempt the entire field of VoIP regulation by beginning its *IP-Enabled Proceeding*. Accordingly, Comcast cannot show actual success on the merits.³⁴

The court pointed out that while a state agency's interpretation of a federal statute is not entitled the deference that could be shown to the interpretation of a federal agency, MoPSC could nonetheless interpret a federal statute in the absence of a decision by the FCC. The court found that:

. . . Congress did not intend for VoIP services to be completely unregulated. And, unless preempted or faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates. Therefore, in the absence of preemption or a contrary determination by the FCC, the MoPSC has jurisdiction to decide whether Digital Voice is a telecommunications service.³⁵

The court also pointed out that the FCC had not preempted states from regulation of all VoIP services. While it acknowledged that the Vonage Decision preempted states from regulating VoIP services for which it was not possible to separate traffic into interstate and intrastate jurisdictions, it did declare it was impossible separate all VoIP services into interstate and intrastate communications nor did it preempt states if separation is possible.³⁶

³⁴ *Comcast IP Phone of Missouri, LLC v. Missouri Public Service Comm.*, No. 06-4233-CV-C-NKL, Order at page 5 (W.D. Missouri Jan. 18, 2007) (*Comcast Missouri Order*)

³⁵ *Comcast Missouri Order*, page 8.

³⁶ *Comcast Missouri Order*, pages 8 -10.

KCC Proceeding

The Commission opened Docket No. 07-GIMT-432-GIT on November 11, 2006, to investigate whether interconnected VoIP service providers should be obligated to contribute to the KUSF. Interested parties were asked to file comments, at a minimum, addressing the following:

- a. The Commission's statutory authority to require VoIP providers to contribute to the KUSF.
- b. The ability of VoIP providers to identify local and interstate traffic.
- c. Whether 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.

Comments were to be filed on December 15, 2006. Reply comments were to be filed on January 12, 2007. This matter is still pending before the Commission.

Comments were divided between parties believing the Commission does not have jurisdiction to require interconnected VoIP service providers to contribute to the KUSF, parties believing that FCC orders prevent the Commission from requiring contributions to the KUSF, and parties believing that the Commission does have jurisdiction to impose such obligations and should impose contribution requirements on interconnected VoIP service providers. The parties all discuss one or more of the FCC's orders highlighted above. Additionally the parties discussed Kansas statutes and whether certain provisions are broad enough to permit the Commission to require interconnected VoIP service providers to contribute to the KUSF or if they are to be read more narrowly.