

# Telecommunications Alert: Eighth Circuit Upholds Injunction against Nebraska Requirement that VoIP Provider Vonage Pay into State Universal Service Fund

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In an order issued last Friday, a unanimous three-judge panel of the Eighth Circuit upheld a 2008 preliminary injunction by a Nebraska federal district court that stopped the Nebraska Public Service Commission (NPSC) from asserting state jurisdiction over a Voice over Internet Protocol (VoIP) provider, Vonage, to force the company to pay into the Nebraska Universal Service Fund (USF). *Vonage Holdings Corp. v. Nebraska PSC*, No. 08-1764 (May 1, 2009).

This decision technically is only binding on other states in the Eighth Circuit, but it will be cited as precedent in challenges to other states with USF surcharges or states that are considering them.

The district court had found that Vonage was very likely to succeed on the merits of its case against the NPSC's 2007 order requiring interconnected VoIP service providers to collect a surcharge from their customers for the Nebraska USF because the FCC, in its 2004 *Vonage Order*, had preempted state regulation of VoIP services like Vonage's.

Noting that it had upheld the validity of the FCC's 2007 *Vonage Order*, the Eighth Circuit said that it found "nothing in the NPSC's arguments here to alter our earlier conclusion" that the FCC correctly decided that VoIP services are subject to exclusive federal regulation. The court observed that "while a universal service fund surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied."

While the 2007 NPSC order required *all* interconnected VoIP services to contribute to the Nebraska USF, the Eighth Circuit order addressed itself only to nomadic VoIP services like those provided by Vonage.

Interestingly, the Eighth Circuit never mentioned the FCC's *amicus* brief before it that claimed its 2004 preemption of state VoIP service, which involved the Minnesota PUC's attempts to impose "traditional telephone company" entry and rate oversight on VoIP services, did not preempt state-required USF contributions.

Please let us know if you would like additional information about this case or would like to further discuss its implications.

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*Please contact your Mintz Levin telecommunications attorney, or any attorney listed below, for more information as we continue to follow these developments.*

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