

Telecommunications Alert: Forthcoming Eighth Circuit Decision on Nebraska Public Service Commission Requirement Regarding State Universal Service Fund Likely to Have Broad National Significance

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The U.S. Court of Appeals for the Eighth Circuit earlier this month held oral argument in the appeal of a federal district court decision that barred the Nebraska Public Service Commission from requiring voice over Internet protocol (VoIP) service provider Vonage Holdings Corp. to contribute to Nebraska's universal service fund (USF). The Eighth Circuit's eventual decision, likely to be issued early next year, will have significant implications for whether and how states will be permitted to assess a state USF surcharge on interconnected VoIP service providers' revenues. It could also have a broader impact on the extent of state regulatory authority over VoIP.

Background of Nebraska Public Service Commission Order

In 2007, the Nebraska Public Service Commission (NPSC) determined that despite the Federal Communications Commission's (FCC) 2004 *Vonage Preemption Order*¹ preempting certain of Minnesota's regulations on interconnected VoIP services, the NPSC was not preempted from requiring interconnected VoIP providers to support the Nebraska state USF based on a percentage of their *intrastate* revenues.² Citing a subsequent FCC order adopting rules in 2006 requiring interconnected VoIP providers to contribute to the federal USF,³ the NPSC ordered interconnected VoIP providers in Nebraska to begin billing, collecting, and remitting to the NPSC a state USF surcharge from their customers.

The district court, in granting Vonage's request for a preliminary injunction, placed great emphasis on the FCC's *Vonage Preemption Order* preempting Minnesota's attempt to impose "traditional 'telephone company' regulations" on Vonage's VoIP service.⁴ The NPSC appealed, arguing that the district court erred in such reliance. The NPSC argued that imposition of a state USF surcharge and collection requirement was not a form of "traditional 'telephone company' regulation" preempted by the FCC (such as Minnesota's attempts to require certification, entry, and tariff regulation of VoIP services), which the FCC had found to conflict with its federal deregulatory policies.

Debate over FCC Amicus Brief

The FCC in an *amicus* brief to the Eighth Circuit asserted that the Nebraska state USF regime supports and promotes the federal USF scheme. Vonage countered that the FCC's 2006 *USF Contribution Order* in no way "un-preempts" state regulation of Vonage. Vonage argued that states may impose requirements on interconnected VoIP, such as Enhanced 911 service, only because the FCC has *explicitly granted* to states the authority to do so. The *Vonage Preemption Order* and this case, argued Vonage, are both in essence about jurisdiction, and the FCC has exclusive jurisdiction over Vonage's inherently interstate service. At oral argument, the advocates were pressed on the meaning and scope of the "traditional 'telephone company' regulations" that had been preempted by the FCC in the *Vonage* order.

Acknowledging the FCC's appearance on behalf of the NPSC, Vonage noted that the FCC filing had been made by the FCC's Office of General Counsel without specific direction from the FCC. Thus, Vonage argued, deference normally accorded to an agency's interpretation of its own order should be reserved for FCC actions voted on by all commissioners, as opposed to a position taken by agency staff without direction from the full commission.

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We will be glad to forward to you a copy of the Eighth Circuit's ruling when it is released. Please contact your Mintz Levin attorney, or any attorney listed in the left column of this Alert, to be sent the court's opinion.

Endnotes

¹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004) ("*Vonage Preemption Order*").

² NPSC, App. No. NUSF-1, Prog. No. 18 (rel. Apr. 17, 2007).

³ *Universal Service Contribution Methodology*, WC Docket No. 06-12, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006) ("*USF Contribution Order*").

⁴ *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008).

If you would like more information on this or any other telecommunications matter, please contact your telecommunications attorney at Mintz Levin or one of the attorneys listed below.

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