FCC Says States May Prospectively Impose Universal Service Contribution Requirements on Nomadic Interconnected VoIP Service Providers

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The FCC has recently ruled, on a prospective basis, that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol ("VoIP") service providers, so long as a state's particular requirements do not conflict with federal law or policies. Specifically, the FCC has concluded that state universal service fund contribution rules for nomadic interconnected VoIP are not preempted if they are consistent with the FCC's contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in another state. *See In the Matter of Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-112, FCC 10-185, Declaratory Ruling (rel. Nov. 5, 2010).

The Declaratory Ruling resolves a petition of the Nebraska and Kansas state commissions for a "declaratory ruling with prospective only effect" that states are not preempted from imposing universal service contribution requirements on "the future intrastate revenues" of nomadic interconnected VoIP providers. Because the amended petition sought a declaratory ruling with prospective only effect and did not present the question of retroactivity, the FCC did not reach that question of retroactivity in the Declaratory Ruling.

Federal universal service contributions are currently calculated on the basis of the end-user revenues that contributors earn from their provision of interstate services; contributors are not assessed based on revenues from intrastate communications. Because of the difficulty that nomadic interconnected VoIP providers have in identifying whether calls are interstate as opposed to intrastate, the FCC in the *Interim Contribution Methodology Order* established a "safe harbor" under which an interconnected VoIP provider may presume that 64.9% of its revenues arise from its interstate operations. In the alternative, an interconnected VoIP provider may conduct a traffic study (*i.e.,* a statistical sampling) to estimate the percentage of its revenues attributable to interstate traffic and use that percentage to calculate its contribution amount. Interconnected VoIP providers that are able to determine the jurisdictional nature of their calls may calculate their federal contribution amounts using actual revenue allocations.

In light of the *Interim Contribution Methodology Order*, the FCC concluded that the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them. Such providers, according to the FCC, benefit from state universal service funds, just as they benefit from the federal Universal Service Fund, because their customers value the ability to place calls to and receive calls from users of the PSTN. The FCC noted that extending state contribution requirements to nomadic interconnected VoIP providers promotes the principle of competitive neutrality by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations."

The FCC further concluded that state universal service contribution requirements do not conflict with federal rules to the extent that states calculate the amount of their universal service assessments in a manner that is consistent with the rules adopted in the *Interim Contribution Methodology Order*. Additionally, the FCC stated that, to avoid a conflict with its rules, a state imposing universal service contribution obligations on interconnected VoIP providers must allow those providers to treat as intrastate for state universal service purposes the same revenues that they treat as intrastate under the FCC's universal service contribution rules. This will ensure that state contribution requirements will not be imposed on the same revenue on which an interconnected VoIP provider is basing its calculation of federal contributions. A state that fails to comply with this limitation in the future may be subject to preemption consistent with the FCC's *Declaratory Ruling*.