

MINUTES OF THE SENATE UTILITIES COMMITTEE

The meeting was called to order by Chairman Jay Emler at 9:30 A.M. on January 25, 2007 in Room 526-S of the Capitol.

Committee members absent: Senator Mark Taddiken- excused

Committee staff present: Raney Gilliland, Kansas Legislative Research Department
Tatiana Lin, KSU Legislative Fellow
Mike Corrigan, Revisor of Statutes
Ann McMorris, Committee Secretary

Conferees appearing before the committee:

Janet Buchanan, KCC
Mike Murray, Embarq Corporation
Colleen Jennison, Cox Communications
Jason Talley, Nuvio
Timothy Pickering, AT&T
John Federico, Kansas Cable Telecommunications Association

Others in attendance: See attached list.

Approval of Minutes

Moved by Senator Pyle, seconded by Senator Reitz, the minutes of the Senate Utilities Committee meetings held on January 23, 2007 and January 24, 2007, be approved. Motion carried.

Chair opened the hearing on

S.B. 49 - Kansas Universal service fund, VoIP providers

Janet Buchanan, Chief of Telecommunications, Kansas Corporation Commission, provided background information regarding VoIP service, a summary of decisions of the FCC and a summary of the current proceedings before the Commission. (Attachment 1)

Proponents

Mike Murray, Director of Governmental Affairs, Embarq Corporation, stated Embarq's position is that the Legislature should set policy as it pertains to VoIP support of the KUSF. The rules should be the same for everyone who uses the "interconnected" wireline telephone network. (Attachment 2)

Opponents

John Federico, Kansas Cable Telecommunications Association, voiced his concern that legislation requiring VoIP providers to contribute to the KUSF is premature due to the unresolved issues surrounding the FCC's Interim Order and the open Docket at KCC. (Attachment 3)

Colleen Jennison, Cox Communications, believes there are too many unanswered questions regarding how the courts and the FCC will rule on this case and how those decisions may affect state-specific universal service funds. She also felt that any legislative action would be premature. (Attachment 4)

Jason Talley, CEO of Nuvio Corporation, stated there are a number of outstanding legal issues surrounding the classification of VoIP as well as pending decisions at the FCC regarding the treatment of VoIP traffic. He noted all of these issues should be resolved prior to Kansas enacting a bill such as **S.B. 49**. (Attachment 5)

Timothy Pickering, General Attorney, AT&T Kansas, stated the AT&T's position is that the KCC has ample authority under existing Kansas law to adopt the fair and equitable numbers- and connections- based approach. It was recommended the legislature monitor this issue and request an update from KCC in 2008. (Attachment 6)

CONTINUATION SHEET

MINUTES OF THE Senate Utilities Committee at 9:30 A.M. on in Room 526-S of the Capitol.

KCC agreed (1) to provide a map of the area of service providers who are voluntarily paying KUSF, and (2) provide a list of known VoIP providers. KCC will also provide information on the extent of broadband deployment.

Chair closed hearing on **S.B. 49**.

Adjournment.

Respectfully submitted,

Ann McMorris, Secretary

Attachments - 6

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: JANUARY 25, 2007

Name	Representing
Linda Langston	COX
Janet Buchanan	KCC
Don Low	KCC
Dina Fisk	VERIZON
Cileen Jensen	COX
Tim Pickering	AT+T
Mike Murray	Fairbank
Doug Galloway	Fairbank
John Federico	KCTA
Tom Erickson	AT&T
Nancy Lister	Public Strategies Inc.
Jason Talley	Novio
Doug Smith	SITA

KANSAS

CORPORATION COMMISSION

KATHLEEN SEBELIUS, GOVERNOR
BRIAN J. MOLINE, CHAIR
ROBERT E. KREHBIEL, COMMISSIONER
MICHAEL C. MOFFET, COMMISSIONER

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

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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.



Embarq Corporation
EMBARQ.com

Before the Senate Utilities Committee
SB 49 VoIP-KUSF
Michael R. Murray, Director of Governmental Affairs
Thursday, January 25, 2007

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to comment on SB 49 at today's hearing.

This issue is very similar to policy legislation enacted last year in Kansas. In the 2006 Session you passed legislation requiring VoIP providers to contribute to the 911 Fund.

Also in 2006, the Federal Communications Commission ordered VoIP providers to contribute to the Federal Universal Service Fund.

Following on the FCC decision in 2006, the objective of SB 49 is to require interconnected VoIP providers (those companies which deliver intrastate telephone service via voice-over-the-internet protocol) to contribute to the Kansas Universal Service Fund supporting universally affordable and available telecommunications, just like other wireline and wireless carriers contribute today.

In ordering VoIP providers to contribute to the Federal Universal Service Fund, **the FCC found that interconnected VoIP providers benefit from their access to the interconnected wireline network**, and therefore interconnected VoIP providers should contribute to the preservation of that network on the same basis as every other provider that currently must support that network. It is becoming increasingly anti-competitive for VoIP providers to benefit from their access to the interconnected wireline telephone network on an unequal basis.

"Interconnected" is the key term. VoIP providers who deliver telecommunications by interconnecting to the wireline telephone network built and maintained by wireline telecommunications providers should require their customers to contribute their "fair share" to the system that ensures that the wireline telephone network remains affordable for all end users just as every other wireline and wireless telephone customer does today.

The Kansas Corporation Commission has recently opened a docket to determine whether VoIP providers should contribute to the Kansas Universal Service Fund. It is our position that the Legislature should set policy as it pertains to VoIP support of the KUSF, and SB 49 does exactly that.

SB 49 does not contemplate giving the KCC regulatory authority over VoIP. The intent of SB 49 is to make it crystal clear that VoIP providers which use the interconnected wireline network to provide telecommunications must bear their fair share of the costs associated with providing universal service and keeping local telephone rates affordable.

What's good for goose is good for the gander. The rules should be the same for everyone who uses the "interconnected" wireline telephone network. Wireline telephone companies such as Embarq have **"carrier of last resort" obligations** under the law. In its local exchanges, the incumbent local exchange company must maintain the wireline to each customer even if the customer has chosen a competitor as the local provider. There is a cost associated with that obligation. And, if the customer wants to switch back to the incumbent local exchange company, the wireline must be there to do so.

It is our hope that you will act favorably on SB 49. Thank you for your consideration, and I'd be pleased to respond to questions.

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Kansas Cable Telecommunications Association

Testimony in Opposition To SB 49

**Presented By: John Federico
President: Kansas Cable Telecommunications Association**

Senate Utilities Committee

January 25, 2007

Mr. Chairman, and members of the Senate Utilities Committee, I appear before you today on behalf of the Kansas Cable Telecommunications Association in opposition to SB 49. Our opposition is based singularly on the notion that consideration of any legislation requiring VoIP providers to contribute to the KUSF is premature due to the unresolved issues surrounding the FCC's Interim Order, and the open Docket at the KCC.

At the appropriate time, the KCTA would welcome a dialogue on the policy behind SB49.

Thank you for the opportunity to present these brief comments and would be pleased to stand for any questions.

John J Federico, JD
President: KCTA

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Senate Utilities Committee
Coleen Jennison
January 25, 2007

Thank you Mr. Chairman and members of the committee, I am Coleen Jennison, Director of Government Affairs for Cox Communications.

We appreciate your allowing us to share our views as they relate to SB 49.

First allow me to state that Cox Communications voluntarily pays on all CDT revenue, regardless of the delivery method of the telephone service.

However, we believe it is premature to pass legislation or implement the fee on interconnected VoIP providers. The Federal Communications Commission (FCC) Interim Order is just that, Interim, and the final decisions have not been made on this topic. In addition, the FCC's order has been appealed in the federal courts.

Specifically, the Interim order avoided making a determination whether VoIP service is entirely interstate or a combination of interstate and intrastate. Nor did the FCC address whether interconnected VoIP service is an information service or a telephone service.

Cox Communications believes there are still too many unanswered questions regarding how the courts and the FCC will rule on this topic and how those decisions may affect state-specific universal service funds.

In our filings at the Kansas Corporation Commission (KCC), Cox Communications indicated that depending on the final outcome of the federal ruling, the KCC could be put in the position of having to make refunds to carriers/customers if the state determinations are not compatible with the FCC orders.

Again, Cox Communications voluntarily pays into the Kansas Universal Service Fund. Once the final determinations are made on this issue, Cox Communications will abide by those decisions. Until that time, we believe that any legislative action would be premature.

Thank you Mr. Chairman and members of the committee for allowing me the opportunity to testify. I would be happy to answer any questions.

Senate Utilities Committee
January 25, 2007
Attachment 4-1



nuvio corpora
2500 west 110th street
overland park, kansas 66210
toll free 866.486.8846
phone 913.444.4422
fax 913.498.1810
email info@nuvio.com

**Written Testimony of Mr. Jason P. Talley,
Chief Executive Officer of Nuvio Corporation**

Today we are discussing Senate Bill 49, which proposes to force VoIP Providers, as defined by *K.S.A. 2006 Supp. 12-5353*, to contribute to the Kansas Universal Service Fund. I am the Chief Executive Officer of Nuvio Corporation, a VoIP Provider based in Overland Park, Kansas. Nuvio is a large provider of business VoIP services, otherwise known as hosted PBX. I am deeply troubled about this proposed legislation.

This bill, and the legal and logical analysis behind it is flawed in multiple ways. First and foremost, the FCC has determined that VoIP traffic is *interstate* in nature. Furthermore, the Federal Courts have decided that our service is appropriately classified an "information service", which is subject to exclusive federal jurisdiction. Your legal basis for attempting to assess this fee is not valid.

Secondly, there is much confusion over the FCC's recent decision to impose Federal USF obligations on VoIP providers and what that means to states' ability to then collect USF. It means absolutely nothing. By way of background, the FCC recently released its *Interim Universal Service Order*, which set a safe harbor percentage of 64.9% of the revenues of a VoIP provider as being subject to FUSF. However, the FCC made it clear in the *Vonage Order* that providers of VoIP services cannot be required to segregate their services into inter- and intrastate components for a non-service driven reason. The fact that the FCC established a "safe harbor" for VoIP providers to use when contributing to the FUSF does not mean that the balance is assignable to intrastate communications and should not be used by this committee. More importantly, the FCC also made clear in its order that it could have found that 100% of VoIP services are attributable to interstate services:

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Consistent with this advocacy and based on the conclusions in the Vonage Order, we find that it would be reasonable for us to treat the interconnected VoIP traffic as 100% interstate for USF purposes. Indeed, in another context where providers were unable to separate their interstate telecommunications revenues from other revenues, the [FCC] found a safe harbor of 100 percent to be reasonable. Nevertheless, we establish a safe harbor that is lower than 100% as a convenient alternative for interconnected VoIP providers.¹

As clearly set out in the quotation above, the FCC did not find that 35.1% of the traffic handled by providers of VoIP services was intrastate; rather, the FCC adopted the 64.9% as a “convenient alternative” while expressly stating that 100% of the VoIP providers’ traffic could be considered interstate.

There are a number of outstanding legal issues surrounding the classification of VoIP as well as pending decisions at the FCC regarding the treatment of VoIP traffic. Additionally, there is the belief that a large rewrite of the 1996 telecommunications act will occur with this Congress. All of these issues should be resolved prior to Kansas enacting a bill that has been pre-empted by federal law.

¹ *Federal-State Joint Board on Universal Service*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), *appeal docketed*, Vonage Holdings Corp. v. FCC, No. 06-1275 (D.C. Cir. July 18, 2006)

Testimony of Timothy S. Pickering, General Attorney – AT&T Kansas
220 SE 6th Street, Topeka, Kansas 66603 (785) 276-8411
Regarding SB 49
Before the Senate Utilities Committee
January 25, 2007

Chairman Emler and members of the Committee, good morning. My name is Tim Pickering and I am the General Attorney for AT&T Kansas. We appreciate the opportunity to speak to you today on Senate Bill 49 regarding Voice over Internet Protocol services (VoIP) and the Kansas Universal Service Fund (KUSF).

I. What Is VoIP Service?

This Committee has previously received briefings and heard testimony regarding VoIP services. As a brief overview, “interconnected VoIP services” are gaining in acceptance as a substitute to traditional phone services. These services utilize a broadband Internet connection and perform functions similar to traditional wireline voice calls, allowing customers to send and receive voice communications, and access other features like caller ID and voicemail. Users of interconnected VoIP services are assigned telephone numbers to make calls to, and receive calls from, the public switched telephone network (PSTN). Services are now offered by a wide range of providers, including cable companies, some traditional phone companies, and start-ups, like Vonage.

II. Recent Kansas Action on VoIP Services.

Kansas has been at the forefront of examining the role government should play in the regulation of interconnected VoIP services. You may recall that last year this committee heard a bill concerning VoIP services and E911 services, HB 2590. That bill sought to impose two \$.25 per month charges to help fund the E911 system, and it became law on July 1, 2006. This bill was supported by AT&T. Importantly, state action to impose such fees was authorized by the June 2005 Federal Communications Commission (FCC) *VoIP E911 Order*, which placed certain requirements on some VoIP providers to provide E911 functionality.¹

With respect to the subject matter covered in SB 49, whether VoIP services should directly support the KUSF, the Kansas Corporation Commission (KCC) recently opened Docket No. 07-GIMT-432-GIT to examine this precise question. Initial Comments were filed December 15, 2006 and Reply Comments were filed January 12, 2007. Dozens of entities were represented. As is often the case in regulatory proceedings, a consensus on the appropriate course of action has not yet been reached. All of the comments may be accessed electronically at <http://www.kcc.state.ks.us/docket/cal.cgi?docket=07-GIMT-432-GIT>.

¹ See In the Matters of Vonage IP Enabled Services and E911 Requirements for IP-Enabled Service Providers, WC Docket Nos. 04-36 and 05-196; FCC 05-116; First Report and Order and Notice of Proposed Rulemaking; Released June 3, 2005 (“*VoIP E911 Order*”).

III. AT&T Cautions Against the Use of Revenue-Based KUSF Assessments.

The goals of SB 49 and the KCC in Docket No. 07-GIMT-432-GIT – to ensure the continued viability of the KUSF – are important. The KUSF provides subsidies to local providers so that local telephone rates in high-cost areas remain affordable. Today, the KUSF is funded through a revenue-based system, which assesses a set percentage (now 6.07%, dropping to 4.35% beginning March 1, 2007) on intrastate telecommunications services for funding universal service. However, this system is badly in need of reform. In the long run, revenue-based universal service funding is threatened by new services and products, like VoIP, that are increasingly substituting for traditional telecommunications services in the marketplace, yet are not directly contributing to universal service. This not only threatens the stability and viability of the KUSF, but also distorts competition, as these new services gain artificial advantages in the marketplace based solely on the fact that they do not trigger KUSF obligations, and are now able to avoid other telecommunications-related fees.

Additionally, there is significant legal uncertainty over the state's authority to impose KUSF assessments on revenues from interconnected VoIP services. First, both state and federal law limit the KCC's statutory authority to impose universal service contribution requirements to intrastate "telecommunications," which VoIP services have not been classified. Second, the FCC has preempted traditional state economic regulation of VoIP. In the *Vonage Order*,² the FCC held that such services are primarily interstate and subject to exclusive federal jurisdiction. The FCC expressly preempted the application of traditional state regulatory requirements to VoIP, including any obligation to contribute to state universal service funds.

Some cases that touch these issues are working through the courts and the FCC is continuing to analyze regulation in this area. Additional decisions are expected in the future. However, in view of the uncertainty around this state's authority, any effort to directly impose KUSF assessments on revenues from interconnected VoIP services will not stabilize the KUSF. Instead, it would give rise to litigation, which in turn would increase uncertainty and raise the specter of refunds and other adjustments should the action be struck down.

IV. The Solution: A Numbers- and Connections-Based Assessment.

The state now faces a dilemma – how to ensure the stability and viability of the KUSF while promoting competitive neutrality. Clearly, the solution does not lay in the direct assessment of revenues from interconnected VoIP services, which would surely give rise to legal challenge. But that does not mean the Legislature or the KCC is powerless to act. On the contrary, in order to provide service, VoIP providers interconnect with the PSTN through the purchase of intrastate telecommunications services, which may be assessed to fund the KUSF. To promote the viability and stability of the fund – and to further competitive neutrality – the Legislature and the KCC should focus on assessing the intrastate services where appropriate, and require that the providers of those services contribute to the KUSF.

² Memorandum Opinion and Order, *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), ¶ 10 & n.28, *appeal pending, Minnesota Pub. Utils. Comm'n v. FCC*, Nos. 05-1069, *et al.* (8th Cir.).

One mechanism for ensuring this result is to adopt a numbers- and connections-based methodology for funding universal service. This approach would assess contributions to the KUSF on the basis of working telephone numbers and connections to the public network. This would stabilize funding for the KUSF, in addition to being transparent to consumers and competitively and technologically neutral. A numbers- and connections-based system also would ensure that the state's universal service contribution mechanism is equitable and nondiscriminatory.

Specifically, all competing service providers that provide telephone numbers or network access connections would be required to contribute on the same basis. There would be no question about which services are assessable or how to allocate the assessable component of a bundled service offering. This transparency also would curtail the market distortions that the current process has created, which affects customers' purchasing decisions. Adoption of this approach would protect the fiscal stability of the KUSF over the long term and ensure equitable and competitively neutral contribution obligations for all rivals in the same market.

V. No Action on SB 49 Is Needed at this Time.

AT&T respectfully suggests that SB 49 should not be adopted at this time. It is AT&T's position that the KCC has ample authority under existing Kansas law to adopt the fair and equitable numbers- and connections- based approach outlined above. This proposal has already been submitted to the KCC for consideration in Docket No. 07-GIMT-432-GIT. The details of this subject matter should be carefully examined in the regulatory proceeding. As such, AT&T believes the Legislature should monitor this issue, and request an update from the KCC in 2008.

Thank you for your time this morning.