

FCC Releases Order Extending Universal Service Contribution Obligations to Interconnected VoIP Providers and Modifies the Wireless Safe Harbor

On June 27, 2006, the Federal Communications Commission (“FCC”) released an order adopting two interim modifications to the existing approach for assessing contributions to the federal universal service fund (“USF” or “Fund”).¹ The FCC established universal service contribution obligations for “interconnected Voice over Internet Protocol (“VoIP”) providers,” as the FCC defines that term. The FCC also raised the interim wireless safe harbor from its current 28.5 percent level to 37.1 percent. The FCC took these actions, which will be in effect for the fourth quarter 2006 contribution requirements, to increase the contributions to USF in an effort to sustain and stabilize the Fund. Therefore, providers will need to make their first universal service filing on August 1, 2006, which will project the provider’s revenues for the fourth quarter of 2006.² As applied, both of these actions may impact substantially a carrier’s current operations.

At least on an interim basis, the FCC explicitly retained the current revenue-based contribution system, stating that moving to a non-revenue based contribution system would require significant time to implement and that the current actions would provide more immediate stability to the Fund.

The FCC also issued a Notice of Proposed Rulemaking to further refine the requirements adopted in the *Order*. Comments will be due **30 days** after publication in the Federal Register and reply comments will be due **60 days** after publication in the Federal Register.

APPLYING UNIVERSAL SERVICE OBLIGATIONS TO INTERCONNECTED VOIP PROVIDERS

The FCC has established universal service obligations for providers of interconnected VoIP services, as the FCC previously has defined that term.³ This will have a significant impact on a VoIP provider’s operations, because it will be difficult for many VoIP providers to design a service that will fall outside of the parameters that the FCC has established. Indeed, the FCC has broadly defined the term “interconnected VoIP provider” and has stated that it will expand the definition as necessary as VoIP services increasingly substitute for traditional telephony services.

Scope of the Order

In the *Order*, the FCC defined “interconnected VoIP services” as those services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.⁴ The FCC stated that interconnected VoIP services offer the capability for users to receive calls from and terminate calls to the PSTN, and that the obligations that the FCC has established in the *Order* apply to *all* VoIP communications made using an interconnected VoIP service, even those that do not directly involve the PSTN. Universal service obligations apply regardless of how the provider accesses the PSTN.

FCC Authority and Reasoning

The FCC determined that it had the authority to apply universal service obligations to interconnected VoIP providers under two provisions of the Act: (1) section 254(d), which authorizes the FCC to apply universal service obligations to any “provider of interstate telecommunications,” and (2) its ancillary jurisdiction under Title I of the Act.

Section 254(d) permits the FCC to require “any other provider of interstate telecommunications” to contribute to the Fund.⁵ In determining to apply universal service obligations to interconnected VoIP providers, the FCC emphasized that it has not previously classified interconnected VoIP services as “telecommunications services” or “information services” under the definitions set forth in the Act, referring to the *IP-Enabled Services Notice* and the 2004 *Vonage* decision preempting regulation by the Minnesota PUC,⁶ and that it is not making that determination in the order. The FCC explained that an interconnected VoIP provider qualifies as a “provider of interstate telecommunications” because it provides “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 or received.”⁷ The FCC did *not* go further and determine whether interconnected VoIP providers are also offering *telecommunications services*, as distinct from telecommunications. The FCC distinguished a “provider of interstate telecommunications” from an offeror of “interstate telecommunications service” stating that providers of interstate telecommunications do not necessarily offer telecommunications for a fee to the public. The FCC has applied this same rationale in other contexts to extend universal service obligations to payphone aggregators and private carriers after finding that such entities provide “telecommunications.”

The FCC made several findings to reach its conclusion that interconnected VoIP providers are “providers of interstate telecommunications.” First, the FCC found that the interconnected VoIP provider indeed “provides” a transmission service. Second, the FCC found that interconnected VoIP providers provide “telecommunications,” stating that the “heart of ‘telecommunications’ is transmission.”⁸ The FCC stated that interconnected VoIP providers are providing telecommunications regardless of whether they own or operate their own transmission facilities. Although the FCC has emphasized that it is not defining VoIP as “telecommunications service,” clearly this decision appears to establish a critical element for making such a classification. Lastly, the FCC noted that it previously had classified Vonage’s interconnected VoIP service as a jurisdictionally mixed service, leading to the FCC’s decision that the service is “interstate jurisdictionally,” and that other interconnected VoIP providers likely provided a mixed use service.

The FCC also premised its decision to apply universal service obligations to interconnected VoIP providers under its ancillary jurisdiction in Title I. The FCC concluded that regardless of the statutory classification of interconnected VoIP services, it has authority under Title I to promote universal service by adopting contribution rules for such services. The FCC explained that it may assert ancillary jurisdiction when Title I of the Act gives the FCC subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is “reasonably ancillary to the effective performance of various responsibilities.”⁹ The FCC found that both conditions were satisfied in this case and that its action ensures the FCC’s universal service obligation.

Implementation Issues for Interconnected VoIP Providers

As a result of this order, all interconnected VoIP providers must report and contribute to USF based on their interstate and international end user telecommunications revenue. The FCC established an interim safe harbor of 64.9% for VoIP providers. The FCC has provided three options for interconnected VoIP providers to fulfill this obligation: (1) use the interim safe harbor of 64.9%; (2) report based on their actual interstate telecommunications revenue; or (3) rely on traffic studies, subject to certain conditions.¹⁰ Interconnected VoIP providers must report and contribute to universal service beginning with the fourth quarter 2006, which means that they must file their first quarterly report on **August 1, 2006**, containing projected revenues for fourth quarter 2006.

In establishing options for interconnected VoIP providers to fulfill their universal service obligations, the FCC effectively has limited the application of the preemptive effects of the *Vonage Order*. Specifically, those interconnected VoIP providers that develop the capability to track the jurisdictional nature of the calls no longer would qualify for the preemptive effects of the *Vonage Order* and would be subject to state regulation.¹¹

Implementation Issues for Wholesale Providers

The FCC also has required wholesale providers supplying telecommunications services to interconnected VoIP providers must continue remitting universal service on the basis of those revenues for two full quarters after the effective date of the order. As a practical matter, this means that the Fund may receive contributions from telecommunications revenues associated with the same facilities two times – once from the VoIP provider and once from the wholesaler

providing service to the VoIP provider. The FCC explicitly has prohibited wholesale carriers from excluding those revenues by invoking the carrier's carrier rule during this interim period.

FCC INCREASES LEVEL OF WIRELESS SAFE HARBOR

The FCC also raised the current interim safe harbor for wireless providers from 28.5 percent to 37.1 percent. This will be in effect as of the fourth quarter of 2006. The FCC also determined that any wireless provider that uses a traffic study to determine its actual interstate revenues for universal service contribution must submit those traffic studies along with their FCC Form 499s to both USAC and the FCC for review.

NOTICE OF PROPOSED RULEMAKING

The FCC also released an NPRM seeking to refine the interim requirements that it adopted in the *Order*. The FCC has generally sought comment on the universal service obligations that it has established in the *Order* for interconnected VoIP providers. Specifically, the FCC has asked for comment on how the new requirements for interconnected VoIP providers can be improved. The FCC also has sought comment on whether to eliminate or change the interim safe harbor for interconnected VoIP providers.

The FCC sought comment on whether to eliminate or raise the interim wireless safe harbor. The FCC also has sought comment on whether mobile wireless providers can, or should be able to, determine their actual interstate and international end-user revenues. The FCC seeks comment on related issues pertaining to the safe harbor and a wireless carrier's ability to determine the jurisdictional nature of its traffic.

REVIEWING/APEALING THE FCC'S DECISION

Any party in the proceeding or any interested person whose interests are adversely affected may petition the FCC to reconsider the decision. Petitions for reconsideration are due thirty (30) days from publication in the Federal Register. Interested parties also may file a petition for review in federal appeals court. Petitions for review are due within sixty (60) days of publication in the Federal Register. We

expect multiple parties to file both petitions for reconsideration and petitions for review.

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Please contact one of the members of our Telecommunications Practice Group if you have any questions regarding this *Order*, if you are interested in filing a petition for reconsideration or a petition for review of this order, or if you are interested in submitted comments in response to the NPRM.

ENDNOTES

1. *Universal Service Contribution Methodology*, WC Docket No. 06-122; Federal-State Board on Universal Service, CC Docket No. 96-45, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) (“Order”). On June 27, 2006, Kelley Drye circulated a brief client advisory based on the FCC’s Public Notice summarizing the FCC’s adoption—but not release—of the order.
2. Under the FCC’s rules and orders, carriers submit quarterly universal service filings referred to as FCC Form 499Q and one annual filing referred to as the FCC Form 499A. In the quarterly filings, the provider projects estimated revenues for the following quarter, and the Universal Service Administration Company (“USAC”) will bill the provider based on those projected revenues. In the FCC Form 499A, the company reports actual revenues for the previous year, which essentially provides the company with an opportunity to correct its projections, either up or down. Please note that interest will apply for low projections, so it is in the company’s best interest to be as accurate as possible in projecting revenues.
3. *See Order* 36 (citations omitted).
4. *Id.* ¶ 36.
5. *See* 47 U.S.C. § 254(d).
6. *Order* ¶¶ 14 and 35.
7. *Id.* ¶ 38 (quoting 47 U.S.C. § 153(43)).
8. *Id.* ¶ 41.
9. *Id.* ¶ 47 (citation omitted).
10. For example, before an interconnected VoIP provider may begin to base its contributions on a traffic study, the study must be submitted to the Commission for approval. While the Commission recognized that problems have been identified with some traffic studies used by wireless carriers, and now requires wireless carriers to submit their studies to the Commission and USAC, wireless carriers do not have to obtain prior approval of their studies. Until a study is approved, an interconnected VoIP provider may use the safe harbor.* *Id.* ¶ 57.
11. *Id.* ¶ 56.