BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to the universal service fund mechanism established in NUSF-26	**Application No. NUSF-1** **Progression Order No. 18**
QWEST CORPORATION'S POST-HEARING BRIEF	

Qwest Corporation ("Qwest") submits its brief following the hearings of December 5, 2006 in this matter as follows:

west stands on its pre-filed and oral testimony presented at hearing, which demonstrates the following points:

(1) VoIP is an interstate information service, not an intrastate telecommunications service;

(2) Nebraska and federal law each limit the assessment of the NUSF surcharge to intrastate telecommunications services;

(3) The FCC has preempted and occupied the field of VoIP regulation, such that the Nebraska PSC lacks jurisdiction or authority to regulate VoIP, including regulation by the assessment of state universal service surcharges.

In this brief, Qwest highlights one specific problem with assessing universal surcharges on a state-by-state basis. As agreed by Mr. Bullock[1] and Mr. Pursley,[2] it is not enough to simply determine that 64.9% of VoIP traffic is interstate, and therefore

[1] Tr. p. 41-43.

[2] Tr. p. 65-67.

deduct that 35.1% of VoIP traffic is intrastate. A state commission that wants to assess a state universal service fund surcharge must "have some methodology for determining the state to which the intrastate portion of VoIP belongs to."[3] Two methods for making this determination were forwarded at hearing: billing address or registered location.[4] Regardless of which method the Nebraska Commission selects, another state could select another method (or even a third method not discussed in these proceedings), such that a VoIP customer or provider in "State 2" could be assessed an intrastate USF surcharge in both Nebraska and State 2 or in neither.[5] This potential for conflict illustrates the case for the FCC's express and repeated declarations that VoIP is inseparably interstate.[6] Indeed, if Nebraska imposes an NUSF surcharge on VoIP services that State 2 determines to be within its own jurisdiction, then this Commission would be regulating commerce beyond Nebraska's state borders, which is a volation of the Commerce Clause. This was the justification the FCC used to preempt the field of VoIP regulation in the *Vonage Preemption Order*:[7]

> 38. . . . Under the Commerce Clause jurisprudence, a state law that "has the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders" is a violation of the Commerce Clause. In addition, state regulation violates the Commerce Clause if the burdens imposed on interstate commerce by state regulation would be "clearly excessive in relation to the putative local benefits." Finally, courts have held that "state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause."

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[3] Tr. 41.

[4] Tr. 41-42.

[5] Tr. 42-43.

[6] *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking, (rel. June 27, 2006)("*Interim Contribution Order*"), at ¶ 14.

[7] *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22,404 (FCC 2004)("*Vonage Preemption Order*"), at ¶ 38-39.

> 39. Minnesota's regulation likely has "the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders." Because the location of Vonage's users cannot practically be determined, Vonage would likely be required to comply with Minnesota's regulation for all use of DigitalVoice – including communications that do not originate or terminate in Minnesota, or even involve facilities or equipment in Minnesota – in order to ensure that it could fully comply with the regulations for services in Minnesota. And, as we have explained above, this would likely be the result even if Vonage elected to discontinue seeking subscribers in Minnesota, given that end users could use the service from any broadband connection in Minnesota. While states can and should serve as laboratories for different regulatory approaches, we have here a very different situation because of the nature of the service – our federal system does not allow the strictest regulatory predilections of a single state to crowd out the policies of all others for a service that unavoidably reaches all of them. For these reasons, Minnesota's regulation would likely have the "practical effect" of regulating beyond its borders and therefore would likely violate the Commerce Clause.

Moreover, this conflict creates an inconsistency with the federal fund, and improperly relies on or burdens the federal fund in violation of 47 USC § 254(f).

In response, Staff contends that the federal Mobile Telecommunications Sourcing Act (4 USC § 116 *et seq.*) and its Nebraska derivative (Neb. Rev. Stat. § 77-2703.04) provide for similar methods to determine the location of wireless services for purposes of assessing state taxes and surcharges. However, rather than demonstrating that the Commission can adopt the proposed surcharges on VoIP traffic, the federal and Nebraska mobile telecommunications sourcing acts demonstrate the opposite. Under 47 USC § 332, wireless services are declared jurisdictionally interstate as well, except for certain areas of authority delegated to the states. As a necessary result of this preemption, the federal Mobile Telecommunications Sourcing Act and its state derivatives were needed to properly coordinate the assessment of taxes and surcharges on wireless services.

No such statutory scheme exists with regard to VoIP traffic. As such, there is no

methodology under either FCC orders, federal statutes, or Nebraska law to permit the assessment of the NUSF surcharge on VoIP traffic without conflicting with the FCC's preemption of the field and regulating beyond Nebraska's borders in violation of the Commerce Clause. As a result, Qwest urges the Commission to avoid implementing the surcharge until the FCC makes a final determination regarding the regulatory classification of VoIP service and resolves the potential state conflicts that could result from attempts to regulate an inseparably interstate information service.

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Respectfully submitted,

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Certificate of Service

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