IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 08–1764

VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC.,

Plaintiffs-Appellees,

v.

NEBRASKA PUBLIC SERVICE COMMISSION ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

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BRIEF FOR AMICI CURIAE UNITED STATES AND
FEDERAL COMMUNICATIONS COMMISSION SUPPORTING
APPELLANTS' REQUEST FOR REVERSAL

STATEMENT OF INTEREST

The district court in this case issued a preliminary injunction that bars Defendant-Appellant Nebraska Public Service Commission (NPSC) from requiring Plaintiffs-Appellees Vonage Holdings Corporation and Vonage Network, Inc. (collectively, Vonage) to contribute to Nebraska's universal-service program. The district court granted such relief on the basis of its determination that Vonage was likely to prevail on its claim that the Federal

Communications Commission (FCC) had preempted the NPSC's state universal service contribution requirement.

The district court's decision raises several issues of substantial interest to the FCC. First, the FCC has an important interest in ensuring that the courts correctly interpret the agency's precedents, especially where, as here, that precedent is construed to overturn a state's exercise of regulatory authority. Second, the FCC has a substantial interest in promoting universal service in an equitable and nondiscriminatory manner, as Congress directed in the Communications Act of 1934. *See* 47 U.S.C. § 254(b)(4). Third, the FCC has an interest in preventing the regulatory uncertainty that would result if the courts were to address in the first instance important legal and policy questions that are the subject of pending agency rulemaking proceedings—such as the question of how Internet telephony services such as Vonage's should be classified and regulated under the Communications Act.

For these reasons, and because we believe this Court would benefit from the FCC's considered views regarding federal and state authority over Internet telephony services, the United States and the FCC submit this amicus brief to urge the Court to reverse the district court's preliminary injunction in this case. The government is authorized to participate as amicus curiae by Rule 29(a) of

the Federal Rules of Appellate Procedure and has filed with this Court a motion for leave to file this amicus brief out of time.

STATEMENT OF ISSUE

This amicus brief addresses the following issue: Whether the district court erred when it concluded that FCC precedent likely preempted the application of the NPSC's state universal-service contribution requirements to Vonage, a provider of interconnected Voice-over-Internet-Protocol service.

STATEMENT

1. Voice-over-Internet-Protocol (or VoIP, for short) refers to a technology that allows end users to engage in voice communications over a broadband Internet connection. *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007) (*MPUC*). Some VoIP services are "fixed," which means that the end user can use the service from only one location (such as the end user's home). *Id.* at 575. Vonage, however, provides a VoIP service that is "nomadic": its customers can place and receive VoIP calls from any broadband Internet connection anywhere in the world. *Ibid.* Vonage's VoIP service is also "interconnected," which means that its customers can place calls to, and receive calls from, anyone with a telephone connected to the traditional public switched telephone network (PSTN). *Id.* at 574; *see also* 47 C.F.R. § 9.3 (defining "interconnected VoIP service").

The development and growth of interconnected VoIP service present difficult regulatory issues under the Communications Act. One such issue is how this service should be classified and regulated. Under the Communications Act, it has been argued that interconnected VoIP service could be regarded as a "telecommunications service" – which is subject to common-carrier regulation under Title II of the Communications Act, 47 U.S.C. §§ 201-276 – because it is often viewed by consumers as a substitute for traditional telephone service. Or, it has been argued, interconnected VoIP service could be classified as an "information service" – which is subject to minimal regulation – because it employs Internet technology. *See* 47 U.S.C. § 153(20), (47) (defining "information service" and "telecommunications service"); *see also MPUC*, 483 F.3d at 575, 577-78. The FCC has an open rulemaking proceeding in which it is considering the regulatory classification issue. *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

Another important issue concerns the extent to which the states can regulate the intrastate component of a nomadic VoIP service, such as the one provided by Vonage. The Communications Act generally grants the FCC exclusive jurisdiction over interstate (and international) communications, while leaving the regulation of intrastate communications to the states. *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004); *see* 47 U.S.C. § 152(b). But the

FCC may preempt state regulation under the so-called "impossibility exception" in situations where "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e.*, state regulation would conflict with federal regulatory policies." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In the case of nomadic VoIP, at least one side of the communication always takes place "in cyberspace," *MPUC*, 483 F.3d at 574, making it difficult for providers to pinpoint the exact geographic location of one or both ends of a call for purposes of determining whether that call originated and terminated in the same state (and is therefore subject to state jurisdiction) or in different states (and is therefore subject to federal jurisdiction). Consequently, the FCC has the authority to preempt state regulation under the impossibility exception to ensure that valid federal regulatory objectives applicable to VoIP services are not frustrated. *Id.* at 576.

The FCC exercised that preemption authority in 2004 with respect to Minnesota's attempt to impose "traditional 'telephone company' regulations" to Vonage's VoIP service. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*), *aff'd*, *MPUC*, 483 F.3d 570. The state regulations at issue in that case required

Vonage to obtain a state certificate and meet other entry conditions before providing intrastate service in Minnesota, and then to provide such service pursuant to tariff. *Id.* at 22408-09 ¶¶ 10-11 & n.30, 22430-31 ¶ 42 & n.148, 22432 ¶ 46.

The FCC found that those regulations conflicted with important federal policies applicable to the interstate component of Vonage's service. As the FCC explained, if interconnected VoIP service were to be classified as a telecommunications service, the state's certification and tariffing requirements would frustrate the FCC's policy of removing entry barriers and tariffing requirements in competitive telecommunications markets; on the other hand, if Vonage were to be considered an information-service provider, Minnesota's requirements would frustrate the FCC's policy of minimizing regulation of information services. *Id.* at 22415-18 ¶¶ 20-22. The FCC also found that "[t]here is, quite simply, no practical way to sever [Vonage's service] into interstate and intrastate communications that enables [Minnesota] to apply [its laws] only to intrastate calling functionalities without also reaching the interstate aspects" of the service. On the basis of those two findings – inseverability *and* frustration of federal purpose – the FCC concluded that preemption was necessary. *Id.* at 22423-24 ¶ 31. On review, this Court affirmed the FCC's preemption decision. *MPUC*, 483 F.3d 570.

2. The Communications Act establishes "the preservation and advancement of universal service" as an important federal policy goal. 47 U.S.C. § 254(b). To promote that goal, the Act requires "[e]very telecommunications carrier that provides interstate telecommunications services [to] contribute, on an equitable and nondiscriminatory basis" to the federal universal-service program. 47 U.S.C. § 254(d). The Act also authorizes the FCC, in its discretion, to extend the contribution requirement to "[a]ny other provider of interstate telecommunications … if the public interest so requires." *Ibid.*

In 2006, the FCC adopted rules requiring interconnected VoIP providers to contribute to the federal universal-service fund. *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 ¶ 34 (2006) (*VoIP USF Order*), *aff'd in part and rev'd in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007). Because the FCC has not yet determined whether interconnected VoIP service should be classified as a telecommunications service (and thereby subject to the Act's mandatory contribution obligation), the FCC invoked its permissive authority under § 254(d) over "provider[s] of interstate telecommunications" and concluded that requiring interconnected VoIP providers to contribute to universal service was in the public interest. The Commission explained that interconnected VoIP providers, like other fund

contributors, "benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN." *Id.* at 7540-41 ¶ 43. The Commission also concluded that requiring interconnected VoIP providers to contribute to universal service would promote the "principle of competitive neutrality" by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Id.* at 7541 ¶ 44.

Contributions to the federal universal-service fund are calculated on the basis of the end-user revenues that contributors earn from their provision of interstate (and international) telecommunications; revenues from intrastate communications are not used to calculate federal contribution amounts. Because of the difficulty that nomadic interconnected VoIP providers have in identifying interstate calls, the FCC established a "safe harbor" under which an interconnected VoIP provider may presume that 64.9 percent of its revenues arise from its interstate operations. *VoIP USF Order*, 21 FCC Rcd at 7544-45 ¶ 53. In the alternative, an interconnected VoIP provider also may conduct a traffic study to estimate the percentage of its revenues that derive from interstate traffic and use that percentage to calculate its contribution amount.

Id. at 7547 ¶ 57.[1] Finally, VoIP providers that are able to track the jurisdiction of their calls may calculate their federal contribution amounts using actual revenue allocations. *Id.* at 7544-45 ¶ 53.

3. The Communications Act provides that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). Consistent with that provision, and like many other states, Nebraska has established its own state universal-service fund. *In re Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund,* App. No. NUSF-1, Prog. No. 18 (April 17, 2007) (*NPSC USF Order*), at 3-4. Contributions to the Nebraska state universal-service fund are calculated solely on the basis of telecommunications companies' intrastate revenues. *Id.* at 4.

In the order at issue in this case, the NPSC concluded that interconnected VoIP providers were among the entities required to contribute to the state's universal-service fund. *NPSC USF Order* at 2. To determine the revenue base

[1] The FCC initially required interconnected VoIP providers to obtain the agency's approval of their traffic studies before using them to calculate universal-service payments. *VoIP USF Order*, 21 FCC Rcd at 7547 ¶ 57. The D.C. Circuit, however, vacated the agency's preapproval requirement. *Vonage Holdings Corp.*, 489 F.3d at 1243-44. Accordingly, interconnected VoIP providers currently may use traffic studies to calculate the amount of their universal-service contribution without the FCC's prior approval.

for calculating contributions to the state fund, the NPSC provided that "[i]nterconnected VoIP service providers can elect the same options provided by the FCC" in the *VoIP USF Order*: They can use (1) the safe harbor set forth in the *VoIP USF Order* under which 35.1 percent of their revenues are allocated to the intrastate jurisdiction (calculated by subtracting the federal safe-harbor amount (64.9 percent) from 100 percent); (2) their actual intrastate revenues; or (3) intrastate revenues determined through an FCC-approved traffic study. *Id.* at 13. Under the NPSC's rules, "the customer's billing address should be used to determine [the] state with which to associate telecommunications revenues of an interconnected VoIP service provider." *Id.* at 14.

4. On December 20, 2007, Vonage filed a complaint in the U.S. District Court for the District of Nebraska to challenge the validity of the *NPSC USF Order*. On March 3, 2008, the district court granted Vonage's request for a preliminary injunction prohibiting the NPSC from enforcing its contribution requirements against Vonage. *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008).

The district court concluded that Vonage was entitled to a preliminary injunction because it was likely to succeed on the merits of its argument that the rationale of the *Vonage Preemption Order* preempted the *NPSC USF Order*. The district court acknowledged that the *Vonage Preemption Order* had not

"expressly addressed" the states' authority to impose state universal-service contribution requirements on interconnected VoIP providers. 543 F. Supp. 2d at 1067. The district court nonetheless concluded that the *NPSC USF Order* was preempted because "it is impossible [for Vonage] to distinguish between interstate and intrastate calls." *Id.* at 1068. Citing this Court's decision in *MPUC* affirming the *Vonage Preemption Order*, the district court stated that "[t]here is not a shred of evidence that takes this case outside the 'impossibility exception.'" *Id.* at 1068.

The district court gave no weight to the FCC's decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund; the district court simply stated that the *VoIP USF Order* "does not negate the fact that there is no way to distinguish between interstate and intrastate [VoIP] service." *Id.* at 1067. In addition, although the district court recognized that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service," *id.* at 1065, the court dismissed the relevance of the *VoIP USF Order* by stating that it does not "affect the characterization of VoIP service as an information service," *id.* at 1067.

SUMMARY OF ARGUMENT

The district court erred when it concluded that Vonage was likely to succeed on its claim that the *NPSC USF Order* was preempted under the rationale of the *Vonage Preemption Order*. Unlike the state regulations at issue in the *Vonage Preemption Order*, Nebraska's decision to require interconnected VoIP providers to contribute to the state's universal-service fund does not frustrate any federal rule or policy. Rather, the *NPSC USF Order* is fully consistent with the FCC's conclusion in the *VoIP USF Order* that requiring interconnected VoIP providers to contribute to the federal universal-service fund would serve the public interest.

Moreover, the NPSC's methodology for calculating the amount of interconnected VoIP revenue that is intrastate in nature does not conflict with the FCC's contribution rule. Rather, the NPSC's methodology mirrors the FCC's rule, thereby ensuring that Vonage will not be required to classify as intrastate any revenue that would be classified as interstate under the FCC's contribution rule.

Finally, this Court need not – and should not – address the regulatory classification of Vonage's VoIP service in this case. The FCC is currently considering the classification issue in the context of a comprehensive rulemaking proceeding, which is a far more appropriate forum for resolving the

technical and highly complex regulatory questions presented by interconnected VoIP service. Nor is it necessary for the Court to address the classification of Vonage's service in this case. The FCC's determination that interconnected VoIP providers should contribute to the federal universal-service fund shows that the *NPSC USF Order* is consistent with federal policy regardless of how VoIP services are classified under the Communications Act.

ARGUMENT

THE FCC HAS NOT PREEMPTED THE NPSC USF ORDER

In the *Vonage Preemption Order*, the FCC relied on the "impossibility exception" to preempt Minnesota's regulation of Vonage's VoIP service. Under the impossibility exception, the FCC may preempt state regulation of intrastate communications if "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e.*, state regulation would conflict with federal regulatory policies." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n*, 476 U.S. 375 n.4. With respect to the specific state regulations at issue in the *Vonage Preemption Order*, the FCC concluded that both components of this test had been met, and in *MPUC*, this Court affirmed the FCC's preemption analysis. The district court in this case concluded that this precedent compelled the conclusion that the *NPSC USF Order* was also

preempted under the impossibility exception, because Vonage still cannot accurately determine whether particular VoIP calls are interstate or intrastate in nature. *See* 543 F. Supp. 2d at 1068 ("There is not a shred of evidence that takes this case outside the 'impossibility exception.' ").

The fundamental error in the district court's preemption analysis is that it fails to consider the critical question of whether preemption is necessary to prevent the state regulation at issue from frustrating a valid federal policy objective. It is not enough to simply conclude that it is impossible to separate the interstate and intrastate aspects of the service – that is a necessary, but not a sufficient, finding to support preemption. *MPUC*, 483 F.3d at 578. A finding that state regulation would conflict with federal regulatory policies is also required. *Ibid.* In the *Vonage Preemption Order*, the FCC found that Minnesota's entry and tariff regulations of Vonage's service conflicted with the FCC's deregulatory policies applicable to the interstate component of Vonage's service. The FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional "economic regulation." *See, e.g.*, *Embarq Broadband Forbearance Order*, 22 FCC Rcd 19478, 19481 ¶ 5 (2007) (distinguishing "economic regulation" from universal service obligations and other "non-economic regulations designed to further important public policy

goals"). In contrast to the *Vonage Preemption Order*, the *NPSC USF Order* does not present a conflict with the FCC's rules or policies. Rather, the NPSC's decision to require interconnected VoIP providers to contribute to the state's universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC's rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska's state universal-service contribution requirement.

1. The NPSC's decision to require interconnected VoIP providers to contribute to the state universal-service fund does not frustrate federal policy objectives, but, in fact, promotes them. In the *VoIP USF Order*, the FCC explained that it would be in the public interest to require interconnected VoIP providers to contribute to universal service because "much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN." *VoIP USF Order*, 21 FCC Rcd at 7540-41 ¶ 43. The Commission also found that requiring such contributions would promote competitive neutrality by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Id.* at 7541 ¶ 44. Both of these considerations apply with equal

force to the NPSC's decision in this case. Vonage benefits from the state's universal-service program because its customers in Nebraska (and elsewhere) undoubtedly value the ability to place calls to and receive calls from those in Nebraska who continue to rely on the PSTN for their telephony services. The *NPSC USF Order* also promotes competitive neutrality by ensuring that the burden of supporting universal service in Nebraska does not fall solely on Vonage's voice telephony competitors.

The NPSC's rule for determining the revenue base upon which the state's contribution requirements are assessed is also consistent with the FCC's contribution rules. The NPSC does not assess universal-service charges on any revenue deemed interstate; payments into the state fund are based solely on revenue deemed intrastate (which is, in turn, excluded from the interstate revenue base under the FCC's contribution rules). Nor does the NPSC require interconnected VoIP providers to classify as intrastate any revenue that the provider classifies as interstate under the FCC's rules. If an interconnected VoIP provider relies on the FCC's safe-harbor and presumes that 64.9 percent of its revenues flow from its interstate operations, under the *NPSC USF Order* it may use the equivalent presumption that 35.1 percent of its revenues are intrastate in nature. If an interconnected VoIP provider prepares a traffic study for the purpose of calculating its federal universal-service contribution, under

the *NPSC USF Order* it may use the same traffic study to calculate its corresponding state universal-service payment.[2] The third possibility – that an interconnected VoIP provider develops the ability to accurately distinguish interstate from intrastate calls – similarly ensures that interstate and intrastate revenue bases remain distinct. Thus, this is not a case in which preemption is necessary because the state has adopted an "allocation of [revenue] different from the allocation set forth" in the FCC's rules. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986). Rather, here, there is no possibility that an interconnected VoIP provider will be forced to pay into

[2] After the NPSC issued the *NPSC USF Order*, the D.C. Circuit invalidated the requirement that an interconnected VoIP provider obtain the FCC's preapproval before relying on a traffic study to calculate its federal universal-service contribution. *Vonage Holdings Corp. v. FCC*, 489 F.3d at 1243-44. Accordingly, the FCC no longer enforces the preapproval requirement against interconnected VoIP providers. For purposes of the conflict analysis in this brief, we assume that the NPSC would interpret the *NPSC USF Order*'s reference to an "FCC-approved traffic study" to mean a traffic study that the FCC allows an interconnected VoIP provider to use to calculate its federal universal-service contribution, regardless of whether the FCC has "preapproved" the traffic study.

Nebraska's universal-service fund on the basis of the same revenues that the provider uses to calculate its federal universal-service contribution.[3]

In sum, because the *NPSC USF Order* is not "inconsistent with the Commission's rules to preserve and advance universal service," 47 U.S.C. § 254(f), the district court erred in concluding that Vonage was likely to prevail on the merits of its preemption argument in this case.

2. The district court suggested that Vonage's preemption argument would likely prevail because interconnected VoIP service should be classified as an information service under the Communications Act. 543 F. Supp. 2d at 1067. The district court acknowledged that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service." *Id.* at 1065. The district court suggested, however, that the information-service classification was compelled by this Court's decision in *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (*Vonage*).

[3] The assertion by Vonage that our 2006 letter to the Court undermines the NPSC's rule, *see* Vonage Br. at 26-27, is wrong. The letter means what it says. A safe-harbor percentage proxy is useful for approximating the interstate (and hence intrastate) revenues needed to calculate universal-service contributions; it is not in and of itself useful for classifying particular traffic, which would be necessary for state and federal entry and tariffing policies to coexist.

Contrary to the district court's view, this Court did not consider the classification of Vonage's VoIP service in *Vonage*. In that case, this Court reviewed a Minnesota district-court decision that had concluded that Minnesota's regulation of Vonage's VoIP service – the same regulations at issue in the *Vonage Preemption Order* – was preempted because Vonage provided an information service under the Communications Act. *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. Civ. 03-5287 (MJD/JG), 2004 WL 114983 (D. Minn. Jan 14, 2004) . After the district court had issued its decision, the FCC released the *Vonage Preemption Order*, which preempted Minnesota's regulations under the impossibility exception without regard to the regulatory classification of VoIP service. Because the "the FCC's order preempting [Minnesota's regulation] dispositively support[ed] the District Court's [judgment]," and was immune from "collateral attack[]" in an appeal from that judgment, this Court "affirmed the judgment of the district court on the basis of the FCC Order." 394 F.3d at 569. The Court accordingly had no occasion to address the merits of the district court's characterization of Vonage's service as an information service under the Communications Act.

Nor should the Court attempt to resolve the regulatory classification of Vonage's service in this case. Questions of regulatory classification are inherently "technical, complex, and dynamic," and the "Commission is in a far

better position to address these questions than [the courts] are." *National Cable and Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005). Premature adjudication of this issue by the courts would impinge on the FCC's statutory responsibility to interpret and implement the Communications Act and could create significant confusion and uncertainty in the regulated community.

Moreover, it is unnecessary for this Court to address the classification of interconnected VoIP service in order to resolve the preemption question presented in this case. The FCC's decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund did not turn on the regulatory classification of VoIP services. Accordingly, even if interconnected VoIP services are information services under the Communications Act, the *NPSC USF Order* would be consistent with federal policy for the reasons discussed above. The regulatory classification of interconnected VoIP service simply has no bearing on the conflict analysis at issue in this case.

CONCLUSION

The Court should reverse the district court's preliminary injunction in this case.

Respectfully submitted,

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V.	)	
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 3989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2003.

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