



1200 18TH STREET, NW  
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301  
WWW. WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

August 25, 2009

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: Nebraska Public Service Commission and Kansas Corporation Commission  
Petition for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring  
that State Universal Service Funds May Assess Nomadic VoIP Intrastate  
Revenues, WC Docket 06-122 (filed July 16, 2009)**

Dear Ms. Dortch:

On August 24, 2009, Brendan Kasper of Vonage Holdings Corp. (“Vonage”), and Joe Cavender and the undersigned of Wiltshire & Grannis LLP on behalf of Vonage met with Jennifer Schneider of Commissioner Copps’s office; Christi Shewman of Commissioner Baker’s office; Priya Aiyar of Chairman Genachowski’s office; Julie Veach, Alex Minard, Irene Flannery, and Jennifer McKee of the Wireline Competition Bureau; and Diane Griffin Holland of the Office of General Counsel to discuss the above-captioned Petition (the “State Petition”). Vonage made the points detailed below.

Vonage does not object to contributing to state Universal Service Funds (“USF”). Vonage also agrees with the Nebraska Public Service Commission (“NPSC”) and the Kansas Corporation Commission (“KCC”) to the extent their Petition recognizes the FCC has the authority and responsibility to determine whether and in what circumstances state USF programs do not conflict with federal policy and therefore are not preempted.

The Commission should respond to the State Petition by opening a rulemaking proceeding to address the issues raised by the NPSC and the KCC. Congress has specifically authorized the Commission to “conduct its proceedings in such manner as will best conduce to

the proper dispatch of business and to the ends of justice.”<sup>1</sup> Opening a rulemaking and inviting comment from all interested parties, including other state public utility commissions, will enable the Commission to offer uniform guidance and ensure that all states have the opportunity to adopt interconnected VoIP USF contribution requirements that do not conflict with federal policy. Moreover, a rulemaking will allow the Commission to consider mechanisms to ensure that states can avoid future conflicts (and future preemption) if and when the Commission adopts changes in *federal* universal service contribution methodology.<sup>2</sup>

In the rulemaking proceeding, the FCC should make clear that only the FCC can determine when a state USF program is not preempted by the *Vonage Preemption Order*.<sup>3</sup> To the extent that states seek authority unilaterally to impose state USF obligations, the FCC should not stray from the holding of the *Vonage Preemption Order* that “this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply” to Vonage’s service.<sup>4</sup> Indeed, the *Vonage Preemption Order* has been a great success; it has facilitated Vonage’s ability to roll out innovative new products on a nationwide basis, creating enormous benefits for consumers.<sup>5</sup> As it stands poised to adopt a National Broadband Plan, the FCC should not call into question its authority to adopt a single national policy where necessary “to promote the continued development of the Internet”<sup>6</sup> and to “encourage the deployment...of advanced telecommunications capabilit[ies]”<sup>7</sup> by implying that state commissions may determine the scope of federal preemption decisions like the *Vonage Preemption Order*.

There can be no doubt that the FCC must continue to impose a “single national policy” for VoIP regulation as explained in the *Vonage Preemption Order*.<sup>8</sup> A conflict already exists between the two state petitioners’ USF assessments for providers like Vonage. The Nebraska Public Utility Commission’s regulations would require interconnected VoIP providers to contribute to state USF for all subscribers with Nebraska billing addresses. Kansas has not taken this approach, and has instead attempted to impose state universal service obligations on the basis of a subscriber’s “primary physical service address,” which frequently will *not* be the

---

<sup>1</sup> 47 U.S.C. § 154(j).

<sup>2</sup> *Universal Service Contribution Methodology*, WC Docket No. 06-122, AT&T Petition for Immediate Commission Action to Reform Its Universal Service Contribution Methodology (filed July 10, 2009).

<sup>3</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*Vonage Preemption Order*”).

<sup>4</sup> *Id.* at 22405 (¶ 1).

<sup>5</sup> A recent report estimates that the direct benefit to consumers, over five years, of using over-the-top VoIP providers like Vonage is approximately \$6 billion. See Michael D. Pelcovits & Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., *Consumer Benefits from Cable-Telco Competition* at 16 (updated Nov. 2007), available at [http://www.micradc.com/news/publications/pdfs/Updated\\_MiCRA\\_Report\\_FINAL.pdf](http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf) (visited August 25, 2009).

<sup>6</sup> 47 U.S.C. § 230(b)(1).

<sup>7</sup> 47 U.S.C. § 157 nt.

<sup>8</sup> See *Vonage Preemption Order*, 19 FCC Rcd at 22425 (¶ 33).

subscriber's billing address.<sup>9</sup> All parties will benefit if, as Vonage has suggested,<sup>10</sup> the FCC sets out the limited conditions under which state USF assessments would not conflict with federal policy, including setting forth a uniform approach to ensure that state assessments do not undermine the single national policy for VoIP regulation by conflicting with one another. Vonage believes that, in accordance with the Commission's determination not to require interconnected VoIP providers to alter their systems in order to facilitate regulation, a reasonable approach would be to allow each company to determine how to allocate its revenues to the various states for the purposes of state universal service programs, provided, of course, that each company takes the same approach across all states.<sup>11</sup>

A rulemaking would be the most legally defensible and equitable response to the State Petition. When state public utility commissions first tried to regulate Vonage's DigitalVoice interconnected VoIP service, the FCC declared that "this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice."<sup>12</sup> This holding was not narrowly limited to any particular regulatory provision; rather, it preempted the application of Minnesota's "traditional 'telephone company' regulations."<sup>13</sup> Among the "traditional 'telephone company' regulations" that the Commission preempted in the *Vonage Preemption Order* was Minnesota Statute § 237.16 subd. 9, the statute that would have required Vonage to contribute to Minnesota's universal service program. While the *Vonage Preemption Order* broadly preempted state regulation of Vonage's service, it also specifically identified the narrow range of state authority that was not preempted: "general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices."<sup>14</sup> In light of this unambiguous assertion of federal authority, federal courts consistently have recognized the broad scope of the *Vonage Preemption Order*, including its express preemption of state authority to impose USF requirements.<sup>15</sup>

---

<sup>9</sup> *Investigation to Address Obligations of VoIP Providers with Respect to the KUSF*, Implementation Order Adopting Staff Report and Recommendation, Docket No. 07-GIMT-432-GIT, 2008 Kan. PUC LEXIS 1481, at \*10 (Sept. 22, 2008).

<sup>10</sup> Comments of Vonage Holding Corporation, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36, at 6-8 (filed Nov. 26, 2008).

<sup>11</sup> *Cf. Vonage Preemption Order*, 19 FCC Rcd at 22419-21 (¶ 25 & n.96).

<sup>12</sup> *Id.* at 22405 (¶ 1).

<sup>13</sup> *Id.* at 22404 (¶ 1).

<sup>14</sup> *Id.* at 22405 (¶ 1).

<sup>15</sup> Every federal court—indeed, every federal judicial officer—to consider the scope of the *Vonage Preemption Order* has concluded that it preempted all state attempts to impose any telephone-company regulation on Vonage's interconnected VoIP services, including attempts to assess and collect a state Universal Service Fee. *See, e.g., Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009), *aff'g* 543 F. Supp. 2d 1062 (D. Neb. 2008); *N.M. Pub. Regulation Comm'n v. Vonage Holdings Corp.*, Civ. No. 08-607 WJ/RHS, Memorandum Opinion and Order, 2009 U.S. Dist. LEXIS 74229 (D.N.M. July 28, 2009) (overruling state commission's objections to magistrate judge's proposed findings and adopting recommendation

The Commission is free to revisit its decision to preempt state imposition of USF. A rulemaking will permit the Commission to determine if there is good reason to alter the scope of the *Vonage Preemption Order* and to explain any departure from existing law. A forward-looking resolution of the State Petition, moreover, will avoid the unjust result of forcing Vonage to pay past assessments, and possibly penalties, despite its inability to recover from relevant customers and its reasonable reliance on both the clear text of the *Vonage Preemption Order* and a string of federal court decisions holding that states were not free to impose state USF obligations on Vonage.

If you have any questions or require any additional information, please do not hesitate to contact me at (202) 730-1346.

Respectfully submitted,



Brita D. Strandberg  
*Counsel for Vonage Holdings Corp.*

cc: Priya Aiyar  
Jennifer Schneider  
Christi Shewman  
Julie Veach  
Alex Minard  
Irene Flannery  
Jennifer McKee  
Diane Griffin Holland

of dismissal of state commission's suit); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 Civ. 4306, 2005 U.S. Dist. LEXIS 33121 (S.D.N.Y. Dec. 14, 2005); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004), *aff'g* 290 F. Supp. 2d 993 (D. Minn. 2003).