

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Universal Service Contribution Methodology

WC Docket No. 06-122

REPLY COMMENTS OF VONAGE HOLDINGS CORPORATION

Brendan Kasper
Senior Regulatory Counsel
VONAGE HOLDINGS CORP.
23 Main Street
Holmdel, New Jersey 07733
(732) 444-2216

Brita D. Strandberg
Joseph C. Cavender
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, D.C. 20036
(202) 730-1300

Counsel to Vonage Holdings Corp.

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The central issue presented by the Petition¹ of the Kansas and Nebraska state commissions is not about state universal service funds. Vonage has repeatedly stated that it does not object to paying state universal service fees. What the Petition is about, fundamentally, is jurisdiction to regulate and authority to overturn this Commission's orders. Kansas and Nebraska ("State Petitioners"), as well as a few commenters, disagree with the determination the Commission made in 2004 to preempt state regulation of Vonage's service in the *Vonage Preemption Order*.² But rather than asking the Commission to change that policy, some states decided that they would reject the Commission's choice and impose regulations on Vonage unilaterally. The federal courts have, without exception, rejected these attempts to usurp the Commission's authority. Having failed in court, a few states now ask the Commission to ratify their choice to ignore the Commission's determination that it, and *not* the state commissions, would decide what regulations would apply to Vonage. But as Vonage has explained, even if the Commission were inclined to undermine its own ability to set national policy in the future, it could not lawfully issue the declaratory ruling the Petition seeks.

If the Commission should choose to alter its policy and the preemptive scope of the *Vonage Preemption Order*, it should be clear that that is precisely what it is doing. Additionally, it should emphasize that permitting states to collect state universal service obligations does not mean that it is reversing its decision that this Commission, not the

¹ *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122 (filed July 16, 2009) ("Petition").

² *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22425 (¶ 33) (2004) ("*Vonage Preemption Order*").

state commissions, has the authority and responsibility to determine what regulations will apply to services like Vonage's. And it should make sure to establish clear rules, consistent with the policies that animated the *Vonage Preemption Order*, to guide the states in setting up contribution mechanisms that are consistent with federal policy.

I. The Declaratory Ruling the Petition Requests Would Be Unlawful.

As Vonage has explained, while states are *currently* preempted from imposing state universal service obligations, the Commission could, if it wished, consider changing the scope of its existing preemption through a rulemaking—relief the Petition requested in the alternative.³ What the Commission could not lawfully do, however, would be to grant the Petition's request to issue a declaratory ruling purporting to “clarify,” with retroactive effect, that states have *never* been preempted from imposing such charges on carriers like Vonage, so that Vonage would be subject to all kinds of allegedly past due fees and penalties. Such a declaration would be unlawful for two reasons. *First*, the law is clear that states are preempted from imposing universal service obligations on Vonage, and a declaratory ruling may not be used to change already-clear law.⁴ *Second*, imposing such fees on Vonage retroactively would be “manifestly unjust” and unlawful.⁵

The comments confirm that the Commission cannot grant the retroactive authority the Petitioners request. The only commenters who treat the issue persuasively agree with Vonage on this point. 8x8, Inc. explained that “[r]etroactive application of a decision may be appropriate only where the decision is merely a clarification, correction, or

³ Comments of Vonage Holdings Corp. at 2-6 (filed Sept. 9, 2009) (“Vonage Comments”).

⁴ *Id.* at 6-19.

⁵ *Id.* at 19-22.

application of existing law” but that “[o]n its face, the *Vonage Preemption Order* preempted state USF regulations” and that the FCC has not changed that policy since.⁶ Google similarly pointed out that the notion that the *Vonage Preemption Order* “did not preempt state USF law—meaning states could now assess years of liability against VoIP providers retrospectively—is without support.”⁷ And the Voice on the Net Coalition, too, agrees that if the Commission is to reconsider the regulatory treatment of nomadic interconnected VoIP providers, it ought to do so by a rulemaking.⁸

Commenters who believe the Commission should issue a “declaration” provide essentially no argument in favor of any retroactive application of universal service obligations. CenturyLink, for example, offers nothing more than the conclusory assertion that “[t]he Commission can make clear that state authority to assess universal service on intrastate calling has never been intended to be preempted.”⁹ NARUC, which participated as an *amicus curiae* in the Nebraska litigation, explains that in its view “[t]he only real dispute is over *when* Vonage will have to begin to pay into existing State programs,” which suggests that it does not believe that Vonage should be subject to retroactive liability.¹⁰ These and other commenters raise concerns about the speed with

⁶ Comments of 8x8, Inc. at 9 (filed Sept. 9, 2009). 8x8 also noted that state authority to impose universal service obligations is narrower than the Commission’s authority, and that the Commission explicitly relied on its broader authority when it imposed federal universal service obligations on VoIP providers. *Id.* at 2. This is yet another reason why the Commission should act, if at all, prospectively rather than attempting to “clarify” that providers like Vonage have always been subject to state USF obligations.

⁷ Comments of Google, Inc. at 1-2 (filed Sept. 9, 2009).

⁸ *See* Comments of Voice on the Net Coalition at 7-8 (filed Sept. 9, 2009). *See also* Comments of 8x8, Inc. at 7-8 (filed Sept. 9, 2009).

⁹ Comments of CenturyLink at 8 (filed Sept. 9, 2009).

¹⁰ Comments of National Association of Regulatory Utility Commissioners at 4 (filed Sept. 9, 2009) (“NARUC Comments”) (emphasis in original). NARUC also states that

which the Commission can act,¹¹ but these concerns are baseless. As explained in Part III below, the Commission can act just as quickly through a rulemaking as it can through a declaratory ruling proceeding. Moreover, because it would not be overshadowed by the legal infirmities of a ruling with retroactive effect, a prospective rulemaking would provide a more certain foundation for state universal assessments. In any event, the State Petitioners and their supporters offer no lawful justification for their requested retroactive application of state universal service obligations.

II. The Declaratory Ruling the Petition Requests Would Be Unwise Policy.

In addition to being unlawful, a declaration that state universal service programs have never been preempted would be inconsistent with the forward-looking, proconsumer policies the *Vonage Preemption Order* was intended to further.

As the Commission explained, “a number of provisions in the 1996 Act ... counsel a single national policy for services like DigitalVoice.”¹² The Commission recognized that permitting state regulators to make their own determinations about what regulations would apply to Vonage’s service would be at odds with Congress’s expressed

“[t]he FCC, Vonage, and the petitioners all agree nomadic VOIP providers should contribute to State universal funds.” *Id.* (emphasis removed). It goes further in a recent *ex parte*, stating that “Vonage, the FCC, and Petitioners all agree—the Statute requires Vonage to pay into State universal service programs.” Letter from James Bradford Ramsey, NARUC General Counsel, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket 06-122, GN Docket 09-51, WC Docket 07-38 & GN Docket 09-47, at 2 (filed Sept. 15, 2009). Neither of those statements is correct. As Vonage explained in its comments, the Commission has preempted states from imposing state USF obligations on providers like Vonage. Vonage does not object to paying into such funds if and when the FCC authorizes states to impose such obligations. It is certainly not true, however, that the statute *requires* Vonage to pay state USF charges.

¹¹ *See, e.g.*, NARUC Comments at 4; Comments of NECA, et al. at 7 (filed Sept. 9, 2009).

¹² *Vonage Preemption Order*, 19 FCC Rcd at 22425 (¶ 33).

policy “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.”¹³ The Commission also found support for its conclusions in the *Vonage Preemption Order* in section 706 of the 1996 Act, which encourages “the deployment of advanced telecommunications capability to all Americans” by promoting competition in local telecommunications markets.¹⁴ The Commission recognized that subjecting Vonage’s service to regulation by many state regulators would inhibit its further development,¹⁵ and firmly rejected this outcome, explaining that the Commission “cannot, and will not, risk eliminating or hampering [Vonage’s] innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet.”¹⁶

The Commission’s procompetitive and proconsumer purposes in establishing a single national policy for Vonage’s service—and the benefits that have flowed from that decision—are hardly academic abstractions. In fact, the Commission’s decision to preempt state regulation to promote the development of advanced services like Vonage’s has borne considerable fruit. Vonage has developed and marketed innovative services on a nationwide basis, relying on the Commission’s “single national policy” governing its service. Consumers have realized billions of dollars of direct benefit from “over the top” services like Vonage’s, and economists estimate that the competitive response of other

¹³ *Id.* at 22425 (¶ 34) (quoting 47 U.S.C. § 230(b)(2)).

¹⁴ *Id.* at 22426-27 (¶ 36) (citing 47 U.S.C. § 157 note).

¹⁵ *Id.* at 22427 (¶ 36).

¹⁶ *Id.* at 22427 (¶ 37).

service providers is an order of magnitude larger.¹⁷ And Vonage continues to drive innovation, recently announcing that customers can now place calls at no additional charge to more than 60 countries—while still maintaining its low \$24.99 per month price.

State Petitioners and some commenters ignore all of this when they assert that the principle of competitive neutrality requires granting the Petition.¹⁸ Imposing retroactive liability and permitting states to impose penalties on Vonage would *not* be competitively neutral, since Vonage, unlike other providers, would not be able to recover those fees and penalties from its customers. More fundamentally, the Commission has already determined that protecting and promoting competition requires that “this Commission, not the state commissions” *decide* what regulations will apply to Vonage’s service.¹⁹ That is why the only choice the Commission has that will promote competition—regardless of whether it decides to impose state USF obligations on nomadic interconnected VoIP providers—is to make the decision *itself*, by rule, rather than to validate state commission attempts to regulate Vonage’s service.

III. The Petition’s Request for a Declaratory Ruling Is Unnecessary.

The vast majority of states do not purport to impose state USF obligations on Vonage or similar providers. For these states, the question of whether or not states like Kansas and Nebraska can collect allegedly past due USF contributions from interconnected VoIP providers like Vonage should be entirely academic. Without

¹⁷ See Michael D. Pelcovits & Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., *Consumer Benefits from Cable-Telco Competition*, at iii (updated Nov. 2007), available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

¹⁸ See, e.g., Petition at 11-12.

¹⁹ *Vonage Preemption Order*, 19 FCC Rcd at 22405 (¶ 1).

existing contribution obligations, these states would simply have no basis for collecting past due fees even if the Commission attempted, contrary to law, to authorize retroactive assessments. For these states, a forward-looking rule issued by the Commission would provide just as much authority to impose state USF obligations as a declaratory ruling.

Commenters' interest in a ruling with retroactive effect despite the very limited practical effect of such a ruling confirms that the states' goal is to undermine the Commission's exercise of exclusive jurisdiction over services like DigitalVoice. A retroactive declaratory ruling—that states were *never* prohibited from imposing USF fees—would, at least in the mind of the states, throw into doubt the preemptive effect of the *Vonage Preemption Order* regarding all *other* regulations a state might wish to impose. The hope of the State Petitioners, as they candidly explain, is to eliminate the existing preemption of traditional state telephone company regulation of services like Vonage's.²⁰ The Commission should not endorse such an outcome, which would both undermine its existing policy choices and constrain its ability to set a “single national policy” in the future.

Some commenters claim that a declaratory ruling is desirable because the Commission could not issue a rule as quickly as it could issue the requested declaration.²¹ Of course, a desire for alacrity is no excuse to ignore the law, and, as Vonage has explained, a declaratory ruling with retroactive effect would be unlawful. In any event, the Commission can both comply with the law *and* issue a quick decision. There is no reason to believe the Commission, having invited comment on the Petition's alternative

²⁰ Petition at 20 (explaining that a declaratory ruling will remove doubt that “the FCC must pre-approve each and every state regulation that somehow affects nomadic VoIP”).

²¹ *See, e.g.*, Comments of Tennessee Regulatory Authority at 3 (filed Sept. 9, 2009); Comments of California Small ILECs at 6 (filed Sept. 9, 2009).

request for a rulemaking, could not act as quickly by rule as it could by declaratory ruling. Vonage, contrary to the insinuations of some commenters, does not ask the Commission to proceed by rulemaking in order to delay the Commission's actions. In Vonage's view, the Commission's timetable regarding this Petition is the Commission's concern. Vonage asks that the Commission proceed by rulemaking because that is the lawful, competitively neutral, and fair way to proceed.

IV. The Commission Should Reaffirm Its Single National Policy Over Nomadic Interconnected VoIP Services.

Regardless of whether the Commission decides to modify its policy and permit states to require providers of nomadic interconnected VoIP services to contribute to state USF programs, it should reaffirm its determination that such services are subject to a single national policy and that states are preempted from imposing their own regulations.

Consistent with that single national policy, the Commission should emphasize that even if it provides for a "safe harbor" proxy of VoIP providers' revenues for determining contributions to state USF programs—presumably the mirror of the federal safe harbor proxy—such a proxy does not give rise to state jurisdiction.²² The Commission decided the "jurisdictional question" in the *Vonage Preemption Order*.²³ And when the Commission established rules requiring Vonage and other similar services to make federal USF contributions, it recognized that it could reasonably assess *all*

²² See Letter from Nandan M. Joshi, FCC Counsel, to Michael E. Gans, Clerk, U.S. Court of Appeals for the Eighth Circuit, *Minn. Pub. Utils. Comm'n v. FCC*, No. 05-1069, at 1 (July 11, 2006) (explaining that the establishment of a safe harbor for federal USF contributions did not permit states to assert jurisdiction over any of Vonage's traffic).

²³ *Vonage Preemption Order*, 19 FCC Rcd at 22412 (¶ 14 n.46).

revenues, even though it set a lower figure.²⁴ If the Commission sets a state safe harbor contribution as the mirror of that federal safe harbor, it should leave no doubt that it is simply making a financial determination, not a determination of shared jurisdiction.

In addition, the Commission should ensure that VoIP providers are not subject to duplicative assessments on their revenues. Some commenters, such as NARUC, are skeptical of the possibility,²⁵ which is surprising given that, even though only a few states have thus far asserted jurisdiction to collect from nomadic VoIP providers, a conflict among the states *already* exists.²⁶ And, as Google points out, leaving the states to resolve these conflicts without federal guidelines “will likely result in duplicative assessments and [] overassessments” given “the natural incentives for each state to maximize the contributions into its own state funds.”²⁷ In that regard, Vonage reiterates that if the Commission permits states to assess nomadic VoIP service providers, it should permit providers to allocate subscribers’ revenues to the various states on the basis of any reasonable data, including billing address, phone number, or E911 location, so long as they use the same information for all subscribers. This would minimize the costs of compliance while also ensuring that providers could not “game” the system to avoid

²⁴ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544-45 (¶ 53) (2006) (“*VoIP USF Order*”).

²⁵ *See, e.g.*, NARUC Comments at 9-10. NARUC’s comments demonstrate a fundamental confusion about the nature of USF assessments that requires a response. NARUC discusses the possibility of individual consumers who might be forced to pay overlapping assessments, but assessments are made on the service provider’s revenues. *Cf. id.* at 10 n.18.

²⁶ The conflict is not, as some commenters suggest, simply between Kansas and Nebraska, the two states that filed the Petition. Rather, the conflict is between every state that has one approach and every other state that has another approach. For example, Kansas, which assesses based on 911 address, will conflict with *every state* that uses billing address, not just Nebraska. *See* Petition at 30.

²⁷ Google Comments at 9-10.

paying state universal service fees.²⁸ Such a rule would be consistent with the policy determination the Commission has repeatedly made that providers should not be obliged to make substantial modifications to their services simply to facilitate regulation.²⁹

Conclusion

The Commission should consider carefully what policy to pursue regarding state USF obligations on service providers like Vonage. But if it decides to impose such obligations, it should do so in a prudent, lawful manner, consistent with the single national policy it established in the *Vonage Preemption Order*.

Respectfully submitted,



Brendan Kasper
Senior Regulatory Counsel
Vonage Holdings Corp.
23 Main Street
Holmdel, NJ 07733
(732) 444-2216

Brita D. Strandberg
Joseph C. Cavender
Wiltshire & Grannis LLP
1200 Eighteenth St, NW
Washington, DC 20036
(202) 730-1300

Counsel to Vonage Holdings Corp.

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²⁸ See Vonage Comments at 4-5 (noting also the possibility of subscriber confusion if state USF assessments are from one state while state taxes are assessed from another state).

²⁹ See *Vonage Preemption Order*, 19 FCC Rcd at 22419-21 (¶ 25); see *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3320-21 (¶ 21) (2004).