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November 2, 2009

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: Nebraska Pub. Service Commission and Kansas Corp. 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 No. 06-122 (“Petition”)

Dear Ms. Dortch,

In its *ex parte* letter dated October 28, 2009, Vonage asks that the FCC set rules that will allow each nomadic VoIP provider to determine how to allocate its revenues to the various states for the purposes of state universal service programs, provided that each company takes the same approach across all states.¹

The Nebraska Public Service Commission (“NPSC”) and the Kansas Corporation Commission (“KCC”) (collectively, “State Commissions”) are surprised that Vonage views this issue as so important. In fact, a number of nomadic VoIP providers have paid into the KCC and NPSC state funds, and have never raised the same objections.² The NPSC and KCC staffs have an agreement to work together to resolve a conflict issue if it arises. In the entire length of the state programs, no provider has ever complained about double billing.

Vonage’s proposal does not reflect sound public policy for a number of reasons.

First, having a system where a carrier chooses the contribution assessment method is subject to manipulation. Only a few states now impose contribution requirements on nomadic VoIP providers, and not all states have state universal service funds. Any system in which the provider chooses the method of state-by-state allocation will tempt the provider to choose a

¹ Letter to Marlene Dortch, Secretary, FCC from Brita Strandberg, Counsel for Vonage Holdings Corp., October 28, 2009, WC Docket No. 06-122. (“Vonage Ex Parte”)

² Both fixed and nomadic VoIP providers with the exception of Vonage paid into the NPSC before it was enjoined from collecting the assessment by the federal court. After the court issued an injunction, the NPSC stopped collecting from nomadic VoIP providers, **but has continued to collect from fixed VoIP providers.** (Commissioner Anne Boyle wishes to correct any statements she may have made to the contrary.) Both nomadic and fixed providers contribute to the KCC state fund.

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method that disproportionately assigns revenue to states that do not have funds or do not assess nomadic VoIP. For example, if providers are allowed to allocate their revenues among the states based on the NPA-NXX of the customer, the provider can easily allocate a disproportionate amount of revenue to a state that does not assess nomadic VoIP, because a NPA-NXX need not have any relation to the actual geographic location of the customer. Other allocation methods chosen at the discretion of the provider will create similar temptations.

Further, state law in both Kansas and Nebraska requires that the contribution method meet certain standards, including that it be equitable and non discriminatory.³ Allowing carriers to select their own contribution methodology will not necessarily satisfy state law requirements. Both Kansas and Nebraska conducted proceedings to determine which method would best satisfy state statutory requirements.⁴ (Vonage elected not to participate although other VoIP providers filed comments in Nebraska and attended the Kansas workshop.) No such record justification would exist under Vonage's proposal.

Additionally, Vonage's proposal will significantly increase costs to providers as well as state commissions. For example in Nebraska, the Commission must demonstrate to its state auditor on a regular basis that it is collecting the correct amount of surcharge revenues from the carriers. Nebraska's USF statutes require the Commission to audit carriers to ensure that remittances and distributions are accurate.⁵ Because Nebraska uses a billing address safe harbor allocation method, it has a streamlined approach to auditing providers' contributions using

³ See Neb. Rev. Stat. § 86-323(4) (2008) which provides "All providers of telecommunications should make an *equitable and nondiscriminatory* contribution to the preservation and advancement of universal service." (emph. added) See also, Kan. Stat. Ann. § 66-2008:

(a) The commission shall require every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services and, to the extent not prohibited by federal law, every provider of interconnected VoIP service, as defined by 47 C.F.R. 9.3 (October 1, 2005), to contribute to the KUSF on an *equitable and nondiscriminatory* basis. (emph. added)

⁴ In Kansas, the KCC Staff conducted a workshop on July 2, 2008, to discuss KUSF implementation issues including the identification of provider revenues subject to the KUSF contribution. See *In the Matter of the investigation to Address Obligations of VoIP Providers with Respect to the KUSF, Staff Report and Recommendations*, Docket No. 07-GIMT-432-GIT, dated August 1, 2008, p. 10. On September 22, 2008, the KCC adopted Staff's recommendation in *Implementation Order Adopting Staff Report and Recommendation and Requiring VOIP Providers Operating in Kansas to Report and Remit to the Kansas Universal Service Fund by January 15, 2009*, pp. 6-7. In Nebraska, the NPSC took comment from interested parties, held a formal hearing (with sworn testimony and cross-examination) and made a determination based on the record in the case. See *In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund, Opinion and Findings*, Application No. NUSF-1, Progression Order No. 18 (April 17, 2007)

⁵ See Neb. Rev. Stat. § 86-324(2)(d) (2008) which provides the NPSC shall "require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law. The commission shall require, as reasonably necessary, an annual audit of any telecommunications company to be performed by a third-party certified public accountant to insure the billing, collection, and remittance of a surcharge for universal service. The costs of any audit required pursuant to this subdivision shall be paid by the telecommunications company being audited."

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agreed upon procedures and accounting methods that Commission staff can verify. This method keeps the costs to carriers and the Commission reasonably low.

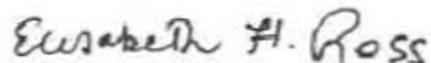
If providers use different methodologies, the Commission will not be able to apply this streamlined method. Both the state and the carriers will have to expend more money on administrative expenses tracking the contributions and the various methods providers use. Most likely, the Nebraska Commission would be required to conduct a full audit of the carriers' books and records to ensure that the methodology used was accurate. Audit costs are passed along to the providers.⁶

Though accomplished by a third-party, Kansas has similar audit requirements as Nebraska.⁷ The KCC concurs that Vonage's proposal will add an extra layer of administrative cost and difficulty to the current state USF audit process.

In a cost/benefit analysis, Vonage's proposal does not prevail. States will definitely face additional costs, many of which will be passed on to providers and ratepayers. Any benefits are speculative, since Vonage has not submitted any evidence that double billing has occurred, or will occur above a *de minimus* level in the future.

If you have any questions or require any additional information, please do not hesitate to contact me at (202) 659-5800.

Respectfully submitted,



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cc: Christi Shewman
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⁶ *Id.*

⁷ See e.g. Kan.Stat. Ann. § 66-2010(b): "The [KUSF] administrator shall be responsible for: (1) Collecting and auditing all relevant information from all qualifying telecommunications public utilities, telecommunications carriers or wireless telecommunications service providers receiving funds from or providing funds to the KUSF; (2) verifying, based on the calculations of each qualifying telecommunications carrier, telecommunications public utility or wireless telecommunications service provider, the obligation of each such qualifying carrier, utility or provider to generate the funds required by the KUSF..." (emphasis added)