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December 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,

If the FCC determines that, based on its prior orders, states have the authority to assess state universal service contributions on nomadic VoIP providers, the financial impact on nomadic VoIP providers of paying existing assessments for past periods they chose not to pay would most likely be minimal.

Only a few states have imposed state universal service charges on nomadic VoIP providers. (A number of other states are waiting for the outcome of this proceeding before they impose contribution requirements so any collections by those states would be prospective only.)

According to Shana Knutson, Legal Counsel, the **Nebraska Public Service Commission** ("NPSC") would not collect retroactively from nomadic VoIP providers who have not paid into the state fund if an FCC decision permitted the NPSC to do so. The federal court enjoined the NPSC from collecting from Vonage. Consequently, the NPSC made the policy decision to treat other nomadic VoIP providers similarly, and has not continued to impose contribution requirements on them. The NPSC would not collect for past periods even for the short period between when it issued its order imposing the contribution requirement and the date that the federal court issued its injunction.

The **Kansas Corporation Commission** ("KCC") would enforce existing assessments for past periods through the Kansas Universal Service Fund's ("KUSF's") third party administrator if the FCC authorized it to do so, particularly since at least one nomadic VoIP provider has paid into the state fund. The KCC estimates that the financial impact on nomadic VoIP providers operating in Kansas would be minimal for several reasons. Generally, the period over which nomadic VoIP providers would owe contributions is short, according to Sandy Reams, Managing

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Auditor.¹ To date, VoIP providers have been required to report to the KUSF for December 2008 through October, 2009, 11 months. Moreover, the relevant KUSF assessment rates are less than half of the federal USF rate and this rate is applied only to the intrastate revenues portion (35.1% if the provider uses the FCC safe harbor).²

It is difficult to determine precisely how much support the KCC could collect because the KCC does not know which, if any, providers are offering nomadic VoIP services in Kansas. Reams used some very conservative assumptions to develop estimates. Based on her analysis, possibly two nomadic VoIP providers (in addition to Vonage) could be operating in Kansas and have not registered with the KUSF. If those companies operated only in Kansas, each would owe at most \$2,537 to the KUSF for the eleven month period.³

One company has registered with the KUSF and identified itself as a nomadic VoIP provider. Although it paid KUSF assessments for certain periods, it may owe \$6,700 in assessments and late charges for the months of December 2008 through February 2009 and May 2009 through October 2009.⁴

Vonage has not provided any financial information to the KUSF administrator or the KCC, making it difficult to calculate what it would owe. Reams estimates that Vonage may owe \$140,000 to the KUSF for the period December 2008 through October 2009, based on publicly-available information.⁵ Reams concludes that this amount should not be significant to a company with over \$900 million of annual earnings.⁶

The potential impact on nomadic VoIP providers serving **New Mexico** does not appear to be substantial, either. The New Mexico contribution requirement has not been in effect for a long period of time. VOIP providers were subject to the state requirement that they contribute to the state universal service fund with respect to intrastate revenues earned, effective April 1, 2006.⁷ Also, the state surcharge rates were low: 3.32% for 2006 and 3.00% for 2007 and 2008, and were applied only to the intrastate retail revenue portion (35.1% if the provider uses the FCC safe harbor).⁸ Because many VoIP providers have ignored state law or provided notice to the third party fund administrator that they contend that the New Mexico Public Regulation Commission ("NMPRC") lacks authority to require VoIP providers to contribute to the state fund,⁹ the NMPRC cannot determine amounts owed by nomadic VoIP more definitively.

¹ See Attachment A, Memorandum of Reams to Marlene Dortch, FCC Secretary, dated December 1, 2009. ("Reams Memorandum") at pp. 2-3.

² *Id.* at p. 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See *Ex Parte* Comments, New Mexico Public Regulation Commission, WC Docket No. 06-122, dated September 8, 2009, Attachment A, p. 8. ("NMPRC Comments")

⁸ *Id.* at pp. 8, 10.

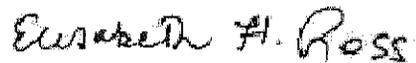
⁹ See NMPRC Comments, p. 5.

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To the best of our knowledge, these are the only three states that have imposed contribution requirements on nomadic VoIP providers.

If you would like any more information, or have any questions, please contact the undersigned.

Respectfully submitted,



Elisabeth H. Ross
Counsel for the Nebraska Public Service
Commission and Kansas Corporation Commission

cc: Austin Schlick
Diane Griffin Holland
Chris Killion
Joe Palmore
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ATTACHMENT A

MEMORANDUM

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

From: Sandy Reams, Managing Auditor
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604

Date: December 1, 2009

RE: Impact of Kansas Universal Service Fund (KUSF) assessment on Nomadic Voice over Internet Protocol Providers

Background:

The Kansas Corporation Commission (KCC) implemented the statutory requirement for interconnected VoIP providers in its September 22, 2008 Order in Docket No. 07-GIMT-432-GIT. K.S.A. 66-K.S.A.2008 Supp. 66-2008(a) states,

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. Any telecommunications carrier, telecommunications public utility or wireless telecommunications service provider which contributes to the KUSF may collect from customers an amount equal to such carrier's utility's or provider's contribution, but such carrier, provider or utility may collect a lesser amount from its customers.

Pursuant to Commission order, VoIP providers were required to begin reporting their Kansas intrastate revenues earned in December 2008 to the KUSF in January 2009. Therefore, VoIP providers have been required to report to the KUSF for the period of December 2008 through October 2009,¹ 11 months.

¹ Carriers report revenues earned in one month to the KUSF administrator on or before the 15th of the following month. Thus, a carrier's October 2009 revenue was due to the KUSF administrator in November 2009.

Nomadic VoIP Providers in Kansas:

To identify VoIP providers in Kansas, public data, including the Federal Communications Commission's (FCC) Form 499 reporting database, is relied upon. Each company registered as a VoIP provider, and that lists Kansas as a state in which it may offer service, is sent a KUSF registration and reporting packet. Each company is to provide company contact information, report intrastate revenues, and pay the related assessments. However, a VoIP provider is not required to identify whether it provides fixed or nomadic service. Thus, unless a company specifically identifies how it provides VoIP services, Staff cannot positively identify how the service is provided.

Based on the FCC's Form 499A database, approximately 50 of the companies registered as VoIP providers that may offer service in Kansas have not contacted the KCC or registered with the KUSF administrator. Of these, Vonage has identified itself as a nomadic VoIP provider. Staff cannot positively determine whether the other VoIP providers offer nomadic or fixed VoIP services. However, three companies have sent letters to the KUSF administrator, and referring to the Eighth Circuit court's determination, state the KCC has no authority over them since they are VoIP providers. The references to the Eighth Circuit's decision, which pertains only to nomadic providers, imply these companies offer nomadic VoIP service

KUSF Assessment Rates:

Since the KCC implemented the statutory requirements for VoIP providers, two different assessment rates have been in effect. For the months of December 2008 through February 2009, the KUSF assessment rate was 4.65% (.0465). Effective March 2009, the assessment rate increased to 5.03% (.0503). Thus, the KUSF assessment rates are less than one-half of the Federal Universal Service Fund (Federal USF) rate.

Late Charges:

Two late charges are automatically assessed to any provider delinquent with its KUSF obligations:

1. Late Payment Charge (LPC): The LPC is applied for failure to remit a KUSF payment on or before the due date. The LPC is 1% per month (12% cumulative). LPC is based on date payment is posted by bank. (February 19, 1997 Order, Docket No. 94-GIMT-478-GIT)
2. Late Carrier Remittance Worksheet (Late CRW) Charge: A late CRW charge of 1% per month (12% cumulative) of the assessment due or \$100, whichever is greater, is applied for each worksheet received after the due date. The charge is assessed based on the date the worksheet is received by KUSF administrator, not the date mailed or postmarked. (January 23, 2006 Order, Docket No. 06-GIMT-332-GIT and January 23, 2006 Order, Docket No. 07-GIMT-276-GIT)

Estimated Impact to Providers:

Vonage has identified itself as a nomadic VoIP provider. Of the 50 companies that have not registered with the KUSF administrator, Staff and the KUSF administrator performed a cursory review of the companies' websites to try to determine if these companies offer fixed or nomadic services. This brief review indicates that four other companies may also offer nomadic VoIP services in Kansas. Of these four providers, two are Federal USF contributors.² Assuming these companies operate only in Kansas, each company would owe, at most, \$2,537 to the KUSF for assessments and late charges for the months of December 2008 through October 2009. Staff cannot provide any estimate for the remaining two companies since there is no public data available to estimate company revenues.

² Companies with \$10,000 or more in annual contributions are required to report and pay into the Federal USF. Thus, a company must have at least \$83,333 of annual revenues (\$10,000 threshold / 12% assessment rate)

Vonage has not provided any financial information to the KUSF administrator or to the KCC. Therefore, in order to ascertain any impact Vonage's compliance with Kansas statute and the KCC order would have on the KUSF and the company, Staff had to rely on publicly-available data. In its Form 10-K filed with the Securities and Exchange Commission for the nine months ended September 30, 2009, Vonage earned \$646,437,000 in gross annual revenue from its telephony operations.³ Vonage states that 95% of its annual telephony revenue is earned by customers in the United States.⁴ Less than one-percent (1%) of the U.S. population resides in Kansas.⁵ Thus, Staff estimates that Vonage's annual revenue subject to the KUSF assessment is \$2.7 million.⁶ Assuming average monthly revenue of \$220,721,⁷ Staff estimates that for the period of December 2008 through October 2009, Vonage owes approximately \$140,000 of assessments and late charges to the KUSF. Staff cautions this is an estimate. Among other factors, the estimate relies on gross reported revenue, and a company is allowed to recognize uncollectible revenue for KUSF purposes. It seems unlikely that even paying \$140,000 to the KUSF for the months of December 2008 through October 2009 is significant to a company with over \$900 million of annual earnings.⁸

Only one company that is registered with the KUSF administrator has specifically identified itself as a nomadic VoIP provider. In May 2009, this provider reported its March and April 2009 revenue and paid approximately \$1,336 in assessments and late charges to the KUSF. Based on this data, Staff estimates this company may owe \$6,700 in assessments and late charges for the months of December 2008 through February 2009 and May through October 2009. This company paid the late charges under protest and now seeks a refund of monies paid to the KUSF.

³ Vonage Holdings Corp. Reports Third Quarter 2009 Results, http://files.shareholder.com/downloads/VAGE/727971534x0x329300/98b9a764-1d6e-4401-bcae-0dd410188a1c/Press%20release%20Q309%20Final_04NOV2009.pdf, downloaded November 25, 2009.

⁴ Id, Form 10-K, Item 1, Business, page 2, which states that 95% of the company's customers are located in the US.
⁵ U.S. Census Bureau State and County Quick Facts, <http://quickfacts.census.gov/qfd/states/20000.html> downloaded November 30, 2009. Kansas population of 2,802,134 / total U.S. population of 304,059,724 = .92%.

⁶ $\$861,916,000 \times .92 = \$818,820,200$ $\times .92\% = \$7,546,030$ $\times 35.1\%$ intrastate safe harbor = \$2,648,657.

⁷ $\$2,648,657$ of annual revenue / 12.

⁸ Vonage's 2008 total revenue was over \$900 million. Vonage's Form 10-K for the year ended December 31, 2008, <http://files.shareholder.com/downloads/VAGE/727971534x0x289944/eb503633-e3f0-4936-be72-a1c1b39f2ce3/annualreport2008.pdf>, Management Update, page 2, downloaded November 25, 2009.