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December 2, 2009

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th 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 December 1, 2009, Brendan Kasper of Vonage Holdings Corp. (“Vonage”), and the undersigned of Wiltshire & Grannis LLP on behalf of Vonage met with Christine Kurth of Commissioner McDowell’s office to discuss the above-captioned Petition (the “State Petition”). Vonage made the points detailed below.

Vonage does not object to paying into state USF funds if the Commission affirmatively changes the law to grant states the authority to impose USF assessments. If the Commission wishes to make this change in law, it may do so swiftly. It need only act by rulemaking to (1) change the existing preemption of state USF assessments and (2) detail the circumstances in which state USF assessments would not conflict with federal policy.

Vonage does not wish to delay Commission action on Nebraska Public Service Commission (“NPSC”) and Kansas Corporation Commission’s (“KCC”) requested change in law.¹ Indeed, Vonage first explained the need for a change in law to enable state USF assessments over a year ago, long before NPSC and KCC filed their Petition.² Changing the law

¹ Vonage recognizes that the Commission is considering reform to USF programs in a number of proceedings, and acknowledges that it may be more appropriate for the Commission to address the petition in the context of a broader reform proceeding.

² See Comments of Vonage Holdings Corp. at 2-3, 5-6, WC Docket No. 05-337 (filed Nov. 26, 2008) (“Vonage Nov. 26, 2008 Comments”).

through a rulemaking is the quickest path to legally sustainable state authority to collect USF from providers like Vonage.

The conflict that already exists between Kansas and Nebraska's assessment mechanisms highlights the need for the Commission's single national policy for VoIP regulation.³ The FCC can address the existing conflict presented by these states' assessment methods and prevent additional conflicts by permitting providers to allocate subscribers' revenues among the states on the basis of any reasonable data, including place of primary use, billing address, phone number, or E911 location, so long as the provider uses the same basis for all customers.⁴ This approach, which Vonage has advocated throughout this proceeding,⁵ would allow providers to use assessment methods that are consistent with existing billing systems. Vonage's proposed approach is also consistent with the Commission's repeated determination to foster innovation by refusing to require providers of innovative services to make substantial modifications to their services simply to facilitate regulation.⁶

Most importantly, Vonage's method would allow providers to comply with state USF requirements in a manner that minimizes customer confusion. Because it values its customer relationships, Vonage has thought carefully about how to satisfy potential state USF assessments in a way that is customer-friendly. Granting providers flexibility to choose assessment bases (so long as the same basis is used for all customers) would allow providers to use the same basis for state USF obligations as for state sales or other tax obligations, and thereby avoid the customer confusion that would arise if customer bills were to show taxes from one state and state USF pass-throughs from another.

Finally, if it does change the law to permit state USF assessments, the Commission should make clear that only the Commission can determine when a state USF program—or any other state regulation—is not preempted by the *Vonage Preemption Order*. To the extent that states seek authority to impose state USF obligations unilaterally, the Commission 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.⁷ As it stands poised to adopt a National Broadband Plan, the Commission should not call into question its authority to adopt, in appropriate circumstances, a single national policy to “promote the continued development of the Internet”⁸ and “encourage the

³ *Vonage Holdings Corporation 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*”).

⁴ Vonage Nov. 26, 2008 Comments at 7-8; Reply Comments of Vonage Holdings Corp. at 10-11, WC Docket No. 06-122 (filed Sept. 24, 2009).

⁵ *Id.*; see also Comments of Vonage Holdings Corp. at 4-5, WC Docket No. 06-122 (filed Sept. 9, 2009).

⁶ See *Vonage Preemption Order*, 19 FCC Rcd at 22419-21 (¶ 25); *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).

⁷ *Vonage Preemption Order*, 19 FCC Rcd at 22405 (¶ 1).

⁸ 47 U.S.C. § 230(b)(1).

deployment...of advanced telecommunications capabilit[ies].”⁹ 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.¹⁰ The Commission should not undercut its ability to pursue similar federal goals in the future.

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: Christine Kurth

⁹ 47 U.S.C. § 1302(a).

¹⁰ Economists have estimated 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 (visited Nov. 30, 2009).