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ATTORNEYS AT LAW

December 17, 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:

Vonage Holdings Corp. (“Vonage”) hereby replies to the most recent ex parte submission by the Nebraska Public Service Commission and the Kansas Corporation Commission (“Petitioners”). In that submission, Petitioners attempt to discount the harmful effect of a declaratory ruling by asserting that retroactive relief will have “minimal” financial impact on providers like Vonage.¹ This attempt to diminish the financial harm of Petitioners’ requested relief, however, both misses the point and demonstrates that there is little reason for the Commission to act retroactively.²

¹ Letter from Elisabeth H. Ross, Counsel for the Nebraska Public Service Commission and Kansas Corporation Commission, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket 06-122 (filed Dec. 2, 2009).

² Petitioners’ claims are dubious even on their own terms. For one thing, Petitioners mischaracterize Vonage’s financial position. Petitioners claim that Vonage has over \$900 million in annual earnings, yet it is apparent that Petitioners are actually referring to Vonage’s annual *revenues*. Petitioners also neglect to mention that carriers that contribute to state USF programs are typically entitled to pass through those costs to their customers. But Vonage would not be able to pass through any costs that Petitioners would apply retroactively, even though Vonage opted not to pass through costs because it was defending this Commission’s authority. Finally, Petitioners’ estimates do not bind their respective states and will provide small comfort to Vonage and other providers in the event of future disputes.

As Vonage has repeatedly emphasized,³ it does not object to making state USF payments if those payments are authorized by this Commission and are implemented in a manner that does not conflict with federal policy. Simply put, Vonage's objection to Petitioners' requested declaratory ruling is not financial. Vonage objects, instead, because Petitioners seek a declaratory ruling that would be contrary to the clear language of the *Vonage Preemption Order* and this Commission's carefully considered single national policy for VoIP regulation.⁴ That single national policy has provided the regulatory framework that has enabled Vonage to time and again deliver innovative services to consumers; it should not be cast aside lightly, as Petitioners request.

The harm of a declaratory ruling could extend far beyond interconnected VoIP providers. This Commission is poised to issue a National Broadband Plan, and it should not now call into question its authority to adopt a single national policy where needed to "promote the continued development of the Internet"⁵ and "encourage the deployment...of advanced telecommunications capabilit[ies],"⁶ just as it did in the *Vonage Preemption Order*. Yet declaring now that the *Vonage Preemption Order* never actually had the broad preemptive effect it claimed to have (and that every federal court has agreed it had⁷) would undermine any future decision to preempt state regulation in a similar manner.

Notably, Petitioners' letter demonstrates precisely why the Commission should not act retroactively. This Commission can provide Petitioners their requested relief by acting through rulemaking – an alternative suggested by the Petitioners themselves. As the Petitioners acknowledge, their asserted financial loss⁸ if the Commission acts prospectively through a rulemaking is minimal. These small stakes certainly do not warrant the litigation risk the Commission would face if it were to attempt to retroactively rewrite the *Vonage Preemption Order*. If the Commission determines that the relief Petitioners seek is appropriate, it can promptly grant that relief by acting prospectively through a rulemaking.

³ Comments of Vonage Holdings Corp., WC Docket No. 06-122 (filed Sept. 9, 2009); Reply Comments of Vonage Holdings Corp., WC Docket No. 06-122 (filed Sept. 24, 2009); Letter from Brita D. Strandberg, Counsel for Vonage Holdings Corp., to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 (filed Nov. 30, 2009).

⁴ *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*").

⁵ 47 U.S.C. § 230(b)(1).

⁶ 47 U.S.C. § 1302(a).

⁷ See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009), *aff'd* 543 F. Supp. 2d 1062 (D. Neb. 2008); *N.M. Pub. Regulation Comm'n v. Vonage Holdings Corp.*, Memorandum Opinion and Order, 640 F. Supp. 2d 1359 (D.N.M. July 28, 2009); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 Civ. 4306(DFE), 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'd* 290 F. Supp. 2d 993 (D. Minn. 2003).

⁸ In truth, Petitioners will suffer no financial harm because, as the federal courts have repeatedly affirmed, Petitioners do not have the authority to impose the USF assessments at issue.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'BDS', with a long horizontal line extending to the right.

Brita D. Strandberg
Counsel for Vonage Holdings Corp.

cc: Priya Aiyar
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