



WILTSHIRE
& GRANNIS LLP

1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

March 4, 2010

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 responds to a request by Commission staff for data concerning the cost to Vonage if the Commission were to grant the above-captioned request for a declaratory ruling to permit states to attempt to collect allegedly past due state universal service contributions from Vonage.

The Commission cannot grant the request for retroactive authority. As every federal court to consider the issue has affirmed, the *Vonage Preemption Order* preempted state universal service assessments.¹ Because current law is clear,² the Commission may not rewrite the law “under the guise of interpreting” the *Vonage Preemption Order*.³ Moreover, even if current law

¹ See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 564 F.3d 900 (8th Cir. 2009), *aff’g* 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’g* 290 F. Supp. 2d 993 (D. Minn. 2003).

² See *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); see also *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

³ See *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

were not clear, the Commission could not impose retroactive liability on Vonage because, as Vonage explained in its comments in this proceeding, doing so would be “manifestly unjust.”⁴

Even if it could grant the Nebraska Public Service Commission and Kansas Corporation Commission’s (“Petitioners”), request, the Commission should not do so. Petitioners claim the impact of their requested relief would be “minimal.”⁵ While the effect on the *states* may be minimal, the broader harms that would flow from any attempt to rewrite the *Vonage Preemption Order* would be substantial.

The Commission in the *Vonage Preemption Order* sought to “add to [] regulatory certainty” and “clear[] the way for increased investment and innovation.”⁶ The *Order* successfully advanced both of these goals and generated substantial economic and consumer benefits. The Commission’s “single national policy” for services like Vonage’s has enabled Vonage and others to offer customers innovative services on a nationwide basis, and consumers have reaped billions of dollars of direct benefit. Economists estimate that VoIP services will generate approximately \$24 billion in direct consumer savings for the five year period of 2008 through 2012.⁷ The direct consumer benefit from VoIP services, however, is dwarfed by the indirect consumer benefits generated by the competitive response of other service providers, which is estimated at approximately \$87 billion over the same five-year period.⁸ Further, the VoIP industry continues to be a bright spot in a weak economy. The VoIP industry was the fastest growing industry from 2000 to 2009 and is expected to be the fastest growing industry from 2010 to 2019.⁹ The VoIP

⁴ Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 19-22 (filed Sept. 9, 2009).

⁵ 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 No. 06-122 (filed Dec. 2, 2009) (“*Petitioners’ Dec. 2 Letter*”).

⁶ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶¶ 1-2 (2004) (“*Vonage Preemption Order*”).

⁷ 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.

⁸ *Id.*

⁹ See, e.g. IBISWorld Press Release, IBISWorld Identifies Best and Worst Performing Sectors by Revenue Growth, Dec. 22, 2009, <http://www.ibisworld.com/pressrelease/pressrelease.aspx?prid=210>. For 2000-2009, VoIP ranked first in revenue growth for all industries at “an astronomical 179035.8%.” IBISWorld estimates that VoIP will also be the top revenue growth industry for 2010-2019 at 149.6%, surpassing Retirement & Pension Plans, Biotechnology, and eCommerce & Online Auctions, among others.

industry is also one of the top industries for job and income growth.¹⁰ Finally, VoIP providers continue to drive innovations that benefit consumers. For example, Vonage recently announced 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. In short, the *Vonage Preemption Order* has been a tremendous policy success.

Were the Commission to now attempt to declare that the *Vonage Preemption Order* does not mean what it says, it would substitute regulatory uncertainty for certainty, with predictably negative results. Vonage and similar providers would face numerous state claims of authority to regulate their services, claims that would divert industry resources and discourage investment in VoIP and other IP-enabled services. This will undermine the substantial economic and consumer benefits that the *Vonage Preemption Order* has helped to foster through its “single national policy” for VoIP services. This is not an idle concern. Already numerous state regulatory commissions and legislatures have applied or are considering applying state telecommunications regulation to VoIP service and this activity will only increase if the Commission backs away from its single national policy.¹¹ More broadly, a post-hoc rewrite of the *Vonage Preemption Order* would undermine industry confidence in the Commission’s commitment to a single national policy for the Internet—one of the policy underpinnings of the *Vonage Preemption Order*¹²—and invite future challenges to the Commission’s authority whenever it adopts similar national policies for advanced services. While these harms are not easy to quantify, they are anything but “minimal.”

¹⁰ See Triangle Business Journal, Report: VoIP the Place to be for Jobs, Money (Apr. 2, 2008), available at <http://www.bizjournals.com/triangle/stories/2008/03/31/daily21.html>. A leading business research firm lists VoIP services at the top of the industries it designates as “hot jobs,” estimating that VoIP services will see average annualized job growth of over 19 % and average annualized wage growth of over 21% through 2012.

¹¹ State commissions in Vermont, Louisiana and Texas have ongoing proceedings addressing potential regulation of VoIP. See *Investigation into regulation of Voice over Internet Protocol (“VoIP”) services*, Order Opening Investigation and Notice of Prehearing Conference, Docket No. 7316 (Vt. Public Service Board, entered May 16, 2007); *Rulemaking to study the possible development of rules applicable to Voice of [sic] Internet Protocol (VoIP)*, Ex Parte, Docket No.: R-28268 (La. Pub. Service Comm’n); *Rulemaking Related to the Regulatory Treatment of Voice Over Internet Protocol Services*, Request for Comment, PUC Project No. 37614 (Public Utility Comm’n of Tex., received Nov. 9, 2010). In addition, state legislatures in Missouri, Ohio and Wisconsin are attempting to increase regulation or impose fees or access charges on VoIP. See A.B. 696, 99th Leg. Sess., Reg. Sess. (Wis. 2010); S.B. 469, 99th Leg. Sess., Reg. Sess. (Wis. 2010); S.B. 162, 128th Gen. Assem., Reg. Sess. (Ohio 2009); S.B. 785, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010).

¹² *Vonage Preemption Order* ¶¶ 33-37.

Turning to the Commission's specific request for information, Vonage estimates that the potential cost to Vonage of paying allegedly past due state USF contributions to Nebraska, Kansas and New Mexico through December 31, 2009 would be \$470,400.¹³ This is not the full measure of the financial impact on Vonage of an attempt to impose retroactive assessments, however. If the Commission were to attempt to grant states authority to collect allegedly past-due contribution amounts, Vonage could be exposed to state claims that Vonage owes penalties and interest on top of the allegedly past-due contribution amounts. In addition, other states might now claim that Vonage and similar providers have been subject to their state universal service funds, greatly expanding Vonage's supposed liability.

Thus, the Commission should decline Petitioners' invitation to sow confusion and uncertainty by attempting to rewrite the *Vonage Preemption Order*, particularly in light of Petitioners' own admission that the financial impact of retroactive relief to state universal service programs would be minimal. If the Commission chooses, it can swiftly ensure Petitioners and all states¹⁴ have the authority to collect state USF contributions from providers like Vonage by granting Petitioners' request for alternative relief and changing the scope of the *Vonage Preemption Order* prospectively through rulemaking.

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.

¹³ This estimate includes potential alleged liability to Nebraska, Kansas, and New Mexico for the period January 1, 2003 through December 31, 2009. Petitioners attempt to limit the scope of potential retroactive liability by claiming liability would be limited to periods after Petitioners and others adopted VoIP-specific contribution requirements. Such assertions are not binding, and do not take into account the possibility that an attempt to retroactively rewrite settled law could permit Nebraska, Kansas and New Mexico to claim that their state USF assessments have always applied to VoIP providers. This estimate does not include potential double assessments resulting from Nebraska and Kansas's conflicting assessment methods. *See Vonage Comments* at 3-4.

¹⁴ Petitioners note that "a number of other states are waiting for the outcome of this proceeding before they impose contribution requirements." *Petitioners Dec. 2 Letter* at 1. For the benefit of these states, the Commission should act prospectively; any attempt to act retroactively will create unnecessary litigation risk that will likely further delay these states' adoption of VoIP contribution obligations.

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cc: Priya Aiyar
Irene Flannery
Sharon Gillett
Bruce Gottlieb
Diane Griffin Holland
Nandan Joshi
Angela Kronenberg
Christine Kurth
Jennifer McKee
Alex Minard
Vickie Robinson
Austin Schlick
Jennifer Schneider
Cindy Spiers
Christi Shewman