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March 24, 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:

On March 23, 2010, Brendan Kasper, Senior Regulatory Counsel of Vonage Holdings Corp. ("Vonage"), and Joseph Cavender and the undersigned of Wiltshire & Grannis LLP, met with Nicholas Degani, Jennifer McKee, Vickie Robinson, and Cindy Spiers of the Wireline Competition Bureau, and Diane Griffin-Holland, Nandan Joshi, Julie Veach, and Richard Welch of the Office of General Counsel. Vonage discussed the above-caption Petition (the "Petition") and made the points below.

Vonage detailed the innovation and consumer benefits that have been driven by the Commission's "single national policy" for services like Vonage's.[1] When Vonage launched in 2002, the average price of local phone services was $36 per month. Vonage then offered a bundled package of local and long distance service, together with features like voice mail for which traditional telephone providers charged extra fees. Now Vonage offers that same plan at a lower price—$24.99 per month—and has added international calling to more than 60 countries. Competitive offerings like Vonage's have saved consumers *billions.*[2] These savings are a direct

[1] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 33 (2004) ("*Vonage Preemption Order*").

[2] Economists estimate that VoIP services will generate approximately $24 billion in direct consumer savings for the five year period of 2008 through 2012. *See* Michael D. Pelcovits & Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., *Consumer Benefits*

result of the Commission's decision, in the *Vonage Preemption Order*, to "add to [] regulatory certainty" and "clear[] the way for increased investment and innovation" for services like Vonage's.[3]

Vonage emphasized the importance of maintaining the integrity of the *Vonage Preemption Order* and of continuing to adhere to the Commission's single national policy for VoIP services. Vonage reiterated that it would not object to contributing to state USF programs if and when the Commission finds that such contributions are consistent with its single national policy for VoIP services and affirmatively changes the scope of the *Vonage Preemption Order*.

Vonage explained that the Commission cannot grant the Petition's request for retroactive authority. As every federal court to consider the issue has affirmed, the *Vonage Preemption Order* preempts state regulation of VoIP services, and in particular, state imposition of universal service assessments.[4] As Vonage explained, the *Vonage Preemption Order* made clear that state universal service fund assessments are unlawful, specifically citing the Minnesota statute that would have required Vonage to pay state universal service assessments.[5] And at no point has the Commission issued an order revisiting that determination or conferring such authority on the states.

Because current law is clear,[6] the Commission may not rewrite the law "under the guise of interpreting" the *Vonage Preemption Order*.[7] Moreover, granting the petition and declaring that the states have never been preempted from imposing state universal service obligations would undermine the Commission's goal to provide regulatory certainty, and it would hinder any attempt by the Commission to adopt similar national policies in the future.

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from Cable-Telco Competition, at iii (updated Nov. 2007), *available at* http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf. 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. *Id.*

[3] *Vonage Preemption Order*, 19 FCC Rcd at 22404 ¶¶ 1-2.

[4] *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).

[5] *See Vonage Preemption Order*, 19 FCC Rcd at 22408-09 ¶¶ 10 n.28, 11 n.30.

[6] *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).

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

In addition, even if current law 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."[8] Vonage explained that it has reasonably relied upon the clear text of the *Vonage Preemption Order* which preempted states from imposing regulations on Vonage—including state universal service obligations. The reasonableness of that reliance has been confirmed by the unanimous agreement of the courts that the *Vonage Preemption Order* broadly preempts state regulation.

Vonage also explained that the Commission should ensure, as part of its single national policy for VoIP services, that if states are permitted to impose state universal service obligations on providers like Vonage their assessment mechanisms are consistent with each other. Currently, Kansas and Nebraska, the two Petitioners in this proceeding, impose inconsistent and potentially overlapping obligations on VoIP providers.

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

Respectfully submitted,

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cc: Nicholas Degani
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[8] Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 19-22 (filed Sept. 9, 2009).