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April 1, 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:

The Nebraska Public Service Commission and the Kansas Corporation Commission (“Petitioners”) filed the above-captioned petition seeking a declaration that states may impose state universal service assessments on nomadic VoIP providers like Vonage following attempts to impose such fees that were rejected by federal courts as unlawful. Petitioners want, notwithstanding this judicial authority, the right to impose such assessments retroactively (potentially along with fees and penalties) on Vonage for allegedly past due amounts. In the alternative, they ask the Commission to issue a rule granting them the authority to impose state universal service liability on providers like Vonage in the future.¹ Because the relief requested by Petitioners requires a change in law, the Commission should address Petitioners’ request in a rulemaking.

1. Petitioners Seek a Change in Law.

Vonage has no objection to paying state universal service assessments if the Commission decides that permitting states to impose such fees would be consistent with federal policy.

¹ *Universal Service Contribution Methodology*, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative Adoption of Rule Declaring That State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues at 1, WC Docket No. 06-122 (filed July 16, 2009) (“Petition”).

However, the Commission made clear in the *Vonage Preemption Order*² that such assessments were unlawful. And only the Commission—not Petitioners—has the authority to modify the scope of the *Vonage Preemption Order* to permit such assessments, something the Commission has never done. Accordingly, it would be unlawful for the Commission to declare that states may impose retroactive liability for state universal service obligations on Vonage. Moreover, imposing retroactive liability on Vonage, as Petitioners request, would be a “manifest injustice” and unlawful for that reason as well.

The Commission may respond to the Petition by modifying the scope of the *Vonage Preemption Order* through a rulemaking³ with prospective effect. Indeed, Petitioners have requested just such relief in the alternative. Petitioners purport to be concerned that a rejection of their request for a declaration with retroactive effect would be tantamount to a declaration that the Commission must “pre-approve” every regulation a state might wish to impose on interconnected VoIP. That concern is misplaced. Federal law is clear about what authority states have to regulate interconnected VoIP providers. Where, as here, parties seek a *change* in the law, they must, of course, ask the Commission to act.

As Vonage has pointed out before,⁴ the *Vonage Preemption Order* was clear that it preempted state authority to impose state universal service obligations. The *Vonage Preemption Order* explicitly preempted the Minnesota Department of Commerce’s *Minnesota Vonage Order*.⁵ The *Minnesota Vonage Order*, as the Commission explained, identified several statutes

² *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22425 ¶ 33 (2004) (“*Vonage Preemption Order*”).

³ The National Association of Regulatory Utility Commissioners (“NARUC”) recently repeated its allegation that Vonage’s suggestion for the Commission to proceed by rulemaking is due to a desire for delay. Letter from James B. Ramsay, General Counsel, National Association of Regulatory Utility Commissioners, to Marlene Dortch, Secretary, Federal Communications Commission at 2, WC Docket Nos. 06-122 and 07-38, GN Docket Nos. 09-47 and 09-51 (filed March 24, 2010). NARUC’s accusations are unfounded. If the Commission had proceeded by rulemaking when the Petition was first filed, or when Vonage first suggested that it do so, *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”), any new rules could have long since been adopted. Indeed, if NARUC (or any state) had wanted, it could have requested the Commission commence a rulemaking long before Nebraska and Kansas eventually did, and any new rules could have been on the books even earlier.

⁴ *See, e.g.*, Comments of Vonage Holdings Corporation, WC Docket No. 06-122 (filed Sept. 9, 2009) at 7-14 (“Vonage Comments”).

⁵ *Vonage Preemption Order*, 19 FCC Rcd at 22411 ¶ 11 (“We grant Vonage’s petition in part and preempt the *Minnesota Vonage Order*”; the Commission’s grant of the petition was only in part because it declined to decide whether Vonage’s service was an information service or a telecommunications service) (footnote omitted). The *Minnesota Vonage Order* is *Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarding Lack of*

and rules that would apply to Vonage.⁶ It was those statutes and rules that were specifically and explicitly preempted when the Commission preempted the *Minnesota Vonage Order*. And it is one of the statutes specifically identified in the *Vonage Preemption Order* that would have required Vonage to contribute to Minnesota's state universal service fund.⁷

The Commission has not revisited that decision. To be sure, the Commission subsequently imposed *federal* universal service obligations on Vonage in the *VoIP USF Order*.⁸ But that order underscored that the states did *not* have the authority to impose state universal service obligations on providers like Vonage. The *VoIP USF Order* noted that, "based on the conclusions" of the *Vonage Preemption Order*, it would be appropriate to treat *all* VoIP traffic as interstate for the purposes of calculating VoIP contributions.⁹ That statement cannot be reconciled with any argument that the states had, at the time, the authority to impose state universal service obligations on VoIP providers like Vonage—the FCC could have imposed a 100% *federal* contribution requirement on providers like Vonage only because the *Vonage Preemption Order* had made clear that any *state* universal service obligations were preempted.

Nor did the *VoIP USF Order* modify the scope of the *Vonage Preemption Order* to grant states new authority to impose state universal service obligations on providers like Vonage. On the contrary, the language of the *VoIP USF Order* makes clear that the *Vonage Preemption Order* still preempted state universal service obligations. The Commission declared that if VoIP providers could determine the actual end-points of their customers' communications, the providers could use that information to determine how much of their traffic was interstate and how much was intrastate. That data could be used to reduce the amount the provider had to pay to the federal fund.¹⁰ But, the Commission noted, "an interconnected VoIP provider with [that] capability ... would no longer qualify" for preemption of state regulation under the *Vonage Preemption Order*.¹¹ Notably, this is the *only* circumstance under which the Commission said that a VoIP provider would become subject to state regulation.

Authority to Operate in Minnesota, Minn. PUC Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (issued Sept. 11, 2003) ("*Minnesota Vonage Order*").

⁶ *Vonage Preemption Order*, 19 FCC Rcd at 22408 ¶ 10 n.28.

⁷ *See id.* (identifying the Minnesota statutes at issue in the *Minnesota Vonage Order*), citing Minn. Stat. § 237.16. Minn. Stat. § 237.16 subd. 9 is the provision that would have required Vonage to contribute to Minnesota's state universal service fund. *See Vonage Preemption Order*, 19 FCC Rcd at 22433 ¶ 47 (ordering that "the *Minnesota Vonage Order* IS PREEMPTED").

⁸ *IP-Enabled Services*, 21 FCC Rcd 7518 (2006) ("*VoIP USF Order*").

⁹ *Id.* at 7544-45 ¶ 53.

¹⁰ *Id.* at 7546 ¶ 56.

¹¹ *Id.*

It is implausible that the Commission modified the scope of the *Vonage Preemption Order* in the *VoIP USF Order* to permit states to assess all interconnected VoIP providers without saying so, when at the same time the Commission was so careful to point out that there were certain specific, limited circumstances under which a provider *would* become subject to state regulation. The Commission's silence on this topic in the *VoIP USF Order* contrasts sharply with its discussion of states' ability to assess E911 fees in the *Vonage Preemption Order* and in the *VoIP E911 Order*.¹² In the *Vonage Preemption Order*, the Commission expressly preempted Minnesota's right to impose E911 fees, just as it had Minnesota's statute governing state USF obligations.¹³ But in the *VoIP E911 Order*, unlike in the *VoIP USF Order*, the Commission spoke specifically of states' authority to impose 911 fees on interconnected VoIP providers, addressing ways that states could collect 911 fees directly from VoIP providers or indirectly from entities VoIP providers interconnect with.¹⁴ By contrast the Commission has not modified the scope of the preemption of state universal service obligations in the *Vonage Preemption Order*—not in the *VoIP USF Order* nor at any other time—and it may not now simply “declare” with retroactive effect that the order never meant what it said about such obligations.

2. Imposition of Retroactive Liability on Vonage Would Be Manifestly Unjust.

Even if the Commission could otherwise issue a declaration that the *Vonage Preemption Order* does not preempt state universal service obligations, those obligations could not lawfully be imposed on Vonage retroactively because to do so would be a manifest injustice. Vonage will not repeat the arguments made in its comments in this regard.¹⁵ But three points bear emphasis.

First, a declaration that states always have had authority to collect state USF assessments from providers like Vonage would empower states to seek penalties, interest, and late charges for failure to pay those charges when due. Vonage, in other words, could be affirmatively penalized for its reliance on (1) the clear language of the Commission's *Vonage Preemption Order* and (2) multiple federal court decisions concluding that the *Vonage Preemption Order* preempts imposition of state universal service assessments on Vonage.

¹² See *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10273-74 ¶ 52 (2005) (“*VoIP E911 Order*”).

¹³ *Compare Vonage Preemption Order*, 19 FCC Rcd at 22431 ¶ 42 n.148 (noting that Minnesota's 911 fees were preempted) *with id.* at 22408 ¶ 10 n.28 (identifying statutes that were preempted, including the statute that would have obliged Vonage to contribute to Minnesota's state universal service fund).

¹⁴ *VoIP E911 Order*, 20 FCC Rcd at 10273-74 ¶ 52 (“In addition [to assessing VoIP providers directly], states have the option of collecting 911 charges from wholesale providers with whom interconnected VoIP providers contract to provide E911 service, rather than assessing those charges on interconnected VoIP providers directly.”)

¹⁵ See *Vonage Comments* at 19-22.

Second, under Kansas, Nebraska, and New Mexico law, Vonage would have been entitled to pass any state universal service charges through to its customers if it had been obliged to pay such fees.¹⁶ Of course, because Vonage was not required to pay such fees to the states, Vonage did not collect fees from its customers. But if states were able to impose these fees retroactively, Vonage would have irretrievably lost the benefit of these pass-through provisions. Vonage, in other words, would be punished for not having collected fees from customers even though every court to have considered the issue has determined that those fees were not due.

Finally, even setting aside liability for years past, the Petitioners would put Vonage in an impossible situation as to traffic being transmitted today. Petitioners say that the Commission should just endorse the FCC's *amicus* brief filed in the Nebraska litigation. But as Vonage pointed out in that case, an agency cannot change its rules in an *amicus* brief. Vonage cannot plausibly tell its customers that it must collect state universal service charges today on the basis of the *amicus* brief: those customers would object that they are being made to pay fees that are not actually due.¹⁷

3. Rulemaking is the Only Appropriate Vehicle for the Petitioners' Requested Change in Law.

Rather than issuing a declaration that states may impose state universal service assessments on interconnected VoIP providers retroactively, the Commission should act by rulemaking. The Petition itself invites the Commission to do so, requesting that “[t]he FCC ... issue a Declaratory Ruling, or in the alternative a Rule, expressing the principles stated in its [2008] *Amicus Curiae* brief.”¹⁸

Even if the Petition had not asked the Commission to proceed by rulemaking in the alternative, the Commission could certainly have done so. The Commission has substantial discretion over what processes it employs to conduct its business.¹⁹ In particular, the Commission has in the past decided that it can be more appropriate to respond to a petition for a declaratory ruling by acting through a rulemaking.²⁰ In fact, the *Vonage Preemption Order* itself

¹⁶ See Kan. Stat. Ann. § 66-2008(a) (providing authority for pass-through); Neb. Admin. Code § 291-10 001.01B, 002.02 (2002) (same); N.M. Admin. Code § 17.11.10.21 (2010) (same).

¹⁷ Cf. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, Case No. 02-MD-1468, 2008 U.S. Dist. LEXIS 73829 (D. Kan. Aug. 15, 2008).

¹⁸ Petition at 1.

¹⁹ See, e.g., Joint Reply Comments of the United States Department of Justice and the Federal Bureau of Investigation, WC Docket No. 03-211 (filed Nov. 24, 2003) at 6-7 (noting that “the Commission has the discretion to proceed by rulemaking or adjudication” in response to a petition for a declaratory ruling, and urging the Commission to open a rulemaking proceeding to address issues raised in the petition.).

²⁰ See, e.g., *Petition for Declaratory Ruling that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation*, 11 FCC Rcd 9051, 9052-53 ¶ 4 (1996) (noting that the petition for a declaratory

is an example of the Commission declining to rule on an issue brought before it in a petition for a declaratory ruling. In that order, the Commission preempted the *Minnesota Vonage Order* without ever deciding whether Vonage's service was a telecommunications service or an information service, leaving that determination for later.²¹ And, while it granted Vonage's petition for a declaration in part (and declined to decide it in part), it also declared that it would address questions of what kind of regulation would apply to Vonage in a rulemaking proceeding.²²

Indeed, issuing a declaratory ruling is *always* an act of discretion. The Commission's rules provide that it "*may* ... on motion or on its own motion issue a declaratory ruling."²³ "May" is the language of discretion, not the language of duty. The Administrative Procedure Act, which provides the statutory basis for the Commission's power to issue a declaratory ruling, is even clearer: "The agency, with like effect as in the case of other orders, *and in its sound discretion*, may issue a declaratory order to terminate a controversy or remove uncertainty."²⁴ Certainly this petition, which seeks to impose retroactive liability on Vonage even though Vonage reasonably relied on the Commission's own decision in the *Vonage Preemption Order*, and even though retroactive liability would impose unrecoverable costs, and even though judicial authority unanimously supports Vonage's position, presents a compelling case for the Commission to exercise its discretion to decline to act by declaratory ruling.

Petitioners argue that the Commission should act by a declaratory ruling rather than rulemaking in order to "avoid lending its imprimatur to the suggestion ... that the FCC must pre-approve each and every state regulation that somehow affects nomadic VoIP, even when the regulation has nothing to do with the ... [types of] regulation that the FCC has preempted."²⁵ The concern is misplaced. The existing regulatory framework imposes no such requirement.

ruling was, in effect, a request to alter existing law, and was therefore best addressed in a rulemaking proceeding).

²¹ See *Vonage Preemption Order*, 19 FCC Rcd at 22411 ¶ 14 & n.46 (granting Vonage's petition only "in part" because "[w]e do not determine the statutory classification of DigitalVoice under the Communications Act These issues are currently the subject of [a separate rulemaking proceeding] where the Commission is comprehensively examining numerous types of IP-enabled services, including services like DigitalVoice"). The Commission has not yet issued a decision regarding whether Vonage's service is an information service or a telecommunications service.

²² See *id.*

²³ 47 C.F.R. § 1.2 (emphasis added).

²⁴ 5 U.S.C. § 554(e) (emphasis added). See also *Yale Broad. Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1974) ("It is clearly within the discretion of the Commission to issue a Declaratory Order on a licensee's proposal. It is equally clear, however, that the Commission is not *required* to issue such a declaratory statement merely because a broadcaster asks for one."), citing 5 U.S.C. § 554(e).

²⁵ Petition at 20.

States are free to regulate interconnected VoIP providers to the full extent permitted by law without obtaining any sort of pre-approval from the Commission.²⁶ It is true that the *Vonage Preemption Order* preempted a wide range of state regulation of Vonage's service, but the Commission has subsequently modified the scope of that order, permitting states to regulate in a manner consistent with the Commission's single national policy.²⁷ It is only when the states wish to regulate in a manner inconsistent with federal law that they must seek a change in the scope of federal preemption. Contrary to Petitioners' suggestion, that does not amount to a requirement that the Commission "pre-approve" state regulations. It amounts only to the unremarkable requirement that when the Commission wishes to change the scope of its preemption of state regulation, whether in response to a request from the states or not, it must do so in a manner consistent with law.

This regulatory framework has worked well. Where federal law permits state regulation of nomadic interconnected VoIP services, states are free to act. And Vonage does not object to the Commission modifying the law to permit states to impose state universal service fund obligations. What Vonage does object to, however, is any notion that the Commission's clear holding in the *Vonage Preemption Order* had been modified silently, without any notice, all in clear violation of the Administrative Procedure Act.²⁸ Petitioners request a change in the *status quo*; that is properly the subject of a rulemaking with prospective effect.

²⁶ And, as with any legal dispute, if there should be any doubt about whether a state has imposed regulations consistent with federal law, the courts are fully capable of resolving such questions.

²⁷ See, e.g., *VoIP E911 Order*, 20 FCC Rcd at 10273-74 ¶ 52 (permitting states to impose 911 fees on interconnected VoIP providers). Compare *Vonage Preemption Order*, 19 FCC Rcd at 22431 ¶ 42 n.148 (noting that Minnesota's 911 fees were preempted).

²⁸ See *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (an agency is not permitted "under the guise of interpreting a regulation, to create *de facto* a new regulation"); 5 U.S.C. 553(b) (requiring notice of a proposed rulemaking).

Marlene Dortch
Federal Communications Commission
1 April 2010
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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.

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