



1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

June 3, 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 No. 06-122 (filed July 16, 2009)***

Dear Ms. Dortch:

In their May 14, 2010 *ex parte* letter,¹ the Nebraska Public Service Commission and the Kansas Corporation Commission (collectively, “Petitioners”) continue to press the Commission to declare, with retroactive effect, that the states may impose state universal service obligations on nomadic interconnected VoIP providers like Vonage. Petitioners’ arguments are no more compelling for having been repeatedly made, and nothing in this latest rehashing of those arguments changes the fact that what they ask the Commission to do would be both unlawful and unwise.

Petitioners’ latest *ex parte* recycles the claim that the Commission did not preempt state universal service contribution requirements in its 2004 *Vonage Preemption Order*,² but instead

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 No. 06-122 (filed May 14, 2010) (“Petitioners’ May 14, 2010 *ex parte*”).

² *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*”).

preempted “only state certification, tariffing, and related requirements.”³ This, Petitioners claim, is apparent from the order’s “operative language.”⁴

Petitioners’ newest attempt to rewrite the holding of the *Vonage Preemption Order*, like their earlier attempts,⁵ is flatly contradicted by the *Vonage Preemption Order* itself. The allegedly “operative language” in the order to which Petitioners apparently refer is a phrase from the second sentence of paragraph 46 of the *Vonage Preemption Order*. That paragraph actually provides: “For the reasons set forth above, we preempt the *Minnesota Vonage Order*. As a result, the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements”⁶

Petitioners mistakenly treat this reference to certification, tariffing, and other related requirements from the second sentence of paragraph 46 as the definitive description of what the order actually does. But paragraph 46 itself undercuts Petitioners’ argument. There, the Commission does *not* say that it is preempting some vague, unspecified collection of “certification, tariffing [and] other related requirements.” Instead, the Commission says that it is preempting the *Minnesota Vonage Order*. The language Petitioners rely on merely identifies some of the consequences of having preempted the *Minnesota Vonage Order*. The question then is not, as Petitioners would have it, how to determine whether a particular requirement qualifies as a “certification, tariffing or other related requirement” under some undisclosed test. Rather, the question is whether a regulation is one that falls within the scope of the *Minnesota Vonage Order*.

The *Vonage Preemption Order* itself answers this question. The order explains that the *Minnesota Vonage Order* “assert[ed] regulatory jurisdiction over Vonage and order[ed] the company to comply with *all state statutes and regulations relating to the offering of telephone service* in Minnesota,” which the Commission referred to as Minnesota’s “telephone company regulations.”⁷ Accordingly, all “telephone company regulations,” in contrast to general business laws,⁸ are preempted. If that were not clear enough, the Commission specifically identified several “telephone company regulations” that were at issue, and, as Vonage has repeatedly

³ Petitioners’ May 14, 2010 *ex parte* at 3 (internal quotation marks omitted). Petitioners purport to quote paragraph 10, footnote 28 of the *Vonage Preemption Order*, but the language they purport to quote appears nowhere in either paragraph 10 or footnote 28. For the purposes of this *ex parte*, Vonage assumes that Petitioners intended to refer to paragraph 46 and responds accordingly.

⁴ *Id.* at 2.

⁵ See, e.g., Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 7-14 (filed Sept. 9, 2009) (“Vonage Comments”).

⁶ See *Vonage Preemption Order*, 19 FCC Rcd at 22432 ¶ 46.

⁷ *Id.* at 22409 ¶ 11 & n.30 (emphasis added).

⁸ See *id.* at 22404-05 ¶ 1.

pointed out, one of those provisions—just like the provisions Nebraska and Kansas seek to impose here—would have required Vonage to pay state universal service assessments.⁹

Petitioners attempt to circumvent the clear holding of the *Vonage Preemption Order* by arguing that footnote 28 of the *Vonage Preemption Order*, which is the footnote that contains the citation to the Minnesota statute that would have required Vonage to pay state universal service assessments, “does not discuss state USF requirements, yet [sic] alone preempt them; it is a string cite of Minnesota statutes without any text at all.”¹⁰ Moreover, Petitioners continue, the “paragraph to which the footnote is attached (paragraph 10) is part of the section of the Order entitled ‘History of Vonage’s Petition’ and does not contain any preemptive language.”¹¹ Accordingly, Petitioners conclude, this “preemption-by-implication argument is not convincing.”¹²

Petitioners misunderstand footnote 28. As explained above, the *Vonage Preemption Order* preempted the *Minnesota Vonage Order*.¹³ As the *Vonage Preemption Order* explained in its paragraph 11 (in the historical background section Petitioners attempt to dismiss), the *Minnesota Vonage Order* had declared that Vonage was required to “comply with Minnesota Statutes and Rules.”¹⁴ In turn, that paragraph refers, in its footnote 30, to footnote 28 as providing a list of Statutes and Rules that the *Minnesota Vonage Order* attempted to apply to Vonage. That is why the list of statutes and rules in footnote 28 is authoritative. There is no “implication” about it.

Instead of looking to the *Vonage Preemption Order*’s specific and explicit preemption of state universal service obligations, Petitioners argue that the scope of the *Vonage Preemption Order* should be discerned by parsing the Commission’s discussion of Minnesota’s 911 regulations.¹⁵ But there is no reason to rely on the Commission’s discussion of 911 regulations because the Commission’s preemption of Minnesota’s state USF obligation is clear.

In addition to their erroneous claims that the *Vonage Preemption Order* did not actually preempt state universal service assessments, Petitioners claim that imposing retroactive state

⁹ See *id.* at 22408 ¶¶ 10-11 & nn.28, 30. See also Vonage Comments at 14.

¹⁰ Petitioners’ May 14, 2010 *ex parte* at 4 (citation omitted).

¹¹ *Id.*

¹² *Id.*

¹³ See *Vonage Preemption Order*, 19 FCC Rcd at 22433 ¶ 47.

¹⁴ *Id.* at 22409 ¶ 11 n.30.

¹⁵ Petitioners’ May 14, 2010 *ex parte* at 5.

universal service obligations on Vonage would not be a “manifest injustice.”¹⁶ Petitioners do not challenge any of Vonage’s arguments showing why imposing retroactive liability *would* be manifestly unjust.¹⁷ Nor do Petitioners discuss any of the factors that courts have identified as relevant to the question. Instead, they argue that because Vonage knew that the states wanted to impose such fees, Vonage could have reserved funds in case those assessments were ultimately upheld. Aside from failing to address the relevant legal standard, Petitioners’ argument is wrong as a matter of principle. The fact that Vonage could have been reserving money to pay baseless claims does not transform those claims into legitimate ones. Moreover, as Vonage has previously explained, Vonage is permitted to pass through state universal service fees to its customers, but only if it knows that it must pay those fees. Vonage would not be able to pass those fees through if it were “reserving” them while continuing to defend the Commission’s prior decision to preempt state authority in this area.

Petitioners also make the erroneous claim that a declaratory ruling would somehow be a quicker resolution to this proceeding than proceeding by rulemaking. As Vonage pointed out last year in responding to this same claim, “[i]f the Commission determines that the relief Petitioners seek is appropriate, it can promptly grant that relief by acting prospectively through a rulemaking.”¹⁸ The same remains true today, and the Commission could issue a rule just as quickly as it can issue a declaratory ruling.

Petitioners seek to bolster their argument that the Commission ought to act quickly on their petition by claiming that “each month that passes increases the pressure on state universal service funds and raises the level of uncertainty in long-term strategic planning.”¹⁹ As Vonage has previously explained, the Commission is better situated than Vonage to decide whether to address the petition as a separate proceeding or as part of its comprehensive USF reform proceeding.²⁰ Whatever it might decide in that regard, however, the Commission should not be swayed by unsupported claims about “pressure” and increasing “uncertainty.” The fact is that, as all parties agree, the amount of money that nomadic interconnected VoIP providers like Vonage will contribute to state universal service funds is so modest that it would have essentially no perceptible impact on the state funds’ viability.

¹⁶ *Id.* at 2. To their credit, Petitioners seem to recognize that if they are wrong and the *Vonage Preemption Order* did in fact preempt state universal service assessments, then any change to that regime would need to be made prospectively only. *See id.* at 2 n.3.

¹⁷ *See* Vonage Comments at 19-22.

¹⁸ Letter from Brita D. Strandberg, Counsel for Vonage Holdings Corp., to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 2 (filed Dec. 17, 2009); *see also* Letter from Brita D. Strandberg, Counsel for Vonage Holdings Corp., to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 (filed Aug. 25, 2009) (encouraging the Commission to respond to the Petition by rulemaking).

¹⁹ Petitioners’ May 14, 2010 *ex parte* at 2.

²⁰ *See* Vonage Comments at 5-6.

Petitioners' related suggestion that other providers will "transition customers to nomadic VOIP service in an effort to take advantage of" federal preemption of state universal service assessments also is not credible. There is no reason to believe that providers would make enormous investments in changing their technological infrastructure to provide nomadic interconnected VoIP service simply in order to sell a service that is immune from state universal service fees. As already explained, those fees are typically passed on to customers and are modest. Further, there is no evidence that consumers choose service providers based on whether they must pay such fees. Whether other providers will eventually decide to offer nomadic interconnected VoIP service to compete with Vonage or not has little to do with how quickly the Commission acts on this petition. Petitioners' tag-along argument that states are "required by Section 254(b)(5) to assist the FCC in providing universal service support" is simply untrue—the Communications Act does not require states to have universal service fund programs at all.

Finally, Vonage notes that Petitioners' discussion about the statutory scope of state authority over wireless service has no bearing on whether it would be lawful or appropriate to grant Petitioners' request for retroactive authority to impose state universal service obligations on Vonage. The scope of state authority over VoIP is governed by the *Vonage Preemption Order* and not Section 332 of the Communications Act. As discussed above, the *Vonage Preemption Order* certainly does preempt state universal service.

Vonage is committed to the principles of universal service, delivering high quality, cutting-edge services at reasonable cost to consumers across America. Vonage already contributes substantial funds to the federal universal service fund, even though it is unable to receive universal service support. And Vonage is ready and willing to contribute to state universal service funds if the Commission decides that such assessments are appropriate. But the Commission's analysis should focus on what is the best single national policy of regulation for nomadic interconnected VoIP services; it should reject the arguments offered by Petitioners that would encourage the Commission to undermine its own ability to set that single national policy and that would lead instead to greater uncertainty and eventual rejection by the courts.

Marlene Dortch
Federal Communications Commission
3 June 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', followed by a horizontal line extending to the right.

Brita D. Strandberg
Counsel for Vonage Holdings Corp.

cc: Priya Aiyar
Christine Kurth
Angela Kronenberg
Jennifer Schneider
Christi Shewman
Julie Veach
Richard Welsh
Diane Griffin Holland
Chris Killion
Vickie Robinson
Shana Knutson
Patrice Petersen-Klein
Mike Hybl
Sue Vanicek