



WILTSHIRE
& GRANNIS LLP

1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

August 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:

On August 4, 2010, Brendan Kasper, Senior Regulatory Counsel of Vonage Holdings Corp. (“Vonage”), and Joseph Cavender and the undersigned of Wiltshire & Grannis LLP, met with Angela Kronenberg, advisor to Commissioner Clyburn, to discuss the above-captioned petition.

Vonage expressed its concern that issuing a declaratory ruling with retroactive effect would be the least transparent way of addressing the states’ request to be able to impose state USF charges on nomadic interconnected VoIP providers like Vonage. Such a declaration would have the effect of rewriting the *Vonage Preemption Order*¹ without acknowledging that any change was actually being made.

In addition, Vonage explained that applying state USF fees retroactively against Vonage would be a manifest injustice and therefore unlawful. Vonage has consistently defended this Commission’s decision to preempt state regulation of its service, including over state USF. Every court to consider the question has agreed that states are preempted from imposing such obligations on Vonage. Relying on both the clear text of the *Vonage Preemption Order* and unanimous federal authority, Vonage has declined to pay such fees or to pass them through to its

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 (2004) (“*Vonage Preemption Order*”).

customers. To impose those fees now, retroactively, would mean that Vonage would in effect be punished for having successfully defended this Commission's order, because the states assert that Vonage's liability has continued to accrue all the while, even though no court has agreed that any such amounts are due. What is more, Vonage will not be able to pass through retroactive state USF fees (or any penalties assessed) to its customers.

Vonage remains concerned that a declaration granting the petition with retroactive effect would be both unlawful and bad policy. Vonage does not object to paying state universal service fees. State USF fees are currently preempted, however, and if the Commission wishes to change the law to permit the states to impose such fees it may do so only prospectively. When and if the Commission does so, it should explain how states may impose state USF obligations consistent with federal policy, including resolving the current conflict between the two petitioners as to how a customer's revenues should be allocated.²

In contrast, declaring that states have retroactive authority to impose state USF fees would be unlawful. The Commission is not permitted "under the guise of interpreting a regulation, to create *de facto* a new regulation."³ Yet that is what a retroactive declaration would do. The Commission's 2004 *Vonage Preemption Order* was clear: states' "telephone company regulations" were preempted, while "general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices" were unaffected by the order.⁴

To ensure there would be no confusion as to what qualified as "telephone company regulations" the Commission defined the term precisely in the order. In footnote 30, the Commission explained that Minnesota's commission had issued an order asserting that Vonage must comply with a number of requirements, which the FCC listed specifically in footnote 28.⁵ The Commission said, "We will refer to these requirements, collectively, throughout this Order as either 'telephone company regulations' or 'economic regulations.'"⁶ In other words, the Minnesota commission's order—which the *Vonage Preemption Order* specifically preempted⁷—had identified certain statutes and rules as being applicable to Vonage. Footnote 28, which listed those statutes, is thus a list of provisions that are explicitly preempted.⁸ Among those provisions was Minnesota Statute § 237.16, which would have permitted Minnesota to impose state

² See Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 3-4 (filed Sept. 9, 2009) ("Vonage Comments") (explaining that Nebraska would require VoIP providers to contribute for all subscribers with Nebraska billing addresses while Kansas would require contributions based on a subscriber's "primary physical service address").

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

⁴ *Vonage Preemption Order*, 19 FCC Rcd at 22404-05 ¶ 1 (internal quotation marks omitted).

⁵ *Id.* at 22409 ¶ 11 n.30.

⁶ *Id.*

⁷ *Id.* at 22433 ¶ 47 ("IT IS ORDERED ... [that] the *Minnesota Vonage Order* IS PREEMPTED").

⁸ The Commission noted that, in addition, any Minnesota statutes not enumerated in footnote 28 that were imposed on certificated entities would also be preempted. See *id.* at 22409 ¶11 n.30.

universal service obligations on Vonage.⁹ While the Commission may reconsider its 2004 decision, it may not, “under the guise of interpreting” that decision, reverse it.

Petitioners have suggested a narrower reading of the *Vonage Preemption Order*, but that reading cannot be squared with the actual language of the order or even of the FCC’s own interpretation of the order in its 2004 brief to the Eighth Circuit in the Minnesota litigation.¹⁰ Moreover, this question has been repeatedly litigated, and every court to consider the question has sided with Vonage. As Vonage said in those cases, the *Vonage Preemption Order* preempts state USF authority. If the states wanted to impose such fees, their proper recourse was to request a change in the law from the Commission. The courts have uniformly agreed, holding that states are preempted from imposing state USF obligations on Vonage, but acknowledging that they may seek a *change* in the law from the Commission.¹¹

Moreover, the Commission should not want to issue a declaration with retroactive effect. The Commission should be particularly concerned, as it considers altering the regulatory treatment of broadband services, that regulated companies and the public know that when the Commission promises regulatory certainty, such a promise can be relied upon. But to declare now, in 2010, that the Commission’s 2004 *Vonage Preemption Order* did not mean what it said, or that the Commission sometime later *sub silentio* altered the 2004 order, would undercut the Commission’s ability to provide regulatory certainty in the future.

Indeed, the Commission in 2004 said it was providing “regulatory certainty” in the *Vonage Preemption Order*.¹² If the Commission now, six years later, attempts to retroactively undo that order, it will have shown that the 2004 promise of regulatory certainty provided no such thing. Especially at a time when the Commission is trying to encourage investment by promising regulatory certainty, the Commission should refrain from demonstrating that those who rely on a promise of regulatory certainty do so at their own peril.

⁹ *Id.* at 22408-09 nn. 28, 30 (footnote 30 defining “telephone company regulations” for the purposes of the order as the statutes listed in footnote 28, and footnote 28 identifying Minn. Stat. § 237.16 as being preempted; Minn. Stat. § 237.16 Subd. 9 is the statute that would have provided Minnesota authority to impose state USF obligations on Vonage).

¹⁰ See Vonage Comments at 17-19 (discussing the 2004 FCC brief). The FCC’s 2004 brief is attached as Attachment 2 to Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC (Aug. 3, 2010).

¹¹ See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 564 F.3d 900, 905 (8th Cir. 2009).

¹² *Vonage Preemption Order*, 19 FCC Rcd at 22404 ¶ 1.

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 stroke extending to the right.

Brita D. Strandberg
Counsel for Vonage Holdings Corp.

cc: Angela Kronenberg