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August 9, 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 6, 2010, Brendan Kasper, Senior Regulatory Counsel of Vonage Holdings Corp. (“Vonage”), and Joseph Cavender and the undersigned of Wiltshire & Grannis LLP, met with Diane Griffith Holland, Austin Schlick, and Richard Welch, of the Office of General Counsel, to discuss the above-captioned petition.

Vonage explained that it does not object to paying state universal service fees. State USF fees are currently preempted, however. The Commission’s 2004 *Vonage Preemption Order*¹ 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.² The Commission went on to define precisely what qualified as “telephone company regulations” 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 28.³ The Commission said, “We will

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*”).

² *Id.* at 22404-05 ¶ 1 (internal quotation marks omitted).

³ *Id.* at 22409 ¶ 11 n.30.

refer to these requirements, collectively, throughout this Order as either ‘telephone company regulations’ or ‘economic regulations.’”⁴ Among the provisions identified in footnote 28 was Minnesota Statute § 237.16, which would have permitted Minnesota to impose state universal service obligations on Vonage.⁵

While petitioners have argued that the *Vonage Preemption Order* is not as clear as it appears, every court to consider the question has sided with Vonage on this point. 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 agreed, holding that states are preempted from imposing state USF obligations on Vonage, but that they could seek a change in the law from the Commission.⁶

If the Commission wishes to change the law to permit the states to impose state USF obligations—as it has in other contexts—it may do so, but only prospectively. While Vonage reiterated its belief that the best way for the Commission to proceed to make such a change would be a through a rulemaking,⁷ Vonage acknowledged that courts have permitted agencies to alter existing law through adjudication as well. Under either approach, though, any determination to change the law to permit states to impose state universal service obligations on Vonage should be prospective only.⁸ Indeed, as Vonage has explained, imposing such an obligation on Vonage with retroactive effect would be manifestly unjust and unlawful.⁹

⁴ *Id.*

⁵ *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).

⁶ See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 564 F.3d 900, 905 (8th Cir. 2009).

⁷ See Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 3 (filed Sept. 9, 2009) (“Vonage Comments”).

⁸ See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (absent express statutory authorization for an agency to promulgate retroactive rules, rules may only have prospective effect); *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (“we have drawn a distinction between agency decisions that ‘substitut[e] ... new law for old law that was reasonably clear’ and those which are merely ‘new applications of existing law, clarifications, and additions’”) (citing *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (explaining this distinction and further noting that a judicial decision denying retroactive effect in a case of an adjudication involving the substitution of new law for old was “uncontroversial”)).

⁹ See Vonage Comments at 19-22.

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.

Brita D. Strandberg
Counsel for Vonage Holdings Corp.

cc: Diane Griffin Holland
Austin Schlick
Richard Welch