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August 23, 2010

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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:

In the above-captioned petition (“Petition”), the Nebraska and Kansas commissions ask the Commission to permit them to impose state universal service obligations on nomadic interconnected VoIP providers like Vonage Holdings Corp. (“Vonage”). While Vonage does not object to a decision allowing states to impose state universal service obligations on interconnected VoIP providers, such a decision would be a change in law that should be applied prospectively only. As such, Vonage has consistently recommended that the Commission respond to petitioners’ request through rulemaking.<sup>1</sup> A rulemaking is the most transparent vehicle for implementing a change in law and generally decisions in a rulemaking only apply prospectively.<sup>2</sup> But, as Vonage has acknowledged, courts have permitted agencies to change existing law prospectively through adjudication as well.<sup>3</sup> If the Commission chooses to rule on the Nebraska and Kansas Petition for Declaratory Ruling, the Commission must be clear that it is changing the law to allow states to impose USF obligations on Vonage and that these obligations may be imposed prospectively only.

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<sup>1</sup> See Comments of Vonage Holdings Corp., WC Docket No. 06-122 at 3 (filed Sept. 9, 2009).

<sup>2</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988).

<sup>3</sup> See *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

I. *Courts have recognized a distinction between adjudications that change the law prospectively and those that clarify or interpret existing law, which can have either prospective or retroactive effect.*

As the D.C. Circuit explained in *AT&T v. FCC*,<sup>4</sup> it “ha[s] drawn a distinction between agency decisions that ‘substitute new law for old law that was reasonably clear and those which are merely new applications of existing law, clarifications, and additions.’”<sup>5</sup> In the former case, “in which there is a ‘substitution of new law for old law that was reasonably clear,’ a decision to deny retroactive effect is uncontroversial.”<sup>6</sup> For example, in *Epilepsy Foundation v. NLRB*,<sup>7</sup> the D.C. Circuit noted that, because the case involved the substitution of new law for old law, there was “little doubt ... that the Board erred in giving retroactive effect” to its new interpretation of a statute.<sup>8</sup>

In contrast to situations involving a substitution of new law for old that that was reasonably clear, in adjudications involving “new applications of existing law, clarifications, and additions, the courts start with a presumption in favor of retroactivity.”<sup>9</sup> That presumption, however, can be overcome. Indeed, even in the face of an agency that wishes to impose a decision retroactively, “retroactivity will be denied when to apply the new rule to past conduct or prior events would work a manifest injustice.”<sup>10</sup>

Of course, the questions of whether a decision must be prospective and whether its retroactive application would be manifestly unjust are related.<sup>11</sup> In *Epilepsy Foundation*, for example, which involved the substitution of new law for old law, the court noted that to apply the new rule retroactively would work a manifest injustice, and was impermissible for that reason as well.<sup>12</sup> But the distinction between these two situations—between substitutions of new law for old law and new applications of law—and the consequences of that distinction for

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<sup>4</sup> 454 F.3d 329 (D.C. Cir. 2006).

<sup>5</sup> *Id.* at 332 (alteration marks omitted) (quoting *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)).

<sup>6</sup> *Verizon*, 269 F.3d at 1109 (quoting *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001)).

<sup>7</sup> 268 F.3d 1095 (D.C. Cir. 2001).

<sup>8</sup> *Id.* at 1102.

<sup>9</sup> *Verizon*, 269 F.3d at 1109 (internal quotation marks omitted).

<sup>10</sup> *Id.* (internal quotation marks omitted).

<sup>11</sup> The first two factors of the familiar (non-exhaustive) five-factor “manifest injustice” test enunciated in *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), ask whether the case is one of first impression and whether the new rule departs from established law or merely attempts to fill a void, *id.* at 390, questions plainly relevant to the “distinction between agency decisions that substitute new law for old law that was reasonably clear and those which are merely new applications of existing law.” See *AT&T*, 454 F.3d at 332 (quotation marks omitted).

<sup>12</sup> 268 F.3d at 1102.

purposes of retroactivity, are well established.<sup>13</sup> Adjudicatory decisions that change the law apply prospectively.

II. *An agency decision to apply an adjudication prospectively is entitled to deference by a reviewing court.*

The D.C. Circuit has explained that while some of an agency's decisions on questions of retroactivity are entitled to deference from the courts, others are not. As the court observed in *Qwest Services Corp. v. FCC*, “[w]e review an agency’s conclusions on manifest injustice with ‘no overriding obligation to the agency[’s] decision.’”<sup>14</sup> That, as the D.C. Circuit explained, is a question of law.<sup>15</sup> On the other hand, the court has “been quite deferential to decisions regarding the retroactive effect of agency action where retroactivity would not work a manifest injustice.”<sup>16</sup> In other words, agency decisions on the question of law on whether manifest injustice *precludes* retroactive enforcement are entitled to no deference, but decisions to act prospectively (or retroactively) otherwise are.<sup>17</sup>

The court’s citation of *Retail, Wholesale* in support of both of those propositions illustrates the distinction the court was drawing. There, giving the agency no deference on the question, the court rejected the agency’s initial decision imposing its new rule retroactively to all the conduct at issue in the case as a manifest injustice.<sup>18</sup> But, the court concluded, because of an intervening Supreme Court decision, the new rule could be imposed retroactively (without it being a manifest injustice) to *some* of the conduct at issue—conduct following the Supreme Court’s decision.<sup>19</sup> Accordingly, the court remanded the case to the agency to permit the agency to decide if the decision should be applied retroactively as to that conduct, and *Qwest* confirmed that the agency would receive some deference on that determination.<sup>20</sup> That discretion is not

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<sup>13</sup> See, e.g., *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986); 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 13.2 (5th ed. 2010).

<sup>14</sup> *Qwest*, 509 F.3d at 539 (citing *Retail, Wholesale*, 466 F.2d at 390; *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1151, 1554 (D.C. Cir. 1987))

<sup>15</sup> *Retail, Wholesale*, 466 F.2d at 390.

<sup>16</sup> *Qwest*, 509 F.3d at 539 (citing *AT&T*, 454 F.3d at 334; *Retail, Wholesale*, 466 F.2d at 393).

<sup>17</sup> This distinction is consistent with the courts’ determination that agencies generally have discretion to act by rulemaking (where retroactivity is generally not possible) or by adjudication (where it is). See *Qwest*, 509 F.3d at 536. It would not make sense to conclude that an agency that chose to proceed by adjudication thereby lost the ability to make its new rule effective prospectively only, no matter how good a reason it had for prospective-only application.

<sup>18</sup> *Retail, Wholesale*, 466 F.2d at 389-93. In *Qwest* itself, the court likewise gave no deference when it reviewed the Commission’s determination regarding manifest injustice. See 509 F.3d at 537 (“Despite proceeding without deference to the Commission’s determination, we find that retroactive application of the Order to IP-transport cards does not work a manifest injustice for the very same reasons that persuaded the Commission.”).

<sup>19</sup> *Retail, Wholesale*, 466 F.2d at 393.

<sup>20</sup> *Qwest*, 509 F.3d at 539.

limitless, however; the agency must offer some explanation to justify departing from the presumption of retroactivity applicable to such cases.<sup>21</sup>

III. *A decision applying state USF obligations on nomadic interconnected VoIP providers like Vonage would substitute new law for old law that was reasonably clear and accordingly must be applied prospectively only.*

The *Vonage Preemption Order*<sup>22</sup> was clear on the broad scope of state preemption: 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.<sup>23</sup> 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.<sup>24</sup> The Commission said, "We will refer to these requirements, collectively, throughout this Order as either 'telephone company regulations' or 'economic regulations.'"<sup>25</sup> Among those provisions was Minnesota Statute § 237.16, which would have permitted Minnesota to impose state universal service obligations on Vonage.<sup>26</sup>

Moreover, every court to consider the question has agreed with Vonage that states are not permitted to impose any telephone company regulations on Vonage—and, in particular, the courts have rejected state attempts to impose state USF obligations on Vonage.<sup>27</sup>

Alternative interpretations of the *Vonage Preemption Order*—that would suggest it is amenable to "interpretation" to permit states to impose state USF obligations on Vonage—are not plausible. The contention that the order only preempted entry regulations cannot be squared with the language of the order, which declared that it preempted all "telephone company" regulations and left untouched only regulations of general applicability to all businesses.<sup>28</sup> More specifically, of course, such an interpretation is inconsistent with the fact that the order expressly identifies a number of statutes—including provisions relating to state USF—that were

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<sup>21</sup> *See id.* at 539, 541.

<sup>22</sup> 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*").

<sup>23</sup> *Id.* at 22404-05 ¶ 1 (quotation marks omitted).

<sup>24</sup> *Id.* at 22409 ¶ 11 n.30.

<sup>25</sup> *Id.*

<sup>26</sup> *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).

<sup>27</sup> *See, e.g., Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009); *N.M. Pub. Reg. Comm'n v. Vonage Holdings Corp.*, 640 F. Supp. 2d 1359 (D.N.M. 2009).

<sup>28</sup> *Vonage Preemption Order*, 19 FCC Rcd 22404-05 ¶ 1.

preempted, and did not simply say that Vonage need not obtain certification from the state. In addition, however, a narrow, “entry only” interpretation would suggest that if, the day after the *Vonage Preemption Order* had been issued, the state had passed a new statute permitting it to impose state USF obligations on Vonage specifically, such a statute would *not* have been preempted. That is not only implausible on its face—a quintessential example of elevating form over substance—it is also directly contradicted by what the Commission said in its 2004 brief to the Eighth Circuit describing the effect of the *Vonage Preemption Order*, in which the Commission explained that *if* the Commission *later* decided that state universal service obligations could be lawfully imposed on Vonage, *then* Minnesota could seek appropriate relief in court from the injunction that barred it from applying its laws to Vonage.<sup>29</sup>

Just as the *Vonage Preemption Order* did not permit states to impose state USF obligations on Vonage, the Commission did not change the law to permit states to begin imposing such obligations in its 2006 *VoIP USF Order*.<sup>30</sup> Indeed, the Commission in that order said nothing about states’ authority to impose state USF obligations, in contrast to the Commission’s approach in its order applying 911 obligations to VoIP providers where the Commission addressed the applicability of state 911 fees.<sup>31</sup> Moreover, in the *VoIP USF Order*, the Commission concluded 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 their contributions, a conclusion that is inconsistent with any argument that the order contemplated states having authority to impose state USF obligations.<sup>32</sup>

Even if the scope *Vonage Preemption Order* could be interpreted in alternative ways, that would not mean that a declaratory ruling granting the petition was merely a clarification of existing law that could be applied retroactively. The decision in *Epilepsy Foundation* is particularly relevant in that regard. There, the D.C. Circuit noted that in a previous decision, the NLRB had come to the opposite conclusion on an issue of statutory interpretation than the conclusion the agency came to in *Epilepsy Foundation*, but had noted that “the statute might be amenable to other interpretations.”<sup>33</sup> That did not mean that the agency’s new interpretation offered in *Epilepsy Foundation* was anything other than a change in the law—which is why the D.C. Circuit refused to allow the agency to apply it retroactively. In other words, the established understanding of a statute (or the *Vonage Preemption Order*) is reasonably clear even if the statute (or order) is amenable to other interpretations. That confirms that here, where federal courts have repeatedly read the *Vonage Preemption Order* to preempt state USF assessments, the law on this issue is, at a minimum, reasonably clear.

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<sup>29</sup> See Vonage Comments at 17-19 (discussing the 2004 FCC brief). The 2004 brief is attached as Attachment 2 to Letter from Brita D. Strandberg, counsel to Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC (Aug. 2, 2010).

<sup>30</sup> See *IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 04-36, 21 FCC Rcd 7518 (2006) (“*VoIP USF Order*”).

<sup>31</sup> See *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10273-74 ¶ 52 (2005).

<sup>32</sup> *VoIP USF Order*, 21 FCC Rcd at 7544-45 ¶ 53. The Commission decided to set a lower number.

<sup>33</sup> *Epilepsy Foundation*, 268 F.3d at 1097.

Vonage again urges the Commission to resolve the issue presented in this petition by rulemaking. A rulemaking will focus all parties on addressing precisely how state USF obligations should be structured (including resolving the conflict between petitioners' two state programs) and on what types of entities appropriately should pay them, while a declaratory ruling runs the risk of focusing more on Vonage and Vonage's service than on the appropriate regulatory framework for IP-enabled services generally. If the Commission, however, issues a declaratory ruling in response to the petition, it must be clear that its decision changes existing law and thus does not apply retroactively.

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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cc: Diane Griffin Holland  
Zachary Katz  
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