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RONALD G. BIRCH\*\*  
WILLIAM H. BITTNER  
KATHRYN A. BLACK  
SUZANNE CHEROT  
ADAM W. COOK  
JON M. DEVORE\*\*  
CHARLES R. EBERLE†  
GREGORY S. FISHER  
JOSEPH H. FLACK

DOUGLAS S. FULLER\*  
MAX D. GARNER  
DAVID KARL GROSS  
TINA M. GROVIER  
WILLIAM P. HORN\*  
STEPHEN H. HUTCHINGS  
DANIEL C. KENT  
THOMAS F. KLINKNER  
DAVID E. LAMPP\*◊

STANLEY T. LEWIS  
AMY W. LIMERES  
JAMES H. LISTER\*†◊  
GREGORY A. MILLER  
JENNIFER L. OWENS, Ph.D.  
TIMOTHY J. PETUMENOS  
ELISABETH H. ROSS\*\*  
HOLLY C. SUOZZO  
KATE N. WILLIAMS

OF COUNSEL:  
JENNIFER C. ALEXANDER  
KENNETH E. VASSAR

1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
(907) 276-1550  
FACSIMILE (907) 276-3680

\* D.C. BAR  
\*\* D.C. AND ALASKA BAR  
† MARYLAND BAR  
◊ VIRGINIA BAR  
ALL OTHERS ALASKA BAR

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VIA ECFS

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, D.C. 20554

**RE: Nebraska Pub. Service Commission and Kansas Corp. 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 (“Petition”)**

Dear Ms. Dortch:

The Nebraska Public Service Commission (NPSC) and Kansas Corporation Commission (KCC) submit this letter in response to legal arguments raised in ex parte presentations filed over the last month. In their petition, the NPSC and KCC request a declaratory ruling that States are not preempted from requiring that nomadic VoIP providers contribute to State USF programs on the 35.1% of their revenues that the FCC has previously found is intrastate.<sup>1</sup>

Consumers, competitors, and universal service are all best served by a wide USF assessment base that does not contain a loophole favoring one particular class of competitors (nomadic VoIP). Competitor-specific loopholes (a) increase the assessment rates borne by customers of those competitors that remain subject to assessment, (b) tilt the competitive playing field, and (c) erode the funding sources for universal service by driving consumers to the favored providers. Competitor-specific loopholes are an example of the government choosing winners in which should be free-market competition among providers. Thus, as a policy matter, nomadic VoIP providers should contribute to State USF programs just as their fixed-VoIP, wireless, and circuit-switched competitors already do. Vonage has not opposed paying into State USF programs on a prospective basis, although other nomadic VoIP providers oppose even that relief.

### **1. The Contested Issue Concerns the Proper Type of Declaratory Ruling**

The proper debate in this case is between granting the petition by a standard declaratory ruling, which interprets existing law and so has retrospective as well as prospective effect, and granting the petition by a declaratory ruling with a “manifest injustice” finding. A manifest injustice finding limits the declaratory ruling to prospective effect, and is used in situations when

<sup>1</sup> *Report and Order and Notice of Proposed Rulemaking, Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 7536 ¶ 34 (2006) (“*VoIP Contribution Order*”), *aff’d. in part and rev’d. in part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

the FCC reconsiders or overrules prior ruling, and recognizes justifiable reasonable reliance on a “reasonably clear” prior ruling to prevent hardship.<sup>2</sup> A ruling which clarifies or supplements a prior ruling or that “represents a new policy for a new situation, rather than ... a departure from a clear prior policy” calls for a standard declaratory ruling.<sup>3</sup> If the FCC makes a manifest injustice finding in favor of the nomadic VOIP providers and so finds that nomadic VoIP do not have to pay into state funds for the past period in which their competitors made contributions, it will prevent the KCC from collecting contributions for that period in the competitively neutral manner required by its statute – a manifestly unjust result in that State.<sup>4</sup>

To date, the only FCC pronouncement that directly discusses State USF contribution requirements as applied to nomadic VoIP providers -- the 2008 amicus curiae brief filed by the General Counsel’s office – supports state authority on this issue.<sup>5</sup> The FCC is the tribunal best-positioned to interpret its own prior rulings. In upholding the preliminary injunction entered against the NPSC in *Vonage v. NPSC*, the Eighth Circuit carefully avoided holding that there is only one permissible interpretation of the 2004 Vonage Order, and invited the NPSC to apply to the FCC for a definitive ruling, which this Petition does.<sup>6</sup> Because the Eighth Circuit did not hold that there is only one unambiguously correct interpretation of that Order, the FCC remains free to decide the best interpretation of its own Order.<sup>7</sup>

Vonage’ suggestion that manifest injustice finding would be appropriate even if the FCC simply clarified rather than overruled existing law in granting the NPSC/KCC petition is incorrect. Providers have always been free to build a risk assessment into their regular non-surcharge rates, in order to build a reserve fund in case the FCC ruled in favor the States. At least one nomadic VoIP provider has paid into the KUSF pending the outcome of this case.

## **2. A Declaratory Ruling Rather than a Notice of Proposed Rulemaking is the Customary and Appropriate Way to Decide Preemption Questions.**

The proposal of some parties that the FCC decide the preemption issue through a slower rulemaking process is interposed for the purpose of delay and has no substantive basis. The

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<sup>2</sup> *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

<sup>3</sup> *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006).

<sup>4</sup> The NPSC has determined not to require contributions from any nomadic VOIP providers for periods before the date of an FCC Order granting this Petition.

<sup>5</sup> A copy of this brief is supplied as Exhibit A to the NPSC/KCC petition, filed on July 16, 2009.

<sup>6</sup> *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm.*, 564 F.3d 900, 904-05 (8<sup>th</sup> Cir. 2009)(“a reasonable interpretation” of the 2004 Vonage Order, not necessarily the only reasonable interpretation, was that preemption did occur in 2004. Even under this interpretation, “a universal service fund surcharge could be assessed” on intrastate revenues, but “the FCC... and not the state commissions, has the responsibility to decide if such regulations will be applied.”) (emphasis added).

<sup>7</sup> The FCC is owed at least as much “Chevron” deference by the courts in interpreting its own rulings as it is in interpreting the Communications Act. “A court’s prior construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Natl. Cable and Telecom. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

more drawn-out rulemaking procedure would further extend the nomadic VoIP loophole for an unknown and open-ended period of time, thus impacting both the KCC and NPSC funds.

As discussed in Parts 3 and 4 of this letter, the FCC in its 2004 Order did not discuss and did not preempt State USF contribution requirements as applied to nomadic VoIP providers. Some commenting parties both (a) disagree with that conclusion, and (b) make the further assertion that the only way the FCC can revise the 2004 Order is by a rulemaking proceeding.

To its credit, Vonage acknowledges hornbook law that the FCC may revise a prior adjudicatory decision with another adjudicatory decision, just as a court may reconsider or overrule an opinion in a prior case with an opinion in a later case.<sup>8</sup> Vonage and the NPSC/KCC cite the same D.C. Circuit case, which squarely holds that:

“an adjudicating agency [may] alter[], even with retroactive effect, a policy established in a previous quasi-judicial action.”<sup>9</sup>

A declaratory ruling deciding a preemption petition, e.g. the *2004 Vonage Order*, is a quasi-judicial action to which this fundamental principle applies.<sup>10</sup> Thus even if granting relief to the e NPSC/KCC required revising or reconsidering the *2004 Vonage Order*, which it does not, there is absolutely no basis to defer a ruling in this case by invoking rulemaking procedures.

Because preemption involves a determination of whether *state law* does or does not conflict with federal law, rather than the creation of new federal standards by which service providers must abide, the FCC has consistently used the declaratory ruling process rather than the rulemaking process to decide preemption questions. The *2004 Vonage Order* that the FCC is interpreting in this case was a declaratory ruling. The 1997 *Pittencrief Order* that confirmed the lawfulness of State USF contribution requirements as applied to wireless carriers was a declaratory ruling.<sup>11</sup> Shortly after passage after of the 1996 Act, the FCC concluded that Congress’s decision not to require use of APA rulemaking procedures in deciding preemption petitions filed under Section 253 of the Act supported the use of informal adjudicatory procedures, typically declaratory rulings, to decide preemption questions.<sup>12</sup> More generally, the

<sup>8</sup> Vonage August 10, 2010 ex parte letter at 1-2 (“courts have permitted agencies to alter existing law through adjudication as well” as rulemaking) and at n. 3.

<sup>9</sup> *Verizon Tel. Companies*, 269 F.3d at 1107.

<sup>10</sup> *In the Matter of America Communications Services, Inc., Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997*, 14 FCC.Rcd. 21579, ¶ 19 (1999).

<sup>11</sup> *In the Matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 1735, 1737 (1997), *aff’d*, 168 F.3d 1332 (D.C. Cir. 1999); see also, *Sprint Spectrum, L.P. v. Kansas State Corp. Commission*, 149 F.3d 1058, 1061-1062 (10th Cir. 1998) (affirming KCC’s assessment of wireless carriers).

<sup>12</sup> *In the Matter of Silver Star, Inc., Petition for Preemption, Declaratory Ruling*, 12 FCC.Rcd. 15639, ¶ 36 (1997) (“Had Congress intended to require the Commission to follow more elaborate notice-and-comment procedures in preemption proceedings, it could have directed the Commission to employ those mandated by the APA for rulemakings or other types of agency action or included more specific procedures in section 253. Because Congress did not do so, we believe that section 253 affords us discretion to use in the preemption context our existing notice-and-comment procedures for informal adjudications.”) (internal citations omitted). There is no reason to believe that different procedures should apply to preemption proceedings arising under provisions other than Section 253.

FCC has also cited Section 5(e) of the Administrative Procedure Act as support for using the declaratory ruling process to decide preemption questions.<sup>13</sup>

Use of rulemaking procedure, which under the Administrative Procedure Act can only be prospective, is also a de facto denial of retrospective relief, raising the issue of whether the standards for denial of retrospective relief have been met.<sup>14</sup>

Various parties suggest that the minor theoretical difference between the NPSC and KCC procedures for allocating intrastate revenues to individual states justifies the unusual approach of deciding preemption issues via a federal rulemaking proceeding. Parties interpose this argument for purposes of delay. The NPSC and KCC have committed to granting credits and exemptions from assessable income in any situation in which the nomadic VoIP provider would otherwise be paying into two State USFs on the same assessable revenue. This takes care of the issue. As NARUC puts it, and as NASUCA echoes, there is unlikely to be large numbers Nebraskans with billing addresses in Nebraska and vacation homes and service locations in Kansas, or vice versa.<sup>15</sup> Notably, the FCC has never established national standards for States to allocate intrastate wireless revenue to individual States. As the NPSC/KCC demonstrated in their November 3, 2009 ex parte letter, in the decade since the FCC in its *Pittencrief* declaratory ruling upheld the right of States to impose USF contribution requirements on wireless carriers, States have worked together successfully among themselves without FCC involvement to utilize appropriate procedure to allocate intrastate wireless revenues among the States, and have successfully worked out minor issues as they have arisen.<sup>16</sup>

### **3. The FCC Should Issue a Standard Declaratory Ruling.**

A standard declaratory ruling with retrospective as well as prospective effect is the correct result. The FCC did not preempt state USF contribution requirements in its 2004 order, and Vonage has no basis for arguing sections of state law on this issue were expressly preempted.

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<sup>13</sup> *In the Matter of America Communications Services, Inc.*, 14 FCC.Rcd. 21579, ¶ 19 (“section 5(e) of the Administrative Procedure Act provides that a federal administrative agency such as the Commission, ‘in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.’ As a result, the Commission can and does adjudicate petitions for declaratory rulings - including petitions for declaratory rulings regarding preemption ....”) (internal citations omitted).

<sup>14</sup> *See Qwest Services Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) (FCC erred in limiting to prospective effect a ruling that menu-driven prepaid calling card services were telecommunications services – the standards for making a manifest injustice finding were not satisfied as the prior law was uncertain).

<sup>15</sup> NARUC ex parte letter dated September 15, 2009 at 3; National Association of State Utility Consumer Advocates Initial Comments dated September 9, 2009 at t 3-4 (“There is certainly no need to open a rulemaking to address the unlikely issue of conflicts between state assessment mechanisms, such as Vonage’s example of a conflict between billing addresses and service addresses ...[those matters can be resolved later] ... on a case-by-case basis.”)

<sup>16</sup> In the alternative, the FCC could issue a declaratory ruling that State USF assessment are not and were not preempted, thereby closing the nomadic VoIP loophole, and limit the non-preemption ruling to those State USFs that grant exemptions and exclusions to prevent any double-assessments. In a follow-up action, the FCC by a second declaratory ruling or by a rule could establish safe harbors for state-by-state allocations of intrastate revenue, which States might choose to utilize to obtain protection from preemption claims. Petition at 28-29.

In the earlier Vonage case, Vonage never asked that the FCC preempt universal service contribution requirements, and explained that its petition did not cover universal service issues. In its 2003 Petition for Declaratory Ruling, Vonage “requests that the Commission preempt Minnesota’s imposition of entry and rate regulation on Vonage’s Services.”<sup>17</sup> As discussed below, that limited preemption is precisely what the FCC ultimately granted. In its Petition, Vonage also specifically requested that the FCC not resolve universal service issues: “Further, this Petition is not intended to overlap with, or otherwise impact, issues concerning Voice Over IP services being considered by the [FCC] in other pending proceedings, including its intercarrier compensation, wireline broadband, *universal service*, and 911 dockets.”<sup>18</sup> Understandably then, the FCC’s 2004 Order did not address State USF contribution obligations.

In fact, the FCC’s narrow preemption language in its 2004 order left States discretion to require contributions to State USFs. In paragraph 46 of the Order, entitled “Conclusion,” the FCC preempted the 2003 Minnesota Order, which it found contravened federal law by imposing conditions on entry and by imposing rate regulation (tariffing). In the next sentence of that paragraph, the FCC allowed Minnesota and any other State to adopt orders that do not impose “certification, tariffing, or other related requirements” on nomadic VoIP providers, and do not otherwise conflict with federal regulations (or non-regulation). In the face of this limited preemption language, any nomadic VoIP providers who chose to assume that state USF contribution obligations were preempted as “related requirements” acted at their own peril.<sup>19</sup> There was no “regulatory certainty” whatsoever on that discrete issue. The state proceedings adopting contribution rules put nomadic VoIP providers on notice of those rules.

Because the 2003 Minnesota Order did attempt to impose entry and rate requirements on Vonage, the fact that the 2003 Minnesota Order was preempted (first sentence of paragraph 46 of the 2004 Vonage Order) says nothing regarding whether another order that did not impose entry and rate (or related) regulations on Vonage would also be preempted. The critical detail comes in the second sentence of paragraph 46, which explains that that the holding is that Minnesota and other States cannot impose entry, rate, or related regulation on Vonage.

Indeed, the FCC in the *2004 Vonage Order* could not and did not find that federal and state law on nomadic VoIP USF contributions conflict, a prerequisite for preempting State law. State contribution requirements parallel the federal requirement that nomadic VoIP providers contribute to the federal USF. In its 2004 order, the FCC was careful to limit its preemption to areas where it found actual federal/state conflicts: “the Minnesota Vonage Order directly conflicts with our pro-competitive deregulatory rules and policies governing *entry* regulations, *tariff*, and *other requirements arising from these regulations* for services such as

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<sup>17</sup> Vonage Petition for Declaratory Ruling at iv (Sept. 22, 2003, WC Docket No. 03-211) (on ECFS).

<sup>18</sup> Vonage Petition for Declaratory Ruling at 3-4 (emphasis added, footnotes citing FCC dockets omitted)

<sup>19</sup> The D.C. Circuit affirmed the FCC’s decision to require that AT&T pay into the Federal USF for time periods prior to the issuance of the FCC’s order finding that AT&T’s prepaid calling card service was an assessable service, finding that AT&T ran a risk by not paying despite “ambiguous” agency precedent. *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006).

DigitalVoice.”<sup>20</sup> Because an actual federal/state conflict is one of the two essential elements of preemption, the FCC could not have intended to have preempted on issues on which it did not find a conflict, and the FCC was careful to address whether a conflict existed issue-by-issue on a granular level of detail.<sup>21</sup>

The FCC has never considered state USF contribution requirements to be economic regulation subject to preemption. In the 2004 Vonage Order, the FCC found that nomadic VoIP providers were “more similar to CMRS” (wireless) carriers than other provider types because of the mobile “all-distance” nature of both nomadic VoIP and CMRS service.<sup>22</sup> Significantly, the FCC observed that “CMRS, including IP-enabled CMRS, is expressly exempt from the type of state *economic regulation* Minnesota seeks to impose on DigitalVoice.”<sup>23</sup> Several years earlier, the FCC had issued the *Pittencrieff* declaratory ruling that states were not preempted from imposing state USF contribution requirements on CMRS carriers.<sup>24</sup> Thus the FCC in 2004 did not consider State USF contribution obligations to be “economic regulation” such as tariffing regulation or related rate regulation – a conclusion it confirmed in both its 2006 *VoIP Contribution Order* (which required nomadic VoIP providers to contribute to the Federal USF)<sup>25</sup> and in its 2007 *Embarq Order*.<sup>26</sup>

#### **4. Footnotes Citing State Statutory Provisions Do Not Assist Vonage**

In an effort to show that a ruling for the NPSC/KCC would be a change of law, Vonage continues to rely on footnotes in the 2004 Vonage Order that do not discuss State USF contribution requirements or state the FCC’s holdings. Vonage now relies on footnotes 28 and 30 in combination, rather than on footnote 28 alone. Footnote 28 is a list of Minnesota statutes and rules mentioned in the 2003 Minnesota Commission Order that was the subject of the FCC’s 2004 Vonage Order. One listed statute is Minn. Stats. 237.16, which in sub-section (1) imposes a requirement that providers obtain certification before entering the Minnesota intrastate market, and in sub-section (9) authorizes the Minnesota Commission to impose a state universal service contribution requirement. The 2003 Minnesota Order repeatedly discussed sub-section (1), which imposed the entry requirement everyone agrees was preempted, but did not discuss sub-

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<sup>20</sup> 2004 Vonage Order, ¶ 20 (emphasis added).

<sup>21</sup> For example, the FCC carefully observed that the none of the special scenarios in which the FCC still permits non-dominant carriers to file FCC tariffs applied to DigitalVoice, so there was a conflict between the Minnesota regime requiring the filing of tariffs and the FCC de-tariffing regime for regulation of interstate carriers: “[C]ertain exceptions to the [FCC’s] mandatory detariffing rules exist; however, these exceptions would not apply to services like DigitalVoice were it to be classified a telecommunications service.” 2004 Vonage Order, ¶ 20, n. 74.

<sup>22</sup> 2004 Vonage Order, ¶ 22.

<sup>23</sup> 2004 Vonage Order, ¶ 22 (emphasis added).

<sup>24</sup> *In the Matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 1735, 1737 (1997).

<sup>25</sup> *VOIP Contribution Order*, 21 FCC.Rcd. 7518, n. 166 (“We note that the Commission’s discussion of section 230 in the *Vonage Order* as cautioning against regulation was limited to ‘traditional common carrier economic regulations.’ [2004] *Vonage Order*, 19 FCC Rcd. at 22426, para. 35.”).

<sup>26</sup> *Embarq Broadband Forbearance Order*, 22 FCC Rcd. 19478, ¶ 5 (2007).

section (9).<sup>27</sup> Footnote 30 of the 2004 Order refers to the statute and rules listed in footnote 28 as the “telephone company regulations” or “economic regulations.” Vonage contends that the FCC preempted all “telephone company regulations,” as defined in footnote 30, and that this preemption covered all sub-sections of all statutes listed in footnote 28.

However, the FCC did not preempt all “telephone company regulations.” This is evidenced in paragraphs 20 and 46 of the 2004 Vonage Order, as discussed above, and by the discussion of Minnesota 911 rules in paragraph 42. In paragraph 42, the FCC concludes that a Minnesota requirement that providers obtain state pre-approval of 911 compliance plans constitutes a condition on Vonage’s entry into the Minnesota communications market. It preempts Minnesota 911 regulations only “to the extent” that they are a condition on “entry.”

Vonage attempts to confine this limitation on the scope of preemption to 911 rules. However, the FCC in paragraph 42 goes on to explain that same limits on the scope of preemption also apply to “other” non-911 “telephone company regulations:”

Under the Minnesota “telephone company” rules, therefore this requirement [that Vonage obtain Minnesota’s pre-approval of a 911 compliance plan before beginning service] bars Vonage from entry in Minnesota. **To that extent**, this requirement is preempted **along with all other entry requirements contained in Minnesota’s “telephone company” regulations** as applied to [Vonage’s] DigitalVoice [service].<sup>28</sup>

Had the FCC wanted to preempt all of Minnesota’s “telephone company regulations,” rather than just those that operation as a condition on “entry,” it would not preempted “all the ***other entry requirements contained in Minnesota’s telephone company regulations***,” which is the wording it used. Instead it would have simply preempted “all Minnesota telephone company regulations.”

## 5. Conclusion

In short, the controlling language in the 2004 Order is paragraph 46, which preempts only state entry (certification), rate (tariffing) and related requirements. State USF contribution obligations are none of these, and so are lawful. A FCC declaratory ruling granting the NPSC/KCC petition would clarify rather than revise existing law, and so should take the form of a standard declaratory ruling with the ordinary retrospective as well as prospective effect.

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<sup>27</sup> The Minnesota Commission’s 2003 Order is Exhibit 5 to the 2003 Vonage Petition for Declaratory Ruling (Sept. 22, 2003)(WC Docket No. 03-211).

<sup>28</sup> 2004 Vonage Order, ¶ 42 (emphasis added).

Respectfully submitted,

/s/ James H. Lister

Elisabeth H. Ross

James H. Lister

*Counsel for the Nebraska Public Service*

*Commission and Kansas Corporation Commission*

cc: Dianne Griffin Holland  
Zachary Katz  
Angela Kronenberg  
Christine Kurth  
Jennifer Schneider  
Austin Schlick  
Christi Shewman  
Richard Welch

Commissioner Anne Boyle  
Shana Knutson  
Patrice Petersen-Klein  
Sue Vanicek  
Sandy Reams