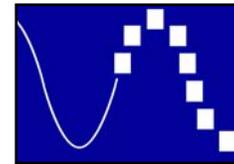


December 10, 2009



The VON Coalition

(Filed electronically)
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Written Ex Parte Communication**
Petition of Nebraska Public Service Commission and Kansas Corporation
Commission for Declaratory Ruling, WC Docket No. 06-122

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's Rules, the Voice on the Net Coalition (the "VON Coalition") submits this letter responding to recent ex parte letters filed by the Nebraska Public Service Commission and Kansas Corporation Commission ("NE/KS Letter")¹ and Vonage Corporation ("Vonage Letter").²

The VON Coalition reiterates its strong opposition to the Petition of the Kansas and Nebraska Commissions seeking to assess state universal service fees on the intrastate revenues of nomadic, interconnected VoIP providers. Simply put the FCC got it right in 2004 -- when it broadly preempted state regulation of interconnected VoIP. The result has been growth in the number of VoIP service providers, wider public acceptance and adoption of the services, and, most important, continued innovation with the introduction of new features. IP-based communications, including VoIP, have been a bright spot in an otherwise bleak economy, in particular helping, small and medium-sized businesses reduce communications costs while increasing functionality. The Commission recently touted the benefits of interconnected VoIP when it added the service to the list of those services eligible for funding through the schools and libraries program.³

As it was in 2004, VoIP is still a jurisdictionally mixed service, and the FCC has the exclusive jurisdiction to determine the policies and rules, if any, that govern the interstate aspect of the service.⁴ The FCC has yet to classify interconnected VoIP as an information or telecommunications service, and does not need to do so in this proceeding to reject the NE/KS request. As noted in the *Vonage Decision*, classification as an information service would subject the service to "the Commission's long-standing national policy of nonregulation of information

¹ Ex Parte of Nebraska Public Service Commission and Kansas Corporation Commission, WC Docket No. 06-122 (filed December 2, 2009).

² Ex Parte of Vonage Corporation, WC Docket No. 06-122 (filed November 30, 2009).

³ Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Schools and Libraries Universal Support Mechanism*, , CC Docket No. 02-6 (released December 2, 2009) at 6-7.

⁴ Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Board*, 19 FCC Rcd 22404 (2004) ("*Vonage Decision*") at 11.

services, particularly regarding economic regulation⁵ Moreover, if the FCC ruled that interconnected VoIP was a telecommunications service, such service would be considered nondominant, competitive service and not subject to FCC entry to tariff requirements.⁶ Thus any state requirements that impeded entry or imposed economic regulation would necessarily conflict with federal policy and “may actually harm consumers by impeding the development of vigorous competition.”⁷

Indeed, the FCC stated in the *Vonage Decision* that it could not find any approach for separating the VoIP service into interstate and intrastate components for the purpose of enabling dual federal and state regulation to coexist, without negating federal policy and rules.⁸ The Commission noted that the provision of tightly integrated services (such as a broadband connection, IP-compatible CPE with integrated capabilities for voice and video, that allows consumers to manage their personal communications) “greatly complicates the isolation of intrastate communication and counsels against patchwork regulation.”⁹ The Commission had the foresight to recognize even then that VoIP offered far more than a basic telephone service and any attempt to regulate “the ‘Internet and other interactive computer services,’ a phrase that plainly embraces [Interconnected VoIP] services.” would frustrate Congress’ stated policy to promote the continued development and preserve the competitive free market for Internet services.¹⁰ As the Commission stated in the *Vonage Decision*, The prospect of the imposition of 50 or more sets of different economic regulations could severely inhibit the development of VoIP. The Commission’s basic concerns were neatly summed up by the following:

We cannot, and will not, risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet.

The recent NE/KS letter demonstrates that USF is precisely the type of regulation that the Commission hopes to avoid. In the letter, the petitioners attempt to quantify the financial impact on VoIP providers paying USF retroactively but cannot do so with any certainty. “It is difficult to determine how much support the KCC could collect because the KCC does not know which, if any, providers are offering nomadic VoIP services in Kansas.”¹¹ The New Mexico Public Regulatory Commission “cannot determine amounts owed by nomadic VoIP more definitively.”¹² The petitioners suggest that all the FCC need do is rule in their favor. Given the inability to allocate interstate and intrastate revenues accurately, such a decision would result in incongruous and burdensome regulation. For example, how will Kansas know which VoIP providers are operating in Kansas? Presumably there will need to be a registration requirement. Will Kansas be permitted to deny operating authority for companies that don’t register or revoke the authority to those companies that register but do not pay? Who will be responsible for determining amounts owed in New Mexico and keeping abreast of current USF assessments? Moreover, the different state

⁵ Id. at 13-14.

⁶ Id. at 12.

⁷ Id. at 13.

⁸ Id. at 15. The Commission also importantly recognized that the use of VoIP customer billing addresses and phone numbers to assert state jurisdiction was pointless because customers could request phone numbers unrelated to their actual physical location or provide billing addresses from where the VoIP service is never used. Id. at 17-19.

⁹ Id. at 21.

¹⁰ Id. at 23,

¹¹ NE/KS Letter at 2.

¹² Id.

rules for calculating a service provider's USF contribution level is precisely the type of regulation the FCC was trying to avoid in the *Vonage Decision*. We can only assume that the regulatory landscape will grow more fractured as additional states begin to assess VoIP providers with state USF fees. In addition, the NE/KS request adds unnecessary complexity to significant issues pending before the FCC. For example, if the FCC transitions from a revenue-based contribution methodology to a numbers or connection-based system will VoIP providers be required to continue to somehow calculate intrastate revenue?

The petitioners – regulators themselves -- are not even certain how many states have imposed USF contribution requirements on VoIP providers.¹³ However, should the Commission grant the petition, the burden to know what states impose USF, how much the USF assessments may be, the process for calculating and remitting the fees, ascertaining whether these fees can be passed through to consumers, how to calculate intrastate revenues, how such fees may or must be shown on a customer invoice –will become the burden of VoIP providers, who in most cases will have no facilities, employees or any other physical presence in the state, and this burden will inevitably translate into additional costs for VoIP consumers.

Vonage now takes the position that it does not object to paying state USF, should the FCC grant the states authority to impose USF assessments with certain conditions. Vonage asks that the FCC take action to eliminate the possibility of conflicting state assessment mechanisms by permitting providers to allocate subscriber revenues among the states on any reasonable basis, including primary use, billing address, phone number or E911 location, as long as such basis was used for all customers.¹⁴ Vonage suggests that this process will give VoIP providers needed flexibility to choose how they handle USF or other similar obligations. While the Vonage proposal may simplify the process somewhat for Vonage and other Interconnected VoIP providers with similar back-office systems, unfortunately it falls far short from eliminating much of the time and expense that VoIP providers with a variety of different business plans will incur to comply with the myriad of state USF obligations. This time and expense could otherwise be directed to further deployment and innovation.

The Commission must deny the KS/NE requests and take this opportunity to maintain and confirm that the *Vonage Decision* means what it says – that states are preempted from regulating interconnected VoIP. This will also put an end to the otherwise never-ending state commission rulemakings – such as those pending today in Connecticut,¹⁵ Louisiana¹⁶ and Texas¹⁷ – asking whether these commissions have the authority to regulate interconnected VoIP, including requiring certification prior to operation. The prospect of state regulation – including multiple different regulations – will only serve to slow innovation, chill investment in VoIP, and raise costs for consumers. A clear Commission decision rejecting the NE/KS and Vonage requests and confirming preemption of all economic and entry regulation of Interconnected VoIP providers will provide the appropriate guidance to the states and enable VoIP providers to focus on serving consumers nationwide.

¹³ NE/KS Letter at 3.

¹⁴ Vonage Letter at 2.

¹⁵ Scope of Proceeding and Request for Written Comments, Connecticut Department of Public Utility Control Docket No. 08-07-15PH02 (August 5, 2009).

¹⁶ Rulemaking to Study the Possible Development of Rules Applicable to Voice Over Internet Protocol, Louisiana Public Service Commission Docket No. R-28268 (July 23, 2009).

¹⁷ Request for Comment, Rulemaking Related to the Regulatory Treatment of Voice Over Internet Protocol Services, Public Utility Commission of Texas Project No. 37614 (November 10, 2009).

December 10, 2009

The Commission got it right in 2004. This Commission has the opportunity to get it righter in 2010.

Please contact me directly if you have any questions.

Sincerely,

/s/

Glenn S. Richards
Executive Director
202-663-8215
glenn.richards@pillsburylaw.com

cc: Priya Aiyar (by email)
Sharon Gillett (by email)
Angela Kronenberg (by email)
Christine Kurth (by email)
Jennifer Schneider (by email)
Christi Shewman (by email)