

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Universal Service Contribution Methodology

WC Docket No. 06-122

COMMENTS OF VONAGE HOLDINGS CORPORATION

Brendan Kasper
Senior Regulatory Counsel
VONAGE HOLDINGS CORP.
23 Main Street
Holmdel, New Jersey 07733
(732) 444-2216

Brita D. Strandberg
Joseph C. Cavender
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, D.C. 20036
(202) 730-1300

Counsel to Vonage Holdings Corp.

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Introduction and Summary

Vonage appreciates the opportunity to comment on the Petition of Kansas and Nebraska,¹ and Vonage is pleased that the Commission is taking up this issue. Vonage is committed to the principles of universal service and has been a major force in contributing to affordable communications service for all Americans.

Vonage now contributes to the federal Universal Service Fund (“USF”), and, as it has stated previously, Vonage does not object to contributing to state universal service programs if the Commission establishes rules that would permit states to impose such charges in a manner consistent with federal policy.

The Commission should accept the Petition’s request in the alternative to consider state universal service fund assessments in a rulemaking proceeding. In a rulemaking proceeding, all interested parties, including other states, would be able to bring their concerns to the table, and the Commission would be able to develop a better record on which to establish clear rules of the road for states and industry. In so doing, the Commission would also reconfirm its earlier declaration that it, and not the state commissions, will decide what regulations will apply to interconnected VoIP providers.

The Commission should, however, decline to accept the Petition’s invitation to declare that the State Petitioners are entitled to collect universal service contributions and penalties for allegedly “past due” amounts on the theory that Vonage has somehow always been subject to such fees. Such a declaration would be patently unlawful because the law, notwithstanding State Petitioners’ arguments to the contrary, is clear. Moreover,

¹ *Petition of Nebraska Public Service Commission and Kansas Corporation Commission 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 (July 16, 2009) (“Petition”).

even if the law were not clear, it would be manifestly unjust to impose retroactive liability on Vonage. In addition, providing the “declaration” that the State Petitioners seek would undermine the Commission’s ability to effectively establish national policies by preempting state regulation in the future.

I. The Commission May Change Existing Law to Permit State Universal Service Contribution Requirements.

Vonage is firmly committed to the principle of affordable universal service. Vonage’s service works anywhere in the world a customer can find a broadband internet connection, no matter whether that connection is provided by DSL, cable modem, wireless service, or broadband-over-power-lines. And Vonage’s service is available for \$24.99 per month, much less than what other carriers charge for products offering fewer features.

In addition to its focus on delivering affordable, innovative services, Vonage fully supports universal service policy, and has paid directly into the federal universal service fund since the Commission determined that such payments were appropriate.² And just as Vonage does not (and did not) object to contributing to the federal universal service program, Vonage does not object to contributing to state programs that are consistent with federal policy. But the Commission, and only the Commission, can decide whether, and how, states might require interconnected VoIP providers to contribute to state

² 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*”). Notably, when Vonage petitioned for review of that order, it did not argue that it should not be required to contribute to the federal fund at all. See *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

universal service programs in a manner consistent with federal policy. Vonage does not believe that such a determination would necessarily be unwarranted or unlawful.³

The Commission should resolve through rulemaking the questions presented by the Petition by considering whether, and under what circumstances, state commissions should be permitted to impose state universal service charges on interconnected VoIP providers like Vonage. In a rulemaking proceeding, all interested parties will have an opportunity to offer their own insights into how best state universal service charges could be applied to nomadic interconnected VoIP service without conflicting with federal policy.

Vonage is aware that the Commission is considering a number of reform proposals that implicate universal service. If the Commission chooses to address state authority to impose universal service obligations on nomadic VoIP providers in advance of more comprehensive reforms, Vonage believes that a reasonable approach would be to provide that states may establish options for calculating state revenues that correspond to the existing federal options. For example, states should create a “safe harbor” revenue percentage that is the inverse of the federal universal service safe harbor percentage.

Federal rules must also address the conflict that already exists between the petitioning states by indicating how states can avoid such conflicts. The Nebraska Public Service Commission’s regulations would require that interconnected VoIP providers contribute to its state fund for all subscribers with Nebraska billing addresses. Kansas, by contrast, has attempted to impose state universal service obligations on the basis of a

³ Cf. Comments of Vonage Holdings Corp., WC Docket Nos. 05-337, 03-109, 06-122, 04-36 and CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, at 3-8 (filed Nov. 26, 2008) (explaining that the Commission is free to revisit its prior determination to preempt state universal service obligations, but must explain the change in policy).

subscriber's "primary physical service address," which frequently will *not* be the subscriber's billing address.⁴ The immediate emergence of an actual conflict among the states demonstrates the wisdom of the Commission's decision to establish a "single national policy" for VoIP regulation,⁵ and demonstrates that state contribution obligations cannot go forward until the Commission, as the architect of that single national policy, adopts the rules and guidance necessary to prevent such conflicts.⁶

The Commission should adopt guidelines that accommodate the variation in resources and the differing commercial concerns faced by interconnected VoIP providers. Specifically, while providers should be required to apply the same proxy for state universal service attribution consistently across all states, providers should be free to select among reasonable proxies. In other words, an interconnected VoIP provider could make state USF contributions based on billing address, 911 address, or phone number, so long as the provider used the same proxy in all states. At a minimum, a company should

⁴ *Investigation to Address Obligations of VoIP Providers with Respect to the KUSF*, Implementation Order Adopting Staff Report and Recommendation, Docket No. 07-GIMT-432-GIT, 2008 Kan. PUC LEXIS 1481 at *10 (¶ 11) (Sept. 22, 2008).

⁵ *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22425 (¶ 33) (2004) ("*Vonage Preemption Order*").

⁶ In a recent *ex parte*, NARUC implicitly acknowledges that state assessments that do conflict with one another are preempted today by suggesting that the Commission decline to extend the benefit of any decision on the Petition to such assessments. Letter from James Bradford Ramsey, NARUC General Counsel, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket 06-122, GN Docket 09-51, WC Docket 07-38 & GN Docket 09-47, at 5 (filed Sept. 2, 2009). NARUC suggests a cumbersome response to such conflicts, placing the burden on providers to demonstrate each instance of duplicative billing and affirmatively request a credit from one of the conflicting states. Notably, NARUC does not indicate how providers should determine which state should be paid and which state should provide a credit. In practice, each state will likely contend it should be paid and the other state should issue a credit, leaving providers like Vonage in precisely the untenable regulatory situation the Commission sought to prevent with the *Vonage Preemption Order*.

be permitted to allocate a subscriber's revenue to the state of the subscriber's billing address or the subscriber's registered E911 location, although Vonage believes that the more options that are available the easier it will be for different companies, with different billing and recordkeeping systems, to begin making state universal service payments. So long as the company uses the same information in each state, there will be no risk of "gaming" the system. And allowing companies to choose what works best with their individual systems is consistent with the Commission's recognition that interconnected VoIP providers should not be required to make modifications to their systems solely to facilitate regulation.⁷ Moreover, there may be important customer-relations reasons for choosing one option over another. For example, companies may have agreements with states or localities to base tax payments on certain proxies for location. A company should be free to use the same proxies to allocate revenue for universal service contribution purposes to reduce the potential for customer confusion arising from having tax and state universal service assessments from different states.

Given that the Commission is considering a number of reform proposals that implicate universal service, however, the Commission may wish to consider this issue in the context of those overall reform efforts rather than in isolation. Vonage has no objection to the Commission doing so. Vonage believes that the Commission's focus should be on establishing sensible universal service guidelines and safeguarding the single, national policy announced for interconnected VoIP—the Commission is better situated than Vonage to determine whether the best course is to focus on comprehensive reform or to address separately the obligations of nomadic interconnected VoIP providers

⁷ *Vonage Preemption Order*, 19 FCC Rcd at 22420-21 (¶ 25 & n. 96).

to contribute to state programs. But in whatever context the Commission decides to address this issue, it should do so in a rulemaking.

II. The Commission Should Decline Petitioners’ Invitation to Declare that States Have Always Had Authority to Impose State Universal Service Charges.

While Vonage is pleased to agree with the Petition insofar as it acknowledges that the FCC has the authority and responsibility to determine whether and in what circumstances state USF programs do not conflict with federal policy. However, Vonage urges the Commission to decline the Petition’s suggestion that it declare that state universal service charges have never been preempted and that Vonage is therefore obliged to pay substantial sums in allegedly past due fees and penalties.

A. The Commission May Not Lawfully Declare that Vonage’s Service Has Always Been Subject to State Universal Service Obligations.

State Petitioners make a bold request of the Commission. They ask the Commission not to “limit” itself to a rule with “prospective-only effect” but rather to “confirm that existing as well as future state assessments are lawful.”⁸ Notwithstanding State Petitioners’ request, there can be little doubt that states are preempted from imposing state universal service fees on nomadic interconnected VoIP providers like Vonage. Indeed, the “confirm[ation]” State Petitioners would have this Commission issue would be wholly unlawful.

As the Supreme Court has explained, an agency is not permitted “under the guise of interpreting a regulation, to create de facto a new regulation.”⁹ As the D.C. Circuit has put it, the law distinguishes between agency decisions that substitute new law for old law that was reasonably clear on the one hand and decisions that merely apply existing law to

⁸ Petition at 2, 20.

⁹ *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

new situations or clarify the law on the other.¹⁰ In addition, even if existing law is unclear and amenable to interpretation, courts refuse to apply such an interpretation retroactively if doing so would constitute a “manifest injustice.”¹¹ The declaration State Petitioners ask this Commission to make, that their state universal service programs have *never* been preempted from applying to Vonage’s service, would run afoul of both of these prohibitions.

- 1. The Commission’s *Vonage Preemption Order* reaches state universal service obligations.**
 - a. The *Vonage Preemption Order* established that the FCC and not state PUCs decide what regulations apply to Vonage.**

Regulatory authority over communications has historically been tied to geography. Since 1934, section 2(a) of the Communications Act has granted the Commission jurisdiction over “all interstate and foreign communication” and over “all persons engaged ... in such communication.”¹² Section 2(b) of the Communications Act reserves to the states jurisdiction “in connection with intrastate communication service.”¹³ If a single service has both intrastate and interstate components or capabilities, and it is impossible or impractical to separate them, the Commission may preempt state regulation “that thwart[s] federal objectives.”¹⁴ Because Vonage’s service is completely independent of geography, one of the first questions regulators had to answer about services like it was who had jurisdiction to regulate it.

¹⁰ *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

¹¹ *AT&T*, 454 F.3d at 332.

¹² 47 U.S.C. § 152(a).

¹³ 47 U.S.C. § 152(b).

¹⁴ *Vonage Preemption Order*, 19 FCC Rcd at 22413 (¶ 17) (citing *Qwest Corp. v. Minn. Pub. Utils. Comm’n*, 380 F.3d 367, 374 (8th Cir. 2004)).

The emergence and growth of interconnected VoIP services presented another important regulatory question as well: whether interconnected VoIP services were “information services,” subject to very light regulation, or “telecommunications services,” which traditionally have been subject to more extensive regulation.

Both questions—who has jurisdiction over Vonage’s service and how it should be classified—were squarely presented in 2003, when the Minnesota Public Utilities Commission issued an order declaring that Vonage was subject to its jurisdiction and must comply with Minnesota’s statutes and rules relating to the offering of telephone service, just as if Vonage were offering traditional wireline service within the state.¹⁵

In response, Vonage filed a complaint for injunctive relief with the federal district court in Minnesota and a petition for a declaratory ruling from the Commission. In both forums, Vonage sought a declaration that its DigitalVoice service is an “information service” exempt from phone company regulation under federal and state law. Vonage also argued that, regardless of the regulatory classification of DigitalVoice, it would be impossible to separate the service into distinct interstate and intrastate portions and that federal jurisdiction was therefore exclusive.

The federal court ruled first. After reviewing the characteristics of Vonage’s DigitalVoice service in light of federal telecommunications law, the court ruled that Vonage was an “information service” and granted the requested injunction against the Minnesota PUC.¹⁶ Shortly thereafter, a federal district court in New York similarly

¹⁵ *Complaint of the Minn. Dept. of Commerce against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance, 2003 Minn. PUC LEXIS 94 (Sept. 11, 2003).

¹⁶ *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *aff’d*, 394 F.3d 568 (8th Cir. 2004).

enjoined the New York State Public Service Commission's attempt to subject Vonage to "telephone corporation[]" regulation in New York.¹⁷

The Commission took a different approach. In the *Vonage Preemption Order*, the Commission never reached the question whether Vonage's service was an information service or telecommunications service because the Commission found "that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy."¹⁸ The Commission found support for this conclusion, among other places, in Congress's manifest preference for an unregulated Internet, and the Commission further concluded that "multiple state regulatory regimes would likely violate the Commerce Clause."¹⁹

The Commission's ruling was not narrowly limited to any particular regulatory provision. Instead, the Commission spoke in broad terms, preempting Minnesota's "traditional 'telephone company' regulations."²⁰ In so doing, the Commission explained, it was "making clear that *this Commission, not the state commissions*, has the responsibility and obligation to decide whether certain regulations apply to

¹⁷ *Vonage Holdings Corp. v. N. Y. State Pub. Serv. Comm'n*, No. 04-CV-4306, Preliminary Injunction Order (S.D.N.Y. July 16, 2004).

¹⁸ *Vonage Preemption Order*, 19 FCC Rcd at 22411 (¶ 14). See also *id.* at 22415-18 (¶¶ 20-22) (discussing ways in which the Minnesota order "Conflict[s] with Commission Rules and Policies"); *id.* at 22425-30 (¶¶ 33-41) (identifying additional support for preemption).

¹⁹ *Id.* at 22412 (¶ 14); see *id.* at 22425-30 (¶¶ 33-41) (discussing federal policy in favor of unregulated internet services and in favor of encouragement of such services); see also *id.* at 22415-18 (¶¶ 20-22) (discussing ways in which entry regulations conflict with federal policy).

²⁰ *Id.* at 22404 (¶ 1).

DigitalVoice....”²¹ The Commission explained that the states would continue to play a “vital role” but that “vital role” would have nothing to do with any regulation of DigitalVoice as a telephone service—rather, states would continue to “protect[] consumers from fraud, enforc[e] fair business practices, for example, in advertising and billing, and generally respond[] to consumer inquiries and complaints.”²²

The Commission’s sweeping language was no accident. As the Commission noted, by the time it issued its decision, “a number of other states ha[d] opened proceedings to examine the jurisdictional nature of VoIP services offered in their states.”²³ The *Vonage Preemption Order* was aimed not just at the particular regulations Minnesota was attempting to impose on Vonage. Rather, by stating that “this Commission, not the state commissions” had the authority and obligation to determine what regulations would apply to Vonage, it was attempting to put a stop to *all* state attempts to regulate Vonage, declaring that states should instead be partners in assisting *the Commission* in determining the proper regulatory treatment for this new service.²⁴

After the Commission issued its declaration of exclusive federal jurisdiction over Vonage’s service, the Eighth Circuit reviewed the Minnesota district court’s injunction and the *Vonage Preemption Order* and affirmed them both. First, the Court held that the Commission’s declaration of exclusive federal jurisdiction in the *Vonage Preemption*

²¹ *Id.* at 22405 (¶ 1).

²² *Id.*

²³ *Id.* at 22410 (¶ 13).

²⁴ *See, e.g., id.* at 22432 (¶ 44) (characterizing the order as having “decided the jurisdictional question”); *see also id.* at 22439-40, Statement of Commissioner Abernathy (expressing appreciation that many state commissioners agreed that preemption of state regulation would not preclude collaboration with state regulators in determining, at the federal level, what regulations should apply to Vonage).

Order was dispositive of the state’s appeal of the injunction, confirming that the scope of the *Vonage Preemption Order* and the injunction that had completely prohibited Minnesota from asserting *any* regulatory jurisdiction over Vonage were coextensive.²⁵ In a subsequent case, the Eighth Circuit considered Minnesota’s challenge to the *Vonage Preemption Order* itself and affirmed it as well.²⁶

In keeping with the Commission’s declaration that it, not the state commissions, would have the authority to decide what regulations would apply to Vonage’s service, the Commission has made case-by-case determinations about the nationwide regulatory obligations of Vonage and other similar service providers. For example, the Commission determined that providers of interconnected VoIP services should be required to provide E911 service.²⁷ Likewise, the Commission has determined that providers of interconnected VoIP services should be required to pay into the federal universal service fund.²⁸ Notably, in no proceeding has the Commission determined that Vonage’s service was somehow *already subject* to whatever regulation the Commission was extending to cover it. And notably, in no proceeding has the Commission ever abdicated its role as the

²⁵ See *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 394 F.3d 568 (8th Cir. 2004). The Commission filed an amicus brief in that case arguing that the injunction and the *Vonage Preemption Order* were coextensive in reach. See Supplemental Brief for the United States and the Federal Communications Commission as Amici Curiae, *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 394 F.3d 568 (8th Cir. 2004) (No. 04-1434) at 2, 9 (filed Dec. 2, 2004) (“FCC 2004 Supplemental Brief”) (arguing that the *Vonage Preemption Order* “places the same limitations on the MPUC’s regulatory authority as does the injunction sought by Vonage and granted by the district court” and noting that “it supports the precise relief ordered by the district court”).

²⁶ *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

²⁷ *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

²⁸ *VoIP USF Order*, 21 FCC Rcd at 7520 (¶ 2).

body with the authority and the responsibility to decide what regulations will apply to Vonage.

b. The *Vonage Preemption Order* unambiguously preempts state universal service programs.

State Petitioners argue that notwithstanding this history, the law, and in particular the *Vonage Preemption Order*, is ambiguous, and that therefore the Commission ought to clarify that state universal service obligations have never been preempted. That position is untenable.

As Vonage has pointed out before, there is simply no plausible way to interpret the *Vonage Preemption Order* as not preempting state universal service obligations. First, the Commission’s own description of what the *Vonage Preemption Order* did is incompatible with any notion that the states have *any* authority, except as expressly permitted by the Commission, to regulate interconnected VoIP services like Vonage’s. As explained above, the Commission explained that in the *Vonage Preemption Order* it was focusing not on *what* particular regulations would apply to Vonage’s service (something the Commission would take up in later orders) but rather *who* would get to make that determination. As the Commission put it, the *Vonage Preemption Order* put to rest the “jurisdictional question” of who would decide “whether certain regulations apply to [Vonage’s] DigitalVoice” service—the answer was “this Commission, not the state commissions.”²⁹

State Petitioners thus have it exactly backward when they urge the Commission to “avoid lending its imprimatur to the suggestion . . . that the FCC must pre-approve each

²⁹ *Vonage Preemption Order*, 19 FCC Rcd at 22405, 22432 (¶¶ 1, 44).

and every state regulation that somehow affects nomadic VoIP....”³⁰ That was, in fact, precisely the point of the *Vonage Preemption Order*.³¹ Of course, if the Commission should permit states to impose state universal obligations on Vonage, it would not have to examine and approve each state plan; rather, it could issue rules that could guide states in setting up their own regulations. But the Commission’s resolution of the “jurisdictional question” in the *Vonage Preemption Order*—that it, not the state commissions should decide what regulations should apply to Vonage—and the expressed hope that the states would assist the Commission in deciding those issues, means that the *Commission* sets the rules in the first instance.³²

Second, the Commission’s description of the regulations it was preempting—“traditional ‘telephone company’ regulations”—is impressive primarily for its breadth. It is not a term of art, yet the Commission used that phrase or a comparable phrase seven times in the *Vonage Preemption Order*.³³ Kansas and Nebraska argue that this means that the order is ambiguous and that this Commission can now interpret it narrowly. But

³⁰ Petition at 20.

³¹ Indeed, if the Commission had intended for states to be able to regulate and for the Commission only to step in after a state went too far, its statement about answering the “jurisdictional question” and its statement that it, not the state commissions, would decide what regulations would apply would have been entirely unnecessary, because the Commission can *always* issue an order preempting state regulation after the state issues it. The Commission’s use of such language demonstrates that it was trying to put a stop to such attempts to regulate *before* they occurred.

³² See *id.* at 22405 (¶ 2) (explaining that the Vonage Preemption Order “will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping *us* answer the questions that remain ... questions regarding the regulatory obligations of providers of IP-enabled services.”) (emphasis added); *id.* at 22412 n.46 (preempting state regulation would “enable this Commission and the states to focus resources in working together”).

³³ See *id.* at 22404 (¶ 1); 22409 (¶ 11 n.30); 22416 (¶ 20 n.69); 22417-18 (¶ 22); 22421 (¶ 26); 22430-31 (¶ 42).

it is simply not plausible to imagine that the Commission repeated the same language seven times in that order (and again in subsequent orders) while secretly believing the language to be so ambiguous that it could later be interpreted to mean anything at all. Indeed, if what was preempted in the *Vonage Preemption Order* was as ambiguous as Kansas and Nebraska now assert, that would have been a rather significant defect.

Third, Kansas and Nebraska's attempt to claim that the *Vonage Preemption Order* is ambiguous about its application to state universal service obligations runs head-on into specific language to the contrary in it. Among the preempted state regulations was Minnesota Statute § 237.16 subd. 9, the statutory provision that would have required Vonage to contribute to Minnesota's state universal service program.³⁴ Whatever other ambiguity State Petitioners might imagine could be contained in the *Vonage Preemption Order*, there can be no ambiguity about whether it preempted state universal service obligations.

c. The FCC's *VoIP USF Order* did not alter the preemption of state universal service by the *Vonage Preemption Order*.

State Petitioners rely heavily on this Commission's decision to impose *federal* universal service obligations on interconnected VoIP providers to bolster their claim that nothing in federal law prohibits states from imposing *state* universal service obligations on them. But that order merely underscores that it has always been clear that states did *not* have such authority. Indeed, prior to the *VoIP USF Order*, interconnected VoIP providers did not contribute to either federal or state universal service programs. And when the Commission issued its order establishing federal obligations, it did not establish any state contribution obligation. Instead, the Commission specifically noted that many

³⁴ *Id.* at 22408-09 (¶ 10 & n.28).

had argued that VoIP service was “inherently interstate” and 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.³⁵ Such a conclusion is inconsistent with State Petitioners’ claim that, either before or after the *VoIP USF Order*, states had some authority to impose their own regulations of any sort—including USF obligations—on interconnected VoIP providers.

But the *VoIP USF Order* is actually even worse than that for State Petitioners. The Commission specifically discussed the *Vonage Preemption Order*, and discussed only *one* circumstance in which it would not serve to preempt state regulation. In the *VoIP USF Order*, the Commission established alternatives to the “safe harbor,” including allowing interconnected VoIP providers to use actual end-points of communications—if the VoIP provider could make such determinations—to allocate revenues.³⁶ But, the Commission emphasized, “an interconnected VoIP provider with [that] capability ... would *no longer qualify*” for preemption of state regulation under the *Vonage Preemption Order*.³⁷ In other words, if an interconnected VoIP provider knew the end-points of its customers’ communications, it could reduce its federal obligations, but it would suddenly become subject to state universal service obligations as well as other regulations. This underscores that where providers do *not* have such information—as *Vonage* does not—state regulation is *not* permitted. Moreover, the Commission’s

³⁵ *VoIP USF Order*, 21 FCC Rcd at 7544-45 (¶ 53). The Commission decided to set a lower number.

³⁶ *Id.* at 7546 (¶ 56).

³⁷ *Id.* (emphasis added).

handling of this issue illustrates its ability to speak clearly to alter the scope of the *Vonage Preemption Order* when such alteration is intended.

d. Every federal court to consider the *Vonage Preemption Order* has recognized that it broadly preempts state regulation.

In light of the foregoing, it is not surprising that every federal court, and indeed, every single federal judicial officer to have considered the question, including courts focusing squarely and solely on state authority to impose state universal obligations on Vonage, has decided that states may not regulate Vonage's service.³⁸ These courts have simply confirmed the clear meaning of the *Vonage Preemption Order*. Except insofar as they are expressly permitted by the Commission, states may not regulate Vonage's service; in particular, unless and until the Commission changes federal policy, states are preempted from imposing state universal service charges on Vonage.

Kansas and Nebraska argue that, notwithstanding the foregoing, the Commission could find support for issuing the declaration they seek in a brief filed by the Office of General Counsel in *Vonage Holdings Corp. v. Nebraska Public Services Commission*.³⁹ Most of that brief addressed the question whether states *ought* to be permitted to impose universal service obligations on Vonage, and, as stated above, Vonage does not object to the Commission issuing an order that would permit them to do so on a going-forward basis, if the Commission finds that doing so would be consistent with federal policy.

³⁸ See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009), *aff'd* 543 F. Supp. 2d 1062 (D. Neb. 2008); *N.M. Pub. Regulation Comm'n v. Vonage Holdings Corp.*, Civ. No. 08-607 WJ/WDS, Memorandum Opinion and Order (D.N.M. July 28, 2009) (overruling state commission's objections to magistrate judge's proposed findings and adopting recommendation of dismissal of state commission's suit); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 Civ. 4306, 2005 U.S. Dist. LEXIS 33121, at *5 (S.D.N.Y. Dec. 14, 2005); *Vonage v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568, *aff'd* 290 F. Supp. 2d 993.

³⁹ 564 F.3d 900.

However, the brief also stated that in the *Vonage Preemption Order*, “[t]he FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional ‘economic regulation.’”⁴⁰ This single statement was the sum of the brief’s analysis of that question—the brief did not address any of the arguments set out above, or, for that matter, any of the arguments that had been raised by Vonage or its *amici* in the Eighth Circuit case. For example, the brief failed to address Vonage’s argument that the Commission had explicitly listed Minnesota’s statutory provision imposing state universal service contribution obligations in the footnote in the *Vonage Preemption Order* that enumerated provisions that were preempted.⁴¹ The Eighth Circuit adopted Vonage’s reading of the *Vonage Preemption Order* without citing the Commission’s amicus brief. That amicus brief cannot change the terms of the *Vonage Preemption Order* to make it ambiguous when it was not ambiguous before.

Moreover, the 2008 amicus brief was not the first time the Office of General Counsel has had occasion to weigh in on the scope of the *Vonage Preemption Order*. In fact, the General Counsel previously took the opposite position regarding the *Vonage Preemption Order*’s application to state universal service programs.

After Vonage had obtained an injunction prohibiting Minnesota from imposing any regulations on it whatsoever, Minnesota appealed. While the appeal was pending,

⁴⁰ Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants’ Request for Reversal, *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 564 F.3d 900 (8th Cir. 2009), at 14. The Commission’s brief was subsequently submitted by the New Mexico Public Regulation Commission to the District Court for the District of New Mexico.

⁴¹ See 19 FCC Rcd at 22408-09 (¶ 10 & n.28).

the Commission issued the *Vonage Preemption Order*. The Eighth Circuit called for briefing on the effect of the order, and the General Counsel filed a brief explaining that the *Vonage Preemption Order* “places the same limitations on the MPUC’s regulatory authority as does the injunction sought by Vonage and granted by the district court.”⁴² The district court’s injunction, based on the conclusion that Vonage’s service was an information service, precluded *any* state regulation at all of Vonage’s service.

Even more telling, the General Counsel’s 2004 brief argued against any carve-out of state authority that would have permitted Minnesota to collect state universal service charges from Vonage.

The Court also can and should affirm without addressing other issues, such as E911 and universal service. These issues are currently before the FCC in the IP-enabled services proceeding.... If the FCC adopts rules regarding E911 or universal service that are inconsistent with the existing terms of the district court’s injunction, the MPUC will be entitled to corresponding modifications of the injunction under Rule 60(b).⁴³

In other words, in 2004, the General Counsel took the position that *if* the Commission issued an order that would permit states to impose universal service obligations on Vonage, Minnesota would *then* be able to get relief from the injunction to that limited extent. But if the *Vonage Preemption Order* had *not* preempted state universal service programs (or was even ambiguous on that point) the General Counsel would have said so then.

The 2004 and 2008 General Counsel *amicus* briefs to the Eighth Circuit are irreconcilable on this point. Vonage submits that the 2004 brief, written immediately after the *Vonage Preemption Order* was issued, has the better analysis. In any event, it

⁴² FCC 2004 Supplemental Brief at 2.

⁴³ *Id.* at 10.

entirely undercuts the argument that State Petitioners make here that the Commission is free to “formalize” the position taken in the 2008 *amicus* brief by declaring that the 2008 brief’s single-sentence statement of the scope of the *Vonage Preemption Order* reflects the Commission’s intent.

The Commission may not “clarify” with retroactive effect existing law that is “reasonably clear.”⁴⁴ As detailed above, the *Vonage Preemption Order*’s preemption of state universal service obligations on Vonage meets this standard. Accordingly, the Commission should decline State Petitioners’ request to “clarify” the scope of the *Vonage Preemption Order*.

2. Imposing state universal service obligations retroactively on Vonage would be a manifest injustice.

Even if the *Vonage Preemption Order* could be interpreted to permit states to impose state universal service obligations on Vonage, such obligations could not be imposed retroactively because doing so would be manifestly unjust.

The D.C. Circuit has set forth a non-exhaustive list of factors for considering whether giving retroactive effect to a regulation would be manifestly unjust. As that court has explained, “courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests.”⁴⁵ The court went on:

Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a

⁴⁴ *AT&T*, 454 F.3d at 332.

⁴⁵ *Retail, Wholesale and Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.⁴⁶

Any attempt to apply state universal service obligations retroactively on Vonage would fail this test. As set forth at length above, this is not an issue of “first impression.” Not only is Commission precedent clear, but judicial authority is also clear and unanimous. It would be the very essence of injustice to say that even after Vonage won *several* lawsuits, and lost *none*, against states attempting to impose regulations against it—including lawsuits that specifically and exclusively dealt with state attempts to impose state universal service obligations on it—that it could be subject to retroactive liability for state universal service obligations.

The Supreme Court’s decision in *Brand X*, on which State Petitioners rely, is not to the contrary. That case stands for the straightforward proposition that courts apply *Chevron* deference (if otherwise appropriate) to an agency interpretation of a statute without regard to whether the court has previously considered the proper interpretation of the statute. Nothing in that case says that an agency’s interpretation, even if it is deferred to in future cases, can somehow undo the effect of prior judicial decisions. Indeed, the Court expressly disavowed any such conclusion, rejecting the dissent’s accusation that it would permit agencies to “reverse” judicial decisions.⁴⁷

Retroactive imposition of state universal service obligations would also fail the second and third factors of the *Retail, Wholesale* test. It is indeed “well established practice” that nomadic interconnected VoIP providers like Vonage do not pay state universal service obligations. That is because it is well established, through both the

⁴⁶ *Id.*

⁴⁷ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

Vonage Preemption Order and the host of court decisions interpreting it, that such obligations are preempted. Moreover, Vonage has expressly relied on this existing rule. In fact, not only does Vonage not pay state universal service fees, it also does not collect state universal service fees from its customers, all out of a reliance on the existing rule.

The fourth *Retail, Wholesale* factor assesses the burden on the entity to which a regulation would be applied retroactively. There can be little question that Vonage would be subject to a substantial burden: it could be obliged to pay both “past due” fees and penalties to a number of states. If Vonage had actually been subject to state universal service obligations all along, it would have passed those costs along to its customers—and it never would have been subject to any penalties.⁴⁸ But imposing such fees on Vonage now, when it would be unable to recover them, would be strikingly unjust.

For similar reasons, there is no “statutory” interest—or interest embedded in the *Vonage Preemption Order*—that warrants retroactive imposition of state universal service obligations. State Petitioners cite competitive neutrality as a basis for imposing retroactive costs on Vonage, but imposition of retroactive contribution obligations and penalties would not be neutral. Instead, Vonage alone would be saddled with costs and penalties and denied the opportunity to recover those costs and penalties through routine line items. State Petitioners’ claim that Vonage has unfairly benefitted from compliance with the *Vonage Preemption Order* is also misplaced. Vonage has never advertised that, in addition to its low per-month rate, customers are obliged to only pay federal, rather

⁴⁸ These monthly costs would be tiny to each individual customer; consequently, imposition of these charges would not have materially harmed Vonage’s competitive position.

than state, USF surcharges (which amount to a few cents each month), and it is doubtful that customers make (or would make) their choice to subscribe on that basis.

Further, State Petitioners' view of competitive neutrality is one-sided and only considers the regulatory obligations and does not consider regulatory rights. What State Petitioners fail to mention is that Vonage also is not eligible to receive universal service funds. Thus, applying state universal service to nomadic VoIP providers amounts to a one-way subsidy to voice providers using circuit-switched technology that compete with nomadic VoIP providers.⁴⁹ This is hardly a model of competitive neutrality.

The short of it is that Vonage has always acted in good faith reliance on the *Vonage Preemption Order* and the unanimous authority of the federal courts in asserting that it is not subject to state regulation, including state universal service regulation. It would be manifestly unjust if Vonage, having won in court every time this issue was litigated, was subject to liability for having merely defended this Commission's authority to preempt state regulation. That is all the more so because these are costs that Vonage is entitled to pass along as separate charges to consumers—but only if it knows that it is obliged to pay them.

B. Declaring that States Have Always Had the Authority to Impose State Universal Service Charges on Vonage Will Undermine the Commission's Ability to Establish National Policy.

Even if it would be lawful for the Commission to upend settled law and declare that states have always had the authority to impose state USF charges on Vonage, such a declaration would be undesirable, because it would make it more difficult for the

⁴⁹ In many cases nomadic VoIP providers cannot even effectively compete with the providers it would be subsidizing because these providers do not offer stand-alone broadband service.

Commission to effectively preempt state regulations to establish a single national policy in the future.

What State Petitioners here seek is not just the authority to impose state universal service obligations on interconnected VoIP service providers like Vonage. Instead, they ask the Commission to cede to the states the authority to decide the scope of the *Vonage Preemption Order*. Rather than work cooperatively with the Commission to help it establish a single national framework of regulations that will apply to Vonage's service,⁵⁰ State Petitioners prefer to make those decisions themselves. That is why, having failed in court, they now ask the Commission to "confirm" that the states had authority to act on their own all along.

State Petitioners ignore that the point of the *Vonage Preemption Order*, as set forth above, was to answer "the jurisdictional question."⁵¹ That is, it was specifically intended to establish that "this Commission, not the state commissions" would determine Vonage's regulatory obligations.⁵²

If the Commission now agrees that states have never been preempted from imposing certain regulations on Vonage, then it will have forever undermined its ability to answer similar "jurisdictional question[s]" in the future. States will have no reason to work with the Commission in establishing federal policy. Instead, the Commission will

⁵⁰ *Cf. Vonage Preemption Order*, 19 FCC Rcd at 22405 (¶ 2) ("Our decision today will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping us answer the questions that remain after today's Order -- questions regarding the regulatory obligations of providers of IP-enabled services.").

⁵¹ *Id.* at 22432 (¶ 44); *see also, e.g., id.* at 22405 (¶ 2) (discussing the fact that issues about precisely what regulations will apply to such services would be determined by the Commission in subsequent proceedings).

⁵² *Id.* at 22405 (¶ 1).

have signaled that states are free to regulate even after the Commission has declared that it wishes to adopt a single national policy.

Such a statement would leave entities—Vonage today, and others in the future— with no choice but to assume that any statement by the Commission that it would assert “jurisdiction” over a service, to the exclusion of state regulators, could not be relied upon. Instead, entities would either have to do their best to comply with state regulations (potentially at substantial cost) or close up shop. When the Commission decides to preempt state regulation and establish a single national policy, it does so not on a whim, but rather because the Commission is convinced that that is the better national policy to pursue. If entities covered by such a statement cannot rely on it, and must incur the costs associated with trying to comply with various state regulations or cease offering services, then the Commission’s policy decision is defeated. Indeed, the failure to take a firm stand against state efforts to thwart the Commission’s choice to exercise exclusive jurisdiction and to pursue a single national policy undermines regulatory certainty, which is the opposite of what the Commission attempted to do in the *Vonage Preemption Order*.

Conclusion

Vonage fully supports the goals of universal service, and would not object to this Commission establishing, in a rulemaking proceeding, a national policy permitting the states to impose state universal service obligations in a manner that is consistent with federal policy. But this Commission should decline the invitation to declare that states have always had authority to impose such fees on entities like Vonage. The Commission should stand by its earlier order that declared that it, not the state commissions, has the authority to determine what regulations will apply to Vonage. It should refuse the State

Petitioners' request that it adopt an order that blinks reality, that would be manifestly unjust to Vonage, and that would undermine this Commission's ability to establish a single, national policy for services in the future.

Respectfully submitted,



Brendan Kasper
Senior Regulatory Counsel
Vonage Holdings Corp.
23 Main Street
Holmdel, NJ 07733
(732) 444-2216

Brita D. Strandberg
Joseph C. Cavender
Wiltshire & Grannis LLP
1200 Eighteenth St, NW
Washington, DC 20036
(202) 730-1300

Counsel to Vonage Holdings Corp.

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