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June 25, 2008

VIA U.S. MAIL OVERNIGHT DELIVERY

Federal Communications Commission
Office of Managing Director
PO Box 979084
St. Louis, MO 63197-9000

**Re: Vonage Holdings Corporation Payment of FY 2007 IVoIP Regulatory Fees,
and Request for Waiver and Refund of Same**

Dear Ms. Dortch and Mr. Dale:

On behalf of Vonage Holdings Corp. ("Vonage"), enclosed please find a completed Form 159 for the submission of FCC Fiscal Year 2007 "IVoIP" Regulatory Fees. For the reasons set forth below, Vonage has submitted the completed forms with full payment via check, but requests a waiver and refund of the submitted fees. Under FCC Rule 1.1166, "[t]he fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."¹ Further, the Commission's rules state that "[s]ubmitted fees will be returned if a waiver is granted."²

On June 19, 2008, Vonage filed with the Commission an "Application for Review of Regulatory Fee Determination Made by the Office of Managing Director" ("Application for Review"), concerning imposition of Fiscal Year 2007 IVoIP regulatory fees on Vonage, a copy of which is attached hereto at Exhibit A. For the reasons set forth therein, and incorporated by reference, Vonage respectfully submits that the imposition of Fiscal Year 2007 fees on Vonage is unlawfully retroactive and contravenes the plain language of the Communications Act of 1934, as amended. The Application for Review, therefore, meets the standard of showing good cause.

Because applying the fee retroactively violates the public interest, waiving the Fiscal Year 2007 fee also satisfies the public interest prong of the test. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their

¹ 47 C.F.R. § 1.1166.

² 47 C.F.R. § 1.1166(c).

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Office of Managing Director
June 25, 2008
Page 2

conduct accordingly; settled expectations should not be lightly disrupted.”³ The public interest dictates that the Commission’s regulatory fee requirement, which presumably became effective November 15, 2007,⁴ should not be retroactively applied against Vonage. The company had no expectation that its fiscal year 2007 activities (undertaken between October 2006 and September 2007) would be subject to regulatory fees when it undertook those activities. In short, the public interest requires a waiver of the Fiscal Year 2007 fee so that this new obligation is applied against Vonage prospectively.

For the reasons set forth in the Application for Review and herein, Vonage submits that good cause for waiver and refund of Fiscal Year 2007 regulatory fees has been shown, and that grant of Vonage’s request would serve the public interest.

An original and four (4) copies of this Request for Waiver are provided. Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided. Please do not hesitate to contact us if you have any questions regarding this filing.

Respectfully submitted,



Tamar E. Finn
William B. Wilhelm, Jr.
Jeffrey R. Strenkowski

Counsel for Vonage Holdings Corp.

Enclosures

cc: Amy Bender
Roland Helvajian

³ *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

⁴ *See* 72 Fed. Reg. 45908 (2007).

Exhibit A

Vonage's Application for Review of Regulatory Fee Determination
Made by the Office of Managing Director

(filed June 19, 2008)

BINGHAM

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FILED/ACCEPTED

JUN 19 2008

June 19, 2008

Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
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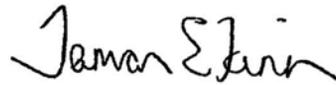
**Re: Vonage Holdings Corporation Application for Review of Regulatory Fee
Determination Made by the Office of Managing Director**

Dear Ms. Dortch:

On behalf of Vonage Holdings Corp. ("Vonage"), enclosed please find an original and four (4) copies of Vonage's Application for Review of Regulatory Fee Determination Made by the Office of Managing Director.

Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided. Please do not hesitate to contact us if you have any questions regarding this filing.

Respectfully submitted,



Tamar E. Finn
William B. Wilhelm, Jr.
Jeffrey R. Strenkowski

Counsel for Vonage Holdings Corp.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Vonage Holdings Corporation)	Docket No. _____
)	
Application for Review of)	
Regulatory Fee Determination Made by)	
the Office of Managing Director)	
)	

APPLICATION FOR REVIEW OF VONAGE HOLDINGS CORPORATION

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Dated: June 19, 2008

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Summary

Vonage Holdings Corporation (“Vonage”), through its undersigned attorneys, requests review of an action of the Office of Managing Director (“OMD”) of the Federal Communications Commission (“Commission” or “FCC”). Specifically, Vonage requests Commission review of the decision made by OMD, pursuant to OMD’s delegated authority, to issue an invoice (Bill No. 08VP002418) to Vonage to collect regulatory fees for Fiscal Year 2007 (“FY 2007”). The interconnected VoIP provider (“IVP”) regulatory fee established by the FCC in the *2007 Regulatory Fee Order* (“Order”) did not become effective during FY 2007. Requiring collection of FY 2007 fees from Vonage contravenes the plain language of the Communications Act of 1934, as amended (the “Act”) and is unlawfully retroactive. Vonage requests a Commission determination that collection of FY 2007 fees from Vonage, an IVP, in FY 2008 is improper and that OMD is without authorization to issue the above-referenced invoice to Vonage. Because Vonage anticipates paying the fee under protest, Vonage also requests a refund of any fees paid for FY 2007.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Vonage Holdings Corporation)	
)	Docket No. _____
Application for Review of)	
Regulatory Fee Determination Made by)	
the Office of Managing Director)	

APPLICATION FOR REVIEW OF VONAGE HOLDINGS CORPORATION

Introduction

Pursuant to FCC Rule 1.115, 47 C.F.R. § 1.115, Vonage Holdings Corporation (“Vonage”), through its undersigned attorneys, requests review and reversal of an action of the Office of Managing Director (“OMD”). Specifically, Vonage requests review and reversal of OMD’s invoice issued to Vonage for the collection of FY 2007 regulatory fees (Bill No. 08VP002418).¹ As set forth in more detail below, OMD’s action contravenes the Commission’s *2007 Regulatory Fee Order*,² and Section 9 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 159. Because the action taken by OMD pursuant to delegated authority is in violation of the Act,³ Vonage respectfully requests that the Commission order OMD to

¹ The invoice is provided at Attachment A (the amount of the fee is confidential and has been redacted from the invoice).

² *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, MD Docket No. 07-81, FCC 07-140 (rel. Aug. 6, 2007) (“*2007 Regulatory Fee Order*”).

³ 47 C.F.R. § 1.115(b)(2)(i) (applicants may request Commission review if “[t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy”).

rescind the FY 2007 regulatory fee invoice sent to Vonage, and refund the regulatory fees paid by Vonage pursuant to that invoice.

I. Background and Jurisdiction

A. Vonage Is an Interconnected VoIP Provider

Vonage is an interconnected VoIP provider (“IVP”). The company provides a VoIP service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment (“CPE”); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. Therefore, the company’s service meets the definition of interconnected VoIP in FCC Rule 9.3.⁴

B. The FY 2007 Regulatory Fee Order

On August 6, 2007, the Commission released the Fiscal Year (“FY”) 2007 *Regulatory Fee Order*, which, among other things, set the Commission’s FY 2007 aggregate collection goal (\$290,295,160), set the updated regulatory fee schedule and rates applicable to service providers for FY 2007 operations, and established a new regulatory fee for interconnected VoIP services.⁵ Because Vonage is an IVP, it is subject to the new IVP regulatory fee.

Initial notice of the *2007 Regulatory Fee Order* was published in the *Federal Register* on August 16, 2007.⁶ In that notice, the FCC stated that the effective date of the *2007 Regulatory Fee Order* was September 17, 2007, “except that changes to the Schedule of Regulatory Fees made pursuant to section 9(b)(3) of the Communications Act, and incorporating regulatory fee

⁴ 47 C.F.R. § 9.3. See also *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22,404 (rel. Nov. 12, 2004).

⁵ See *2007 Regulatory Fee Order*, ¶¶ 11-20.

⁶ 72 *Fed. Reg.* 45908 (Aug. 16, 2007).

payment obligations for interconnected VoIP service providers, shall become effective November 15, 2007, which is 90 days from date of notification to Congress.”⁷ The Managing Director sent notification letters to various members of Congress.⁸ These letters state: “Section 9(b)(4)(B) requires the Commission to notify Congress of such permitted amendments no later than 90 days before the effective date of such amendment.” The Commission stated that it would publish a public notice “once the amendment takes effect, if there is no Congressional objection.”⁹ Notwithstanding this commitment, the Commission did not publish a final notice of Congressional non-opposition to the new IVP fee.

C. The Office of Managing Director’s Vonage Invoice

Through its delegation of authority,¹⁰ on May 23, 2008, OMD sent Vonage a FY 2007 regulatory fee invoice (the “Vonage Invoice”).¹¹ The Vonage Invoice includes a line that sets

⁷ 72 *Fed. Reg.* 45908 (Aug. 16, 2007).

⁸ One of the OMD’s Congressional notification letters is attached hereto at Attachment B. (The letters are essentially identical.) See Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Sam Brownback, Ranking Member, Subcommittee on Financial Services and General Government Committee on Appropriations, United States Senate (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Robert C. Byrd, Chairman, Committee on Appropriations, United States Senate (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Thad Cochran, Ranking Member, Committee on Appropriations, United States Senate (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Richard J. Durbin, Chairman, Subcommittee on Financial Services and General Government, Committee on Appropriations, United States Senate (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Jerry Lewis, Ranking Member, Committee on Appropriations, U.S. House of Representatives (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable David R. Obey, Chairman, Committee on Appropriations, U.S. House of Representatives (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Ralph Regula, Ranking Member, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives (Aug. 14, 2007); Letter from Anthony J. Dale, Managing Director, FCC to The Honorable Jose Serrano, Chairman, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives (Aug. 14, 2007).

⁹ 2007 *Regulatory Fee Order*, ¶ 20.

¹⁰ See 47 C.F.R. § 0.231(a).

forth a "Reason for Bill." In that space, the only reason listed by OMD is: "2007 IVoIP Reg Fees." The transmittal letter that accompanied the Vonage Invoice states that "[t]he enclosed bill (Form 159-B) represents your company's FY 2007 IVoIP portion of last year's ITSP regulatory fee bill."¹² Vonage's regulatory fee payment is due by June 27, 2008. Vonage intends to pay the regulatory fees invoiced by OMD under protest in order to avoid any statutory penalties.¹³ Payment of the regulatory fees does not estop Vonage from challenging OMD's action.¹⁴

D. The Commission's Authority to Address this Application for Review

As detailed below, Vonage disputes OMD's authority to issue an invoice to Vonage for FY 2007 fees (*e.g.*, the Vonage Invoice) as a substantive violation of Section 9¹⁵ and unlawfully retroactive. Vonage requests Commission relief pursuant to FCC Rule 1.115, which provides that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."¹⁶ The "action" taken by OMD

¹¹ The transmittal letter is dated May 23, 2008. The Bill Number on the invoice is 08VP002418. The Current Bill Date on the invoice is May 21, 2008. The FRN listed on the invoice is 0015311582.

¹² Transmittal Letter from Federal Communications Commission to Vonage Holdings Corp. (May 23, 2008).

¹³ In an abundance of caution, in the event that the Commission determines that Vonage's request must be addressed to OMD in the first instance, Vonage also intends to file an application for waiver of the fee with OMD.

¹⁴ See, *e.g.*, *Functional Music, Inc. v. Federal Communications Commission*, 274 F.2d 543, 547 n.9 (D.C. Cir. 1958).

¹⁵ See *Functional Music*, 274 F.2d at 546 (establishing a Hobbs Act exception by providing that review of a final agency order can be obtained after the initial limitations period in cases where the agency takes further action to apply the rule). Section 9(b)(3) of the Act provides that permitted adjustments are not subject to judicial review. This provision, however, does not allow the Commission to ignore the substantive requirements of Section 9. In *Comsat v. FCC*, 114 F.3d 223 (D.C. Cir. 1997), the court held that where the Commission acts outside the scope of its authority under Section 9(b)(3) (permitted adjustments), courts retain authority to review and overturn the Commission's action.

¹⁶ 47 C.F.R. § 1.115(a).

was the issuance of the Vonage Invoice.¹⁷ By issuing the invoice to Vonage, OMD acted under delegated authority pursuant to FCC Rule 0.231.¹⁸ As such, the Commission has authority to address Vonage's request for review of OMD's action. Vonage has timely filed this appeal within 30 days of OMD's action.¹⁹

II. Assessing FY 2007 Regulatory Fees on Vonage Violates Section 9

A. Background on "Mandatory" and "Permitted" Regulatory Fee Adjustments

OMD, on delegated authority, may only issue regulatory fee invoices that comply with Section 9. Section 6003 (a) of the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66) added Section 9 to the Act. Section 9(a) of the Act authorizes the Commission to collect annual regulatory fees to recover the annual costs of its enforcement, policy and rulemaking, user information, and international activities.²⁰ The Act states that fees assessed shall "be established at amounts that will result in collection *during each fiscal year*, of an amount that can be reasonably expected to equal the amount appropriated *for such fiscal year for the performance of [regulatory activities]*."²¹

The Schedule of Fees set forth in the Act is updated annually by the Commission pursuant to the "mandatory adjustment" provision in the Act:

For any *fiscal year* after fiscal year 1994, the Commission shall, by rule, revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect, in accordance with paragraph

¹⁷ See also 47 C.F.R. § 1.4(b)(5) (actions made under delegated authority include those that do not result in the formal publishing of an "order" or other "descriptive document entitled 'Public Notice.'").

¹⁸ 47 C.F.R. § 0.231.

¹⁹ See 47 C.F.R. § 1.115(d).

²⁰ 47 U.S.C. § 159(a).

²¹ 47 U.S.C. § 159(b)(1)(B) (emphasis supplied).

(1)(B), changes in the amount appropriated for the performance of the activities described in subsection (a) of this section *for such fiscal year*. Such proportionate increases or decreases shall—

- (A) be adjusted to reflect, within the overall amounts described in appropriations Acts under the authority of paragraph (1)(A), unexpected increases or decreases in the number of licensees or units subject to payment of such fees; and
- (B) be established at amounts that will result in collection of an aggregate amount of fees pursuant to this section that can reasonably be expected to equal the aggregate amount of fees that are required to be collected by appropriations Acts pursuant to paragraph (1)(B).

Increases or decreases in fees made by adjustments pursuant to this paragraph shall not be subject to judicial review. In making adjustments pursuant to this paragraph the Commission may round such fees to the nearest \$5 in the case of fees under \$1,000, or to the nearest \$25 in the case of fees of \$1,000 or more.²²

In sum, after FY 1994 the Commission must adjust the regulatory fee rates applicable to *current* fee payers to meet regulatory costs for *that fiscal year*.

Section 9(b)(3) of the Act allows the Commission make “permitted adjustments” to add, remove, or reclassify the regulatory fee obligations of services to account for changes in regulation or law. Specifically, the Commission may:

amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). In making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law. Increases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review.²³

²² 47 U.S.C. § 159(b)(2) (emphasis supplied).

²³ 47 U.S.C. § 159(b)(3).

Section 9(b)(4)(B) of the Act requires the Commission to notify Congress of any such changes *90 days prior to the effective date of any such amendments.*²⁴ In 1994, parties requested that the Commission use its permitted adjustment authority to change the schedule of fees established in Section 9(g). In its Order released June 8, 1994, the Commission refused to adjust the statutory schedule, explaining that:

Section 9(b)(4)(B) requires that any amendment to the services contained in the statutory fee schedule not be effective until 90 days after Congress is notified of those revisions. See 47 USC 159. As a practical matter, the Commission could not possibly meet these requirements in time to permit section 9 fee collections in FY 1994.²⁵

Congress made clear, in the plain text of the statute, that there is a difference between “mandatory” and “permitted” adjustments. Mandatory adjustments are routine, happen every year, and do not require Congressional notice before they become effective. They apply to service providers that already know that they will be subject to regulatory fees and can build them into their business model (even if they do not know the exact level until near the end of the fiscal year). Under the mandatory adjustment process, OMD sets the amount of the fee late in the fiscal year and regulated entities are required to pay the fee prior to the close of the fiscal year. As the Commission stated in the *2007 Regulatory Fee Order*, “[c]onsistent with our established practice, we intend to collect these regulatory fees during a filing window in September 2007 in order to collect the required amount *by the end of our fiscal year.*”²⁶

²⁴ See 47 U.S.C. § 159(b)(4)(B).

²⁵ *Implementation of Section 9 of the Communications Act; Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Report and Order, MD Docket No. 94-19, FCC94-140, ¶ 10 (rel. June 8, 1994) (“*1994 Regulatory Fee Order*”).

²⁶ *2007 Regulatory Fee Order*, ¶ 3 (emphasis supplied).

On the other hand, as the FCC recognized in 1994, “permitted adjustments” under Section 9(b)(3) of the Act require Congressional notice and fees adopted pursuant to this authority cannot be collected until the fiscal year in which the new fee becomes effective. The notice to Congress provision provides that the permitted adjustment cannot be effective until 90 days *after* notice to Congress. Thus permitted adjustments are forward-looking.

The fact that mandatory adjustments and permitted adjustments have different requirements under Section 9 of the Act is hardly surprising given that permitted adjustments allow the Commission to subject new service providers, such as Vonage, to the regulatory fee program. These new service providers will typically not have regulatory fees built into their business model, so a forward-looking approach is an appropriate means of bringing new service providers into the regulatory fee system.

In sum, the Act does not state or otherwise imply that the new fees established pursuant to the permitted adjustments provision of Section 9(b)(3) may be made effective immediately upon Congressional notification. To the contrary, the statute requires the Commission to notify Congress 90 days *prior* to the effectiveness of any new fee. As the Commission recognized in the *1994 Regulatory Fee Order*, it may not collect a new fee until the fiscal year in which the permitted adjustment becomes effective.

B. The Regulatory Fees Invoiced to Vonage Were not Collected “During” FY 2007 as Required by Section 9(b)(1)(B) of the Act

In contravention of the plain language of the Act, OMD has applied regulatory fees to Vonage before the effective date of the addition of IVPs to the regulatory fee regime. Pursuant to the Congressional Budget and Impoundment Control Act of 1974,²⁷ the United States government’s fiscal year begins on October 1 of the previous calendar year and ends on

²⁷ Pub. L. 93-344, 88 Stat. 297, 2 U.S.C. §§ 601 *et seq.*

September 30 of the year with which it is numbered. However, the permitted adjustment which added IVPs to the regulatory fee regime did not become effective until November 15, 2007, nearly two months after the close of FY 2007, and fully fourteen months after the beginning of that fiscal year when the regulated activities resulting in FY 2007 regulatory fees commenced.

Because the Act stipulates that regulatory fees may only be levied against service providers in the fiscal year in which they are effective, OMD lacks the authority to assess Vonage FY 2007 regulatory fees. The amendment took effect after the close of FY 2007, Vonage did not have FY 2007 fees built into its business operations (especially as far back as October 1, 2006), and as such, the Vonage Invoice issued by OMD is unlawfully retroactive.

III. OMD and the Commission Lack Authority to Apply FY 2007 Regulatory Fees Retroactively to Vonage

Retroactive application of the regulatory fee regime to Vonage is not contemplated by Section 9. Even if the FCC were to find that permitted adjustments are somehow not unambiguously prospective, it has no discretion to interpret the statute to permit retroactivity. The Supreme Court has found that the retroactive application of a statute must be specifically proscribed by Congress. “Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.”²⁸

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. “Retrospective laws are, indeed, generally unjust; and as has been forcibly said, neither accord with sound legislation nor

²⁸ *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). See also *INS v. St. Cyr*, 533 U.S. 289, 320 (2001).

with fundamental principles of the social compact.”²⁹ Settled expectations should not be lightly disrupted. As such, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.”³⁰ The courts ask whether the new provision attaches new legal consequences to events completed before its enactment. Courts have repeatedly declined to give retroactive effect to statutes burdening private rights unless Congress made clear its intent to do so.³¹

Under *Bowen v. Georgetown University Hospital*,³² OMD may not rely on any purported Commission notice of retroactivity as justification for the Vonage Invoice either.³³ The *Bowen* Court addressed the conjunction between legislation and agency regulation. Like OMD’s decision to issue the Vonage Invoice, *Bowen* involved a case in which a federal agency sought to recoup, under cost limit regulations issued in 1984, funds that had been paid to hospitals for services rendered prior to the effective date of the regulations. In that case, as in this one, the applicable statute provided no authority for the agency to retroactively impose financial burdens on the private party. Similarly, Section 9 of the Act provides no justification for OMD’s retroactive application of FY 2007 regulatory fees to Vonage. On the contrary, the general requirements for the establishment and adjustment of regulatory fees provide that the fees *for a given fiscal year* will be collected *in that fiscal year* under Section 9(b)(1)(B).³⁴

²⁹ *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998).

³⁰ *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (SCALIA, J., concurring).

³¹ *See id.* at 270-71.

³² *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

³³ *See 2007 Regulatory Fee Order*, n.20 (“Interconnected VoIP providers will pay FY 2007 regulatory fees during a separate filing window (to be determined later), most likely in 2008.”).

³⁴ 47 U.S.C. § 159(b)(1)(B) (“The fees assessed under this subsection shall ... (B) be established at amounts that will result in collection, *during each fiscal year*, of an amount that can

By issuing the Vonage Invoice, OMD is trying to apply “permitted adjustments” retroactively—applying fees that did not become effective until November 15, 2007 (in FY 2008) to cover regulatory costs incurred between October 1, 2006 and September 30, 2007 (FY 2007) that were supposed to be collected in FY 2007.³⁵ “An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning.”³⁶ In short, Congress did not authorize the Commission to collect FY 2007 regulatory fees in FY 2008. Therefore, OMD may not now, in direct contradiction to the statute, issue an invoice that requires Vonage to pay regulatory fees retroactively. As the Commission noted in the *1994 Regulatory Fee Order*, Section 9 requires that any permitted adjustment apply prospectively. Here, the only lawful application of the *2007 Regulatory Fee Order* is to authorize the assessment of IVP fees in FY 2008 and beyond. To find otherwise would violate fundamental canons against retroactivity and deny service providers such as Vonage advance notice of a new financial burden imposed by the regulation.

IV. FCC Violated Its Procedures By Failing to Publish Notification of Congressional Non-Opposition

Although the Commission must follow its own rules and procedures, it has failed to do so here. In the *2007 Regulatory Fee Order*, the Commission stated: “We will provide Congress notification upon publication of this order, and will release a public notice once the amendment

reasonably be expected to equal the amount appropriated for such fiscal year for the performance of the activities described in subsection (a) ...”.

³⁵ See, e.g., *Martin v. Hadix*, 527 U.S. 343, 357-58 (“The inquiry into whether a statute operate retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.”).

³⁶ *Caruso v. Blockbuster-Sony Music Entertainment Center*, 193 F.3d 730, 737 (3d Cir. 1999) (quoting Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise*, § 6.10 at 283 (1994)).

takes effect, if there is no Congressional objection.”³⁷ To date, the Commission has issued no such notification. Although the August 16, 2007, *Federal Register* notice gave the anticipated effective date of the IVP amendment, as the FCC recognized, Congress had an opportunity to object to the amendment. Because the Commission did not release a notice that there was no Congressional objection, Vonage lacked notice of the finality of the Commission’s action.

Since *Accardi v. Shaughnessey*, the Supreme Court has consistently held that government agencies are bound to follow their own rules, even self-imposed procedural rules.³⁸ The Court in *Ruiz* explained that “[w]hen the right of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.”³⁹ The Court of Appeals for the District of Columbia extended this holding to procedural requirements that had not been published in the *Federal Register*.⁴⁰

The Commission did not follow its own internal procedures when finalizing the amendments in the *2007 Regulatory Fee Order*. Vonage was not provided notice of Congressional non-opposition, and was therefore unaware of the finality of the Commission’s decision.

³⁷ *2007 Regulatory Fee Order*, ¶ 20.

³⁸ *United States ex rel. Accardi v. Shaughnessey*, 347 U.S. 260, 267-78 (1954). *Service v. Dulles*, 354 U.S. 363 (1957). *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

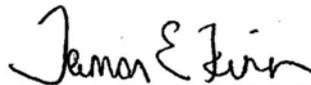
³⁹ *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (citing *Service* and *Vitarelli*).

⁴⁰ See *Massachusetts Fair Share v. Law Enforcement Assistance*, 758 F.2d 708 at 711 (D.C. Cir. 1985). “It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated. This precept is rooted in the concept of fair play and in abhorrence of unjust discrimination, and its ambit is not limited to rules attaining the status of formal regulations. The Supreme Court has declared that ‘[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures,’ even though the procedural requirement there spoken of had not been published in the *Federal Register*, and other courts have concluded similarly.” *Id.* at 711 (internal citations omitted).

V. Conclusion

For the above-stated reasons, Vonage respectfully requests that the Commission determine that OMD was without authority to issue the Vonage Invoice, and order OMD to rescind the Vonage Invoice and refund the FY 2007 fee paid by Vonage. The effective date of the Commission's decision to include IVPs in the regulatory fee system was in FY 2008, and imposition of FY 2007 regulatory fees on Vonage, as an IVP, violates Section 9 of the Act and is unlawfully retroactive.

Respectfully submitted,



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Counsel for Vonage Holdings Corp.

Dated: June 19, 2008

Attachment A

Vonage FY 2007 Regulatory Fee Invoice (Fee Amount Redacted)



Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

May 23, 2008

Dear Regulatee:

In August 2007, the Commission mailed to you a revised FY 2007 Interstate Telecommunications Service Provider (ITSP) Form 159-W bill that did not include in its base the FY 2007 Interconnected Voice Over Internet Protocol (IVoIP) portion of regulatory fees. The enclosed bill (Form 159-B) represents your company's FY 2007 IVoIP portion of last year's ITSP regulatory fee bill. Payment of this bill is due by June 27, 2008. Payments received after June 27, 2008 will be assessed a 25 percent penalty.

Within the past year, some companies have filed a revised FCC Form 499-A which has resulted in higher or lower 2006 revenues, while other companies were delinquent in paying their FY 2007 ITSP bill. In both of these instances, the FY 2007 IVoIP bill was adjusted to reflect these revisions and delinquencies, and therefore, for some companies the enclosed bill reflects a "net" figure rather than just the IVoIP portion of the FY 2007 regulatory fee payment.

There are several ways by which to remit payment. The easiest method of payment is to use the Commission's electronic payment system, or Fee Filer, at <http://www.fcc.gov/fees/feefiler.html>. You will need your FRN and password to enter into this payment system. You can also make the payment by completing the payment information on the attached bill (FCC Form 159-B) and mailing the bill along with the check (or provide credit card information on Form 159-B) to the following address below. The Payment Type Code (PTC) for this payment is 0772.

Federal Communications Commission
Office of Managing Director
P.O. Box 979084
St. Louis, MO 63197-9000

If you have any questions regarding this bill, please call the Financial Operations Help Desk at 877-480-3201, Option 4, Monday through Friday, 8:00 am – 6:00 pm Eastern Time.

Federal Communications Commission

Attachment B

OMD Notice Letter to Senator Brownback

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

August 14, 2007

OFFICE OF
MANAGING DIRECTOR

The Honorable Sam Brownback
Ranking Member
Subcommittee on Financial Services and General Government
Committee on Appropriations
United States Senate
142 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Congressman Brownback:

Consistent with section 9(b)(4)(B) of the Communications Act of 1934, as amended (the Act), the Federal Communications Commission (Commission) transmits this notification of a permitted amendment to the Commission's Schedule of Regulatory Fees for Fiscal Year (FY) 2007. Section 9(a)(1) of the Act requires the Commission to assess and collect annual regulatory fees to recover the costs specified by Congress for its enforcement, policy and rulemaking, international activities and information services. Section 9(b)(3) permits the Commission to amend the Fee Schedule to reflect additions, deletions, or changes in the nature of services as a consequence of Commission rulemaking proceedings or changes in law. Section 9(b)(4)(B) requires the Commission to notify Congress of such permitted amendments no later than 90 days before the effective date of such amendment.

As described in Paragraphs 11 through 14 of the attached Commission order released August 6, 2007, the Commission extended regulatory fee payment obligations to interconnected Voice over Internet Protocol (VoIP) service providers, a service that has experienced dramatic growth over recent years. Extending regulatory fees to interconnected VoIP providers aligns their fee obligations with similarly situated service providers that have paid regulatory fees for years.

Consistent with the statutory process specified in section 9(b)(4)(B) of the Act, this change will take effect 90 days from the date of this letter. Please do not hesitate to contact me at (202) 418-2260 to discuss this matter.

Sincerely,



Anthony J. Dale
Managing Director

CERTIFICATE OF SERVICE

I, Jeffrey R. Strenkowski, hereby certify that on June 19, 2008, I have caused a copy of the Vonage Holdings Corporation Application for Review of Regulatory Fee Determination Made by the Office of Managing Director to be served via U.S. Mail and electronic mail on the following:

Anthony Dale, Managing Director
Federal Communications Commission
c/o Marlene H. Dortch, Secretary
445 12th Street, SW
Washington, DC 20554
anthony.dale@fcc.gov



Jeffrey R. Strenkowski