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August 13, 2009

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Communication; Assessment and Collection of
Regulatory Fees for Fiscal Year 2007, MD Docket No. 07-81

Dear Ms. Dortch:

As a follow-up to our July 7, 2009 meeting with the Office of Managing Director and Office of General Counsel staff, Vonage researched the history of Section 9 of the Communications Act of 1934, as amended (“Act”). Section 6003 of the Omnibus Budget Reconciliation Act of 1993, Pub. L 103-66, added Section 9 to the Act. Pub. L. 103-66, in turn, came from H.R. 2264 (1993). The original version of H.R. 2264 did not contain section 6003. Nor did the Senate amendments to the House bill. Instead, Section 6003 was added by conference agreement in H.R. Conf. Rep. 103-213.

H.R. Conf. Rep. 103-213 (page 499) states that the fee provisions contained in Section 6003 are “virtually identical” to those contained in H.R. 1674, which passed the House in 1991. The conference report incorporates, by reference, H.R. Rep. 102-207 which accompanied H.R. 1674.

H.R. 1674 originally came out of the House Committee on Energy and Commerce, Subcommittee on Telecommunications and Finance. We were unable to find any legislative history on the introduction of, or markups to, the bill as introduced. The only legislative history on that bill is found in H.R. Rep. 102-207 and floor debate in the Congressional Record, which does not provide any further detail with respect to the permissive authority it grants the FCC to modify the regulatory fee schedule.

It is Vonage’s position that the plain language of Section 9 requires the FCC to adopt a permitted amendment to the regulatory fee schedule and provide Congress notice of such amendment *at least 90 days prior to the end of the fiscal year* in which the new fee will be assessed for the first time. Indeed, the Commission has recognized since 1994 that it may not apply adjustments in the regulatory fee schedule to fiscal years that end before the fee adjustment becomes effective. In its *1994 Regulatory Fee Order*, released June 8, 1994, the Commission refused to adjust the statutory schedule, explaining that:

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Ms. Marlene H. Dortch, Secretary
August 13, 2009
Page 2

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*.¹ *Given these statutory requirements*, we conclude that Congress did not intend that we make any changes to the services subjected to the regulatory fee requirement or the amounts contained in the schedule for FY 94.

Consistent with Vonage's interpretation of Section 9, the *1994 Regulatory Fee Order* established a policy that an adjustment to the regulatory fee schedule must be adopted by the FCC at least 90 days prior to the end of the fiscal year in which the fee will first be assessed. Although the *Order* did not engage in a detailed analysis of Section 9, it acknowledged that its policy was required by and consistent with the statute. The Commission applied this same policy in 2009, when it adopted an adjustment to the fee schedule:

Section 9(b)(4)(B) of the Act requires us to notify Congress 90 days *before the change may take effect*. We will provide Congress notification upon release of this Second Report and Order [March 24, 2009].²

Yet between these bookends of consistent policy, the Commission deviated from its policy without explanation. The Commission adopted an adjustment to the fee schedule—adding interconnected VoIP services—less than 90 days before the end of fiscal year 2007. The Order adopting the iVoIP permitted amendment was released by the Commission on August 6, 2007, notice was provided to Congress on August 14, 2007, and the ninety-day notice period expired November 15, 2007, over one month *after the end of fiscal year 2007*.

Where an agency deviates from its well-established policies, it is “obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”). The Commission must

¹ *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*”) (emphasis added).

² *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, MD Docket No. 08-65, RM-11312, FCC 09-21, ¶ 22 (rel. Mar. 24, 2009).

Ms. Marlene H. Dortch, Secretary
August 13, 2009
Page 3

acknowledge that its prior policies and practices are being deliberately changed, not casually ignored. *Id.* at 421. While the *State Farm* case applied this self-evident requirement to an agency decision that “revoked” a prior regulation, the court made clear that the definition of “revocation” meant not only *rescinding* an earlier policy, but also “a *reversal of the agency’s former views as to the proper course.*” *State Farm*, 463 U.S., at 41 (emphasis added). In short, the Commission must provide a reasoned analysis for changes in its practice, not just changes to “substantive” regulations:

[a]n agency is free to discard *precedents or practices* it no longer believes correct. Indeed we expect that an[] agency may well change its *past practices* with advances in knowledge in its given field or as its relevant experience and expertise expands. If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior *policies and standards* are being deliberately changed, not casually ignored.

Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1296 (D.C.Cir.2004) (emphasis added) (internal citations and quotation marks omitted).

The principle that an agency cannot change course without explanation is recognized in numerous cases. “[I]t is ‘axiomatic that [agency action] must either be consistent with prior [action] or offer a reasoned basis for its departure from precedent’ ” *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C.Cir.2001) (quoting *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1443 (D.C.Cir.1997))). “The requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (Apr. 28, 2009). The Commission must demonstrate that the “new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the *conscious change of course adequately indicates.*” *Id.* (emphasis added). Because the Commission failed to explain, let alone acknowledge, its change in course when adjusting the regulatory fee schedule to include interconnected VoIP services less than 90 days prior to the end of FY 2007, the fee assessed on Vonage for FY 2007 is unlawful.

Sincerely yours,

/s/ *electronically signed*

Tamar E. Finn

cc (by e-mail):
Daniel Daly
Lauren Belvin
Andrea Kearney