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September 24, 2009

VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

On September 23, 2009, Brendan Kasper, Senior Regulatory Counsel of Vonage Holdings Corp., and Tamar Finn of Bingham McCutchen LLP met with Austin Schlick, General Counsel, Ajit Pai, Deputy General Counsel, and Lauren Belvin of the Office of General Counsel (“the OGC Participants”).¹

The Participants discussed Vonage’s application for review of the Fiscal Year (“FY”) 2007 regulatory fee billed to Vonage on May 23, 2008 and request for waiver of same. Consistent with its appeal, Vonage argued that assessment of the fee violates Section 9 of the Communications Act of 1934, as amended. The OGC Participants raised questions about whether Section 9 read as a whole restricts the Commission from collecting regulatory fees for Fiscal Year 2007 outside of Fiscal Year 2007 and if the statute is ambiguous, whether the FCC may interpret it to permit retroactive collection in Fiscal Year 2008.

Vonage argued that subsection (b)(1) requires the FCC to collect both mandatory and permitted adjustment fees “during each fiscal year” for which they are billed. “During” means “throughout the course or duration of” or “at some time in” the fiscal year.² The OGC Participants asked whether such a reading would prohibit the FCC from collecting regulatory fees if a company fails to make payment by the end of the fiscal year. Vonage responded that even if the statute could be interpreted to prohibit collection of a past due invoice, the Commission has other remedies at its disposal. For example, payment of overdue debts to the FCC is governed by the Debt Collection Improvement Act of 1996

¹ Although Vonage’s petition and waiver request have not been assigned to a docket, in an abundance of caution, Vonage files this notice in Docket MD 07-81.

² Webster’s II New College Dictionary (1995).

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(“DCIA”),³ and the Commission’s rules promulgated thereunder.⁴ The DCIA and the Commission’s rules promulgated thereunder, found at 47 C.F.R. § 1.1901 *et seq.*, govern the collection of those debts from delinquent payors. The Commission made this distinction in the *1994 Regulatory Fee Order*. “In addition to those specific remedies for nonpayment or untimely payment of regulatory fees provided in section 9, we will invoke our powers under the Debt Collection Act against any regulatee failing to pay a regulatory fee. We will afford a regulatee a 30 day period to respond to our notice of delinquency before invoking the procedures provided in the Debt Collection Act.”⁵

In addition, subsection (c)(1) (25% late payment penalty) and (c)(3) (authority to revoke license for failure to pay) both provide strong incentives for regulatees to pay fees by the due date within the fiscal year and give the Commission other remedies in the event of non-payment. Finally, the Commission may invoke its enforcement authority in the event of non-payment. In the Universal Service context, such enforcement penalties include one-half of the unpaid contribution amount.⁶

The OGC Participants also asked Vonage to reconcile its reading of Section 9(b)(1) with 9(f)(2). In Section 9(f)(2), Congress authorized installment payments and prepayments of certain, proscribed, regulatory fee amounts. The installment payment rules permit a payee to spread “large” payments out over a period of time.⁷ The prepayment rules permit the FCC to require payment of a “small” fee for a number of fiscal years for which the fee applies to the regulated activity (*i.e.*, five years worth of fees for a five-year license) prior to those subsequent fiscal years.

³ Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996).

⁴ See 47 C. F. R. Part 1, Subpart O (providing the administrative rules necessary to require delinquent debtors to pay amounts owed to the Commission).

⁵ *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, ¶ 65 (rel. June 8, 1994) (“*1994 Regulatory Fee Order*”) (internal citations omitted).

⁶ For example, in the case of companies that underpay USF contributions, are referred to the enforcement bureau, and are issued a Notice of Apparent Liability, the typical fine is \$10,000 per month of underpayment, plus one-half of the amount due the USF. See, e.g., *Telrite Corp.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7231, ¶ 25 (2008). Additional penalties apply for failure to file required forms.

⁷ 47 C.F.R. § 1.1157(b)(2) (“Large regulatory fees, as annually defined by the Commission, may be submitted in installment payments or in a single payment on a date certain as announced by the Commission or the Managing Director, pursuant to delegated authority, and published in the Federal Register.”). This provision does not specify that installment payments for large fees may extend beyond the fiscal year.

First, Vonage notes that the plain language of Section 9(f)(2) does not provide for installments beyond the relevant fiscal year. In its initial interpretation of this provision (in the middle of FY 1994), the Commission stated that due to the short time period left in that fiscal year, it would only allow two (2) installment payments by payees for large balances. In FY 1995 and beyond, it began to allow four (4) installment payments for large payment balances. “Since little time is left in which to collect fees for FY 1994, the practical impact of permitting licensees to make installment payments this year should be minimal in any event.”⁸ “We anticipate that all regulatory fees will be collected as early as possible *before the end of the fiscal year.*”⁹ Finally, the Commission stated:

If a regulatee finds it necessary to pay its large regulatory fee by installments, we propose to establish fixed dates on which installment payments will be due. For the 1994 fiscal year, any eligible regulatee that elects to pay a large fee in installments shall make half of its payment on a date to be specified. We also shall specify the date for the second and final installment. *Payments in their entirety will be due prior to the end of this fiscal year.*¹⁰

Clearly the Commission’s interpretation of Section 9(f)(2), in 1994, was consistent with a reading of Section 9(b)(1) that requires the collection of fees “during each fiscal year” for which they are billed. Of course, the Commission has the power to “waive, reduce or defer” payment of a fee in any specific instance for good cause shown.¹¹ Even if this provision does, *arguendo*, provide the Commission authority to collect fees outside of the regulatory fiscal year, its purpose is to provide payees financial flexibility to pay “large” amounts in a manner that is not unduly disruptive to their business, not as a green light to retroactively apply fees against a newly regulated entity for purposes of fee collection.

The prepayments of small amounts *before* the current fiscal year is a limited exception intended to achieve administrative efficiency, not to give the Commission authority to apply regulatory fees *after* the fiscal year in which the costs were incurred. As the Commission recognized in 1994, Section 9(f) states that the Commission’s regulations shall require the payment of “small” regulatory fees “in *advance* for a number of years not to exceed the term of the license held by the payor.”¹²

⁸ *1994 Regulatory Fee Order*, ¶ 42.

⁹ *Implementation of Section 9 of the Communications Act; Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Notice of Proposed Rulemaking, MD Docket No. 94-19, FCC94-46, ¶ 27 (rel. Mar. 11, 1994) (“*1994 Regulatory Fee NPRM*”) (emphasis added).

¹⁰ *1994 Regulatory Fee NPRM*, ¶ 32 (emphasis added).

¹¹ See 47 U.S.C. § 159(d) (emphasis added).

¹² 47 U.S.C. § 159(f)(1) (emphasis added).

We note that the version of this provision passed by the House in the 102nd Congress stated that “If the Commission determines that, because of the small amount of fee involved relative to the cost of annual collection, it would be inefficient to collect any regulatory fee each year, such rules and regulations may also require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor.” The modified language contained in section 9(f) now mandates the payment of small regulatory fees in advance. The enacted language also deleted the requirement that the Commission make an affirmative determination that it would be inefficient to collect a specific regulatory fee each year because of its relatively small amount.¹³

In sum, Congress gave the Commission very limited authority, on a prospective basis only, to collect “small amounts” in advance. In contrast, Vonage first received a bill for 2007 regulatory fees in September 2007 that was due September 19, 2007 but was cancelled and revised later in September 2007 to show a balance of zero. OMD did not send Vonage a bill for 2007 regulatory fees until May 2008, nearly nine months *after* fiscal year 2007 had ended. Thus the prepayment exception to requiring payment “during each fiscal year” is not applicable here.

Section 9(b)(4) requires that the FCC provide notice to Congress at least 90 days in advance of the effective date of a permitted amendment. As the FCC has recognized, the waiting period provides Congress an opportunity to object to the new or reclassified fees prior to the effective date.¹⁴ It also provides new payees time to incorporate the fee in their business plans. In contrast, Section 9(b)(4)(A) provides for immediate notice to Congress of a change in the amount of a mandatory fee because there is no need for a waiting period prior to the fee becoming effective where Congress previously authorized the fee or failed to object to it. In 1994 and 2008, the Commission applied Section 9 to permitted adjustments and determined that the effective date had to fall within the fiscal year for which the fees were being collected.¹⁵ Assessing Vonage for FY 2007 regulatory fees is not consistent with the Commission’s prior and later interpretations of the requirements of Section 9. Courts have vacated other administrative actions that lacked explanations for similar changes in policy.¹⁶

¹³ *1994 Regulatory Fee NPRM*, ¶ 34 (internal citations omitted).

¹⁴ Vonage Holdings Corp. Application for Review, 11-12 (June 19, 2008) (“Application for Review”).

¹⁵ *See* Vonage Holding Corp. Notice of Ex Parte Communication, MD Docket 07-81 (Aug. 13, 2009).

¹⁶ *See, e.g., Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006) (citing 5 U.S.C. § 706, and vacating and setting aside as arbitrary and

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The FCC also failed to follow its own procedures and publish notice of Congressional non-opposition to the new fee. Although Vonage was able to obtain copies of the notice letters the FCC sent to Congress, and the *Federal Register* announced the expected effective date, the FCC never published notice of Congressional non-opposition as required by its 2007 Order to *confirm* the effective date.¹⁷ The OGC Participants stated that actual notice of the effective date would cure any such procedural defect. While Vonage has determined the date the fee *may have become* effective, the FCC never confirmed the lack of Congressional opposition and the date the fee *became* effective as required by its Order.

Finally, even if the statute is ambiguous, as explained in Vonage's Application, the FCC does not have the authority to interpret it to require retroactive payment.¹⁸ Congress must specifically proscribe retroactivity. Nothing in Section 9 explicitly permits the Commission to collect a permitted fee for a period prior to the date that it first became effective.

Vonage continues to analyze Section 9 and will provide further written response to the OGC Participants' questions in the near future.

Sincerely yours,

/s/ electronically signed

Tamar E. Finn

Counsel for Vonage Holdings, Corp.

cc (by e-mail):

Austin Schlick (FCC)
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capricious a decision of FERC as devoid of reasoned analysis). *See also* 5 U.S.C. § 706 (“The reviewing court shall ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law;”).

¹⁷ Application for Review, 11-12.

¹⁸ Application for Review, 9-11.