Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2007	)	MD Docket No. 07-81
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To: The Commission

COMMENTS OF THE VON COALITION

May 3, 2007

TABLE OF CONTENTS

TABLE OF CONTENTS 1

SUMMARY ..... **ERROR! BOOKMARK NOT DEFINED.**

I. IMPOSING REGULATORY FEES ON INTERCONNECTED VOIP PROVIDERS IS INCONSISTENT WITH SECTION 9 OF THE ACT AND THE APA 3

A. Section 9 Does Not Authorize the Commission to Impose Regulatory Fees on Interconnected VoIP Providers 3

1. *Annual Regulatory Fees Apply Only to Licensee or Certificated Entities* .. 3

2. *The Commission lacks Title I ancillary jurisdiction to impose regulatory fees on interconnected VoIP providers* 5

B. The Proposal Fails to Meet Basic Statutory Requirements 7

C. Notice Provided in the *NPRM* Is Inadequate to Afford Interested Parties the Opportunity to Meaningfully Comment 10

II. THE COMMISSION MAY NOT IMPOSE THE SAME FEE ON NON-TITLE II INTERCONNECTED VOIP PROVIDERS THAT IT IMPOSES ON TITLE II COMMON CARRIERS 12

III. CONCLUSION 15

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COMMENTS OF THE VON COALITION

The Voice on the Net Coalition ("VON Coalition"),[1] the nation's leading advocacy organization promoting policies that facilitate access to Internet Protocol ("IP")-enabled services, hereby files comments in response to the above-captioned *Notice of Proposed Rulemaking* to oppose the Commission's tentative conclusion that interconnected voice over Internet protocol ("VoIP") providers should be subject to annual regulatory fees for fiscal year 2007 ("FY2007").[2] First and foremost, imposition of regulatory fees would be inconsistent with Section 9 of the Act and the Administrative Procedure Act ("APA"). Even assuming the Commission has the authority to impose regulatory fees on interconnected VoIP providers, any such fee must reflect the disparate regulatory regimes for interconnected VoIP providers vis-à-vis other Commission

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[1] The Voice on the Net or VON Coalition consists of leading VoIP companies, on the cutting edge of developing and delivering voice innovations over Internet including AccessLine, BMX, BT Americas, CallSmart, Cisco, Convedia, Covad, EarthLink, Google, iBasis, i3 Voice and Data, Intel, Microsoft, New Global Telecom, Openwave, Pandora Networks, PointOne, Pulver.com, Skype, Switch Business Solutions, T-Mobile USA, United Online, USA Datanet, VocalData, Veraz Networks, and Yahoo!

[2] *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Notice of Proposed Rulemaking, MD Docket No. 07-81, FCC 07-55, ¶ 10 (rel. Apr. 18, 2007) ("*NPRM*").

regulatees – both in terms of the costs and burdens imposed on the Commission, and the benefits interconnected VoIP providers derive from regulation.

I. IMPOSING REGULATORY FEES ON INTERCONNECTED VOIP PROVIDERS IS INCONSISTENT WITH SECTION 9 OF THE ACT AND THE APA

The Commission's reliance on its Section 9(a)(1) authority "to recover the costs of [its] regulatory activities" combined with its Title I jurisdiction provides an insufficient basis for imposing regulatory fees on interconnected VoIP providers. Further, Section 9 sets forth highly specific substantive and procedural requirements for regulatory fee obligations that the Commission has simply not fulfilled here. Finally, the Notice is deficient under the Administrative Procedure Act.

A. Section 9 Does Not Authorize the Commission to Impose Regulatory Fees on Interconnected VoIP Providers

1. *Annual Regulatory Fees Apply Only to Licensee or Certificated Entities*

The text of Section 9 and its legislative history make it clear that Congress intended that only Title III spectrum licensees and otherwise licensed or certificated entities would be subject to annual regulatory fees. The Schedule of Regulatory Fees set forth in the original statute by its terms applied only to spectrum licensees, common carriers subject to Section 214 of the Act, and cable landing licensees.[3] Indeed, Congress was aware that certain providers would fall outside the scope of these requirements, yet chose not to reach them. For example, Congress might have

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[3] *See* Communications Act of 1934, as amended, § 9(g), codified at 47 U.S.C. § 159(g); *Implementation of Section 9 of the Communications Act; Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Notice of Proposed Rulemaking, 9 FCC Rcd 6957, ¶ 91 (1994) (international circuit fee imposed on "private submarine cable systems *licensed by the Commission*," emphasis added). In subsequent action consistent with the statute in this regard, the Commission has since expressly applied the fees to non-common carrier satellite licensees. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, Report and Order, 13 FCC Rcd 19820 (1998), *aff'd in relevant part Panamsat Corp. v. FCC*, 198 F.3d 890 (1999).

sought to impose regulatory fees on wireline private carriage service providers (who are subject to neither Title II nor Title III) in the initial Fee Schedule, but did not do so.[4] Moreover, the permissible basis for fee adjustments in Section 9(b)(3) – *e.g.*, "service area coverage, shared use versus exclusive use" – are features associated with a licensed or certificated service.[5] In addition, Congress explicitly authorized dismissal of applications and revocation of "any instrument of authorization held by any entity" for failure to pay the required fee(s), thus further indicating that the Commission intended that regulatory fees would be imposed on the entities that would have applications or "instrument[s] of authorization" before it – *i.e.*, entities requiring a licenses or certification as a condition of providing service.[6] Given the Supreme Court's mandate that statutes authorizing imposition of regulatory fees are to be interpreted narrowly,[7] it is reasonable and appropriate to conclude that Congress's exclusion of non-licensed and non-certificated services at the time of enactment is determinative here.[8] Although Interconnected VoIP providers obtain an FCC Registration Number in order to complete FCC Form 499-A, the Commission does not require a license or certification as a condition of providing service.

Even to the extent there is ambiguity in the statutory text, Section 9's legislative history makes it clear that Congress intended that solely *licensees* would be subject to fees. The

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4 *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"); *NorLight Request for Declaratory Ruling*, 2 FCC Rcd. 132, ¶¶ 19-23 (1987) (applying *NARUC I* to private carriage fiber optic service offering); *Lightnet*, 58 Rad. Reg. 2d (P&F) 182 (1985) (not requiring that fiber optic cables be offered on a common carrier basis); *see also Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993) (Congress is presumed aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute).

5 *See* 47 U.S.C. § 159(b)(1)(A).

6 *See* 47 U.S.C. § 159(c)(2)-(3).

7 *See National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341 (1974).

8 *See Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) (the force of the maxim *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another) "in particular situations depends entirely on context, whether or not the draftsmen's

(continued on next page)

Conference Report explained that Section 9 established the "table of regulatory fees to be collected by the Commission *from its licensees*" to recover costs "with respect to *those licensees.*"[9] Accordingly, imposing regulatory fees on entities not subject to licensing or certification requirements is inconsistent with Section 9.[10] Thus, insofar as interconnected VoIP providers do not require Commission licenses or certification (blanket or otherwise) to operate, the Commission may not impose regulatory fees on them.

2. *The Commission lacks Title I ancillary jurisdiction to impose regulatory fees on interconnected VoIP providers*

The Commission may not bootstrap from the rationale of its decision in the *2006 USF Contribution Order* a decision to impose fees on interconnected VoIP providers. Section 9 is fundamentally different than Section 254(d)'s "permissive authority" on which the Commission principally relied in imposing annual regulatory fee obligations on interconnected VoIP providers.[11] That decision involved the application of an entirely different section of the Act that expressly authorized the Commission to impose contribution requirements on "*other* provider[s]

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mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives.").

[9] *See* H. Conf. Rep. No. 103-213, at 499 (1993), reprinted at 1993 U.S.C.C.A.N. 1188 ("Conference Report") (emphasis added)). Section 9 was adopted as part of the 1993 Budget Act, but its legislative history incorporates by reference the Energy and Commerce Committee Report adopted for the version of the nearly identical regulatory fee legislation passed by the House of Representatives in 1991. *See id*. at 499 (incorporating by reference H.R. Rept. 102-207 (1991) (the "*House Report*"), which accompanied H.R. 1674 of the 102nd Congress).

[10] *See GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (describing "Step 1" analysis under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), whereby "the reviewing court 'must first exhaust the "traditional tools of statutory construction"'" including "the statute's text, legislative history, and structure," as well as its purpose, in order "to determine whether Congress has spoken to the precise question at issue," and citing to *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (which quotes *Chevron*, 467 U.S. at 843 n.9), *Southern California Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997), and *First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996)). Using these "traditional tools of construction" it is clear that Congress "has spoken to the precise question at issue" here and applied section 9 regulatory fees solely to licensees and other certificated entities.

[11] *See 2006 USF Contribution Order* at ¶¶ 38-45.

of interstate telecommunications."[12] Moreover, the Title I ancillary jurisdiction at issue there involved fundamentally different policy considerations of USF size and stability,[13] and a directly relevant Section 1 mandate.[14] Section 9 has no parallels to Section 254(d) in terms that would authorize the Commission to expand its scope beyond licensee entities, nor a compelling accompanying Section 1 statutory responsibility. The Commission must consider Section 9 on its own merits, which its perfunctory paragraph in the *NPRM* fails to do.[15]

The Commission's Title I ancillary jurisdiction does not otherwise provide a basis for imposing regulatory fees on interconnected VoIP services. As noted above, an agency's authority to impose regulatory fees is interpreted narrowly.[16] Consistent with this policy, many services over which the Commission has Title I jurisdiction are not subject to annual regulatory fees.[17] Nor is the imposition of enforcement or regulatory burdens on the Commission alone sufficient to confer Section 9 authority over particular entities. Otherwise, for example, "junk

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[12] *See id.* at ¶¶ 38-45.

[13] *See id.* at ¶ 48. Annual regulatory fee payments, in contrast, are governed by annual appropriations legislation and Commission regulatory priorities.

[14] *See id.* at ¶ 49 (citing to Section 1 responsibility to "make available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide … wire and radio communication service with adequate facilities at reasonable charges.").

[15] The Commission has already done so with respect to other fund contribution requirements. *See* Instructions to the Telecommunications Reporting Worksheet, Form 499-A, at 35 (March 2007) (clarifying that interconnected VoIP providers are *not* subject to TRS, NANPA, and LNPA obligations, all of which are premised on different statutory provisions (47 U.S.C. §§ 225, 251)).

[16] *See supra* note 6.

[17] *See, e.g., Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶¶ 15-22 (2004) (service classified as information service subject to Title I jurisdiction); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd. 13281, ¶ 7 (2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853 (2005) (same); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd. 4798, ¶ 22 (2002) (same). CMRS resellers, which are subject to both Title I and Title II of the Act, are not subject to regulatory fees either.

fax" senders and telemarketers would also be subjected to regulatory fees.[18] For this reason as well, the Commission has failed to establish a nexus between its proposed assessment of regulatory fees on interconnected VoIP providers and its authority to do so under Section 9.

B. The Proposal Fails to Meet Basic Statutory Requirements

As the Commission has recognized, "[p]ermitted amendments must be consistent with the 'costs adjusted for benefits' approach set out in Section 9(b)(1)(A)."[19] Under this approach, section 9(a)(1) of the Act generally requires that "[t]he Commission … assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities."[20] The service-specific fee amounts are to "be derived by determining the full-time equivalent number of employees performing [such] activities" within the Commission's various bureaus and offices, "adjusted to take into account factors that are *reasonably related to the benefits provided to the payor of the fee by the Commission's activities*, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest …."[21] The Commission is permitted to revise its regulatory fee schedule "by regulation" and "through a rulemaking" if it "determines that the Schedule requires amendment to comply with the[se]

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[18] *See, e.g.*, *Septic Safety, Inc.*, Order of Forfeiture, 21 FCC Rcd. 6868 (EB 2006) (TCPA/"Do Not Call List" violation); *First Choice Healthcare, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd. 2795 (EB 2006) (violation of "junk fax" rules).

[19] *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, Report and Order, 19 FCC Rcd. 11662, 11667 ¶ 12 (2004).

[20] 47 U.S.C. § 159(a)(1). .

[21] 47 U.S.C. § 159(b)(1)(A) (emphasis added); *see also Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Report and Order, 18 FCC Rcd 15985, 16039 (2003) ("*FY2003 Order*") (Concurring Statement of Commissioner Copps, urging comprehensive review of methodology to ensure full compliance with Section 9, including that fees be "reasonably related to the benefits provided to the payor by the Commission's activities").

requirements" in which case it must "*add*, delete, or reclassify services … to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."[22] The Commission must notify Congress of such changes at least 90 days before they become effective.[23] Consistent with the statute, section 9's legislative history emphasized that permitted amendments must "ensure such fees are reasonably related *to the benefits provided to the payor of the fee* by the Commission's activities."[24] *All* of these statutory considerations must be addressed in deriving any additions to the Fee Schedule.[25] Yet the single paragraph of the Notice fails to effectively consider or demonstrate compliance with any of these factors.

Specifically, in the single short paragraph in the *NPRM* dedicated to the matter, the Commission has "tentatively conclude[d] that interconnected VoIP providers should pay regulatory fees" and cites as a basis for such action its "broad mandate" under section 9(a)(1) to "assess and collect regulatory fees to recover the costs" of regulatory activities and its "analysis

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[22] 47 U.S.C. § 159(b)(3) (emphasis added); Conference Report at 499 (permitted amendments must be effected "through a rulemaking"). The Commission's proposed action here is unquestionably a "permitted amendment" subject to the requirements of Section 9(b)(3) of the Act, as it proposes to "*add* … services … to reflect … additions… or changes in the nature of its services as a consequence of Commission rulemaking proceedings …." *See id.* (emphasis added). The Commission previously found, for example, based on "technological characteristics" that "substantive distinctions exist between MDS and LMDS and that they should not be placed in the same fee category." *See FY2003 Order* at 15988 ¶ 9. The Commission also declined to place LMDS into the "microwave service category," finding that "technological and commercial applications … indicate that this service may develop on a separate track from current microwave services" by "offer[ing] a broad range of one-way and two-way voice, video, and data service capability, and substantially more capacity than other wireless services." *Id.* A virtually identical analysis – and identical conclusion – applies to interconnected VoIP services in comparison to existing services on the Fee Schedule. *See IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 8-22 (2004) ("*IP-Enabled Services NPRM*").

[23] *See* 47 U.S.C. § 159(b)(4)(B).

[24] *See* Conference Report at 499 (emphasis added); *see also* House Report (Commission must ensure under section 9(b)(3) "that user fee revenues … accurately reflect the cost of specified regulatory activities.").

[25] *See Panamsat v. FCC*, 198 F.3d 890, 895 (D.C. Cir. 1999) (finding that the imposition of "regulatory burdens" on the Commission is "a prerequisite for § 9 fees" and citing approvingly to the Commission's findings of regulatory benefits); *see also FY2003 Order*, at 16040-41 (Concurring Statement of Commissioner Adelstein,
(continued on next page)

in the *2006 Interim Contribution Methodology Order* …."[26] There is no mention, let alone analysis, of the full time equivalent number of employees ("FTEs") performing VoIP regulatory activities; the Commission does not even indicate whether it has determined the FTEs performing the regulatory activities at issue in the first place, which is a statutory prerequisite for deriving a new fee for a new fee category.[27] Nor has the Commission described any addition to the Fee Schedule as reflective of the "consequence of Commission rulemaking proceedings or changes in law."[28] While the Commission has incurred new regulatory burdens by virtue of imposing new regulations on VoIP providers,[29] no specific evidence of these costs is presented, either alone or in comparison with other services.

Also, as discussed above the fee amounts must also account for the benefits derived from Commission regulation.[30] The Commission, however, has not provided any information

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describing the requirements of Section 9(b)(3) and urging that cost-based accounting system be established "so that the appropriate costs are passed along to the proper services from year to year.").

[26] *Id.* at ¶ 10, n.16. In that Order, the FCC concluded that it had ancillary jurisdiction under Title I of the Act to extend USF contribution obligations to interconnected VoIP providers, and the FCC reasoned here that "the regulatory fee obligation would be reasonably ancillary to the Commission's obligations under section 9 of the Act." *See id.*, discussing *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶¶ 46-47 (2006) ("*2006 USF Contribution Order*").

[27] *See* 47 U.S.C. §§ 159(b)(1)(A), (b)(3) (Fee Schedule shall be amended "if the Commission determines" it necessary "to comply with the requirements of paragraph (1)(A)" which expressly requires a determination of the FTEs performing the activities subject to Section 9); *FY2003 Order* at 16040 (concurring statement of Commissioner Adelstein, noting that FTE determination is mandatory component of fee methodology).

[28] *See* 47 U.S.C. § 159(b)(3) (emphasis added). The U.S. Court of Appeals for the D.C. Circuit has made clear that this is also a prerequisite for a new fee category under Section 9(b)(3). *See Comsat Corp. v. FCC*, 114 F.3d 223, 227-28 (D.C. Cir. 1997).

[29] *See, e.g., 2006 USF Contribution Order* (imposing USF contribution and related registration obligations); 47 C.F.R. Part 9 (basic and enhanced 911 obligations); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Second Report and Order and Memorandum Opinion and Order, 21 FCC Rcd 5360 (2006) (CALEA); *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *IP-Enabled Services*, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-22, ¶ 54 (rel. Apr. 2, 2007) (CPNI).

[30] *See supra* note 23 and accompanying text. Indeed, the presence of a benefit to the payor resulting from regulation can be critical to the lawfulness of a regulatory fee regime. *See National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *San Juan Cellular Tel.Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685-86 (1st Cir. 1992).

whatsoever in the *NPRM* regarding the benefits to interconnected VoIP providers of Commission regulation. There is also no discussion as to how it intends to balance those statutory considerations – a condition precedent for compliance with Section 9 and meaningful comment. Interested parties are thus faced with a "heads I win-tails you lose" situation as they can only speculate as to what rationale the Commission will proffer as a statutory basis for its fee. The stated legal basis for the proposed rule is woefully inadequate, as the Commission fails to tie its proposed action to the relevant provisions of Section 9. The absence of any analysis or discussion of how imposition of regulatory fees fit the statutory mandate renders the proposed fee unsustainable.[31]

C. Notice Provided in the *NPRM* Is Inadequate to Afford Interested Parties the Opportunity to Meaningfully Comment

The fee notice provided in the *NPRM* fails to meet the basic requirements of the APA. Section 9 requires that permitted amendments to the Regulatory Fee Schedule comply with the APA which, in turn, requires that the *NPRM* include both "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[32] The U.S. Court of Appeals for the D.C. Circuit has explained:

> Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment: "the Administrative Procedure Act requires the agency to make available to the public,

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[31] Even assuming the Commission could offer such an explanation, the failure to provide notice to the parties of the FCC's proposed rationale renders notice insufficient under the APA. *See American Medical Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995) (*quoting Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)).

[32] *See* 5 U.S.C. § 553(b)(2)-(3).

> in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."[33]

The sparse, perfunctory treatment of interconnected VoIP providers in the *NPRM* clearly fails to meet this standard.

The Commission simply sought comment generally on whether such fees should be assessed based on revenues (akin to the fee currently imposed on wireline carriers) or whether a numbers-based approach (akin to the methodology used for certain wireless providers) should be used instead.[34] The *NPRM* does not even address the fundamental question of how interconnected VoIP should be categorized in the first instance, which is inexplicable given the statutory requirements governing permitted amendments to the Schedule of Regulatory Fees.[35]

The Commission did not, moreover, specifically seek comment on a particular fee amount for VoIP providers. Further, the Commission has provided only general methodological frameworks, with no factual underpinnings, for how it would assess fees on interconnected VoIP providers. Unlike other fee payors, the Commission does not indicate what it anticipates the total FY 2007 payment units and accompanying revenue estimate will be for interconnected

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[33] *See American Medical Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995) (*quoting Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)).

[34] *NPRM* at ¶ 10. As noted above, the Commission provides no information regarding the statutorily required balancing of costs and benefits.

[35] This inadequacy is further demonstrated by a side-by-side comparison between the *NPRM* provisions for interconnected VoIP service, and the Commission's reclassification of LMDS service in 2003. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Notice of Proposed Rulemaking, 18 FCC Rcd 6088-89, ¶¶ 6-9 (2003). In that decision, the Commission set forth the policy and factual basis for its eventual determination that a separate fee category was warranted for LMDS. Further, the Commission did so in the context of a service that was *already* subject to the fee. Where, as here, the Commission is proposing to add a new service to the Fee Schedule, the need for adequate APA notice is even more compelling. *See Sprint Corporation v. Federal Communications Commission*, 315 F.3d 369 (D.C. Cir. 2003) (APA rulemaking notice and comment requirement "ensures 'fairness to affected parties,'" *citing Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

VoIP providers.[36] Indeed, it is questionable whether it could do so in the first place, at least for FY2007.

First, with respect to a revenue-based approach, interconnected VoIP providers have only been subject to USF reporting and contribution requirements since last August.[37] The revenue-based FY2007 regulatory fees for interstate telecommunications service providers ("ITSPs") are significantly based on revenues reported in Form 499-A and 499-Q data filed in 2006. Thus, there is no 2006 Form 499-A data for interconnected VoIP providers with which the Commission could develop a fee that meets the threshold statutory requirements, and only limited calendar year Form 499-Q data.[38] As for a numbers-based assessment, the current number-based fee assessments imposed on CMRS providers are based on NRUF data. Interconnected VoIP providers, however, are not permitted to obtain numbers from the NANPA and are not subject to NRUF requirements. Given the necessarily limited data available, the Commission would necessarily be deriving a fee in a vacuum, which it may not do under the APA and thus should not attempt to impose this fee in FY2007.[39]

II. THE COMMISSION MAY NOT IMPOSE THE SAME FEE ON NON-TITLE II INTERCONNECTED VOIP PROVIDERS THAT IT IMPOSES ON TITLE II COMMON CARRIERS

Assuming *arguendo* that the Commission has authority to impose annual regulatory fees on interconnected VoIP providers, in no event may the Commission simply incorporate them whole cloth into the regulatory fee methodology to be used for other service providers. The

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36 *See NPRM* at Attachments B and C.

37 *See 2006 USF Contribution Order* at ¶ 60.

38 *NPRM* at Attachment B (sources of payment unit estimates based in part on FY 2006 revenues).

39 *See Assessment and Collection of Regulatory Fees For Fiscal Year 1996*, Report and Order, 11 FCC Rcd 18774, ¶ 65 (1996) (declining to impose fee on new class of licensees when Commission did not have "any information in the record of this proceeding on which to calculate a fee").

Commission has made it expressly clear that it has not classified interconnected VoIP providers as telecommunications carriers for purposes of the Act.[40] Moreover, the Commission has not extended the full panoply of Title II and other relevant Commission regulations to non-Title II interconnected VoIP providers.[41] Interconnected VoIP providers have been subject to: USF contributions and related registration requirements; CALEA; and E-911; and CPNI requirements will become effective in the near future. In contrast, an even cursory overview of the Act and the Commission's rules underscores that those requirements are substantially and quantitatively different than wireline and wireless carriers' obligations.[42] Simply put, there is an appropriate and significant gap between the costs imposed on the Commission by Title II wireline and wireless carriers on the one hand, and interconnected VoIP providers on the other. Thus, under the express terms of Section 9, this Commission-acknowledged disparate regulatory treatment must be reflected in the regulatory fee the Commission ultimately imposes on interconnected VoIP providers.[43]

First, the burdens imposed on the Commission by interconnected VoIP providers cannot realistically be compared to those imposed by other Title II and Title III services subject to the

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[40] *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶ 14 (2004), *aff'd sub. nom. National Ass'n of State Utility Consumer Advocates v. FCC*, No. 05-1069, 2007 U.S. App. LEXIS 6448, __ F.3d __ (8th Cir. Mar. 21 2007).

[41] *See IP-Enabled Services NPRM* at ¶¶ 45-49.

[42] These rules, many of which have a statutory counterpart as well, include: Part 1 (wireless applications, pole attachments, NEPA); Part 4 network outage; Part 6 disabilities access; Part 20 CMRS regulation, including HAC and manual roaming; Parts 22, 24, 27 and 101 wireless regulations; Part 32 uniform accounts; Part 42 recordkeeping; Part 43 reporting; Part 51 interconnection; Part 52 number utilization and portability; Part 61 tariffing; Part 63 certification and service discontinuance; Part 64 caller ID, TCPA, CAN-SPAM, priority service, rate integration and geographic rate averaging, among others; and Part 69 access charges.

[43] *See FY2003 Order*, at 16040 (concurring statement of Commissioner Adelstein, stating that the Commission "should have been maintained or reduced based on the level of regulatory activities expended by Commission FTEs" and "prefer[ing] that [the Commission] first assess the level of regulatory activity associated with the industry before making any adjustment based on an ostensible public interest determination.").

type of revenue- and number-based regulatory fee assessments contemplated in the *NPRM*. An overview of Commission's regulatory burdens resulting from the Commission's interconnected VoIP "enforcement activities, policy and rulemaking activities, user information services, and international activities," underscores this fact:

- ***Enforcement/Policy and Rulemaking***. Other than the discrete, enumerated regulatory obligations the Commission has imposed under Title I, Section 254(d) and CALEA, interconnected VoIP providers are not actually or potentially subject to the Commission's enforcement authority. Consumers and other carriers do not file Section 207 or 208 complaints against interconnected VoIP providers. The Commission's rulemaking activities are similarly limited to discrete docketed proceedings and, unlike licensee-specific rulemakings and hearings typical in the broadcast context, the Commission does not engage in such activities for interconnected VoIP providers.

- ***User Information Services***. Other than a single-page entry in the Commission's Form 499 Filer database, the Commission does not maintain database or database information akin to ULS, IBFS or the tariff filing system as part of its regulation of interconnected VoIP providers.

- ***International Activities***. To VON's knowledge, the Commission's activities in the international arena have focused on spectrum-related matters and have not entailed advocacy relating to interconnected VoIP providers.

Nor can it reasonably be argued that interconnected VoIP providers receive the same regulatory "benefits" as other Title II and III carrier fee payors. To provide a few examples, they do not receive exclusive rights of any sort akin to the Title III spectrum licensees that Congress focused on in Section 9's legislative history. Unlike the LECs, against whom they compete in local markets, their services are not tariffed and interconnected VoIP providers may not invoke the filed rate doctrine against their customers and interconnecting carriers as a means of limiting liability. They cannot receive numbers directly from the NANPA. Interconnected VoIP providers do not receive USF support. The Commission has not affirmatively provided the same interconnection rights as Title II carriers. Nor can they avail themselves of Commission complaint procedures with respect to consumer complaints against them.

Accordingly, any regulatory fee imposed on interconnected VoIP providers must reflect these legally and quantitatively significant differences in regulatory regimes. Thus, for example, if the Commission were to adopt a revenue-based approach for interconnected VoIP, it is required by statute to impose a lower contribution factor for interconnected VoIP providers than for full-fledged Title II ITSPs. Similarly, a per-number fee would need to be substantially lower than the fees to be imposed on CMRS licensees.

III. CONCLUSION

For the foregoing reasons, the Commission may not impose FY 2007 regulatory fees on interconnected VoIP providers. Assuming *arguendo* that the Commission has such authority, the Commission must impose a separate fee for interconnected VoIP providers that is substantially lower than the revenue- and number-based fees to be imposed on ITSPs and CMRS licensees, respectively.

Respectfully submitted,

THE VON COALITION

By: /s/ Staci L. Pies
Staci L. Pies
President

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