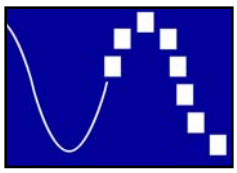
October 28, 2008



The VON Coalition

Ex Parte

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

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

As leading communications innovators, VON Coalition members welcome the Commission's efforts to rationalize intercarrier compensation ("ICC"). We urge the Commission to adopt reforms that encourage innovative communications services and applications, and continue to foster more rapid deployment of broadband networks to unleash the benefits of evolving technologies. If successful, the FCC's intercarrier compensation reforms will eliminate artificial economic inefficiencies, empower consumers to structure their communications as they see fit, and enable the deployment of new services in response to consumer demand.

Indeed, with the right polices, VoIP technologies can deliver enormous benefits for consumers:

- At a time when consumers are struggling to make their mortgages and pay their bills, VoIP enabled competition can save consumers an astounding $110 billion over the next 5 years – putting real money back into consumers' pockets through the power of competition at a time when families really need it.
- And by harnessing VoIP as a broadband driver, just a 7% increase in broadband adoption could create nearly 2.4 million more jobs per year. In fact, VoIP is now projected to be the number one job creator of any industry in the country.
- Already businesses are boosting productivity by as much as 15%, and small businesses could save $16 billion over the next 5 years through VoIP enabled competition.

However, just as successful comprehensive reform can power economic growth, stimulate peer production, and enhance social well-being, so can a critical misstep be highly detrimental and counter-productive to broadband deployment, new ideas and applications, and the growth of the nation's economy. For these reasons, we outline the eight essential elements necessary to achieve vast benefits, but without which could stall, stifle or stop consumers from benefiting from innovative new Internet communication technologies.

The 8 Key Components for Unleashing Consumer Benefits in Comprehensive Reform

I. At the dawn of a new era in voice communications, the Commission should continue its pro-growth, pro-innovation policies that have kept access charges off of Internet communications.

II. In confirming that IP to PSTN and PSTN to IP traffic is classified as information service, the Commission should also confirm the right of carriers to interconnect for purposes of terminating VoIP traffic on the PSTN

III. The Commission should reaffirm that all IP-based voice services, if regulated at all, are subject to exclusive federal jurisdiction.

IV. To the extent that the Commission does not adopt a comprehensive reform package, and resolves the ISP Remand order separately, the Commission should confirm that IP to PSTN and PSTN to IP voice traffic is likewise subject to the same 251(b)(5) rate.

V. The Commission should adopt a forward looking phantom traffic solution that does not apply the highest of rates to the most innovative of services

VI. The Commission should not adopt a hybrid residential/business USF contribution mechanism, but instead move directly to a numbers based contribution mechanism.

VII. The Commission's USF rules should continue to foster one-way and free services.

VIII. The Commission should not apply USF to the "Functional Equivalent" of a NANP telephone number.

More specifically,

I. At the dawn of a new era in voice communications, the Commission should continue its pro-growth, pro-innovation policies that have kept access charges off of Internet communications.

The Commission's comprehensive reform package must specifically reaffirm that the access charge regime does not extend to Internet enabled voice communication. The VON Coalition is concerned that consumers will be harmed by any transition that would instead force Internet based communication to jurisidictionalize traffic resulting in higher rates and reduced availability of innovative, Internet-enabled voice products. By Internet-enabled voice communications, we mean that the FCC should exclude from access charges any information services that use VoIP, any one-way VoIP services, and any free VoIP services offered to consumers.

If the FCC were to apply a jurisdictional based regime for the first time to IP applications that communicate with users on the PSTN, the results would be anti-consumer and anti-growth:

- Rates for innovative IP-enabled voice applications would go up;

- Innovation in and development of new IP-enabled voice applications would be curtailed;
- Consumer demand for broadband would be reduced, slowing the growth in broadband penetration, and thus stunting one of the policy objectives of the Congress when it enacted the Telecommunications Act of 1996.

The FCC long ago soundly rejected regulating communications based on a voice/data distinction, and it should not resurrect that approach here now.[1] Instead, the FCC should acknowledge the exploding diversity of applications and services that serve consumers and promote efficiency.

An amazing transformation is now happening on the Internet. VoIP is allowing people to communicate in entirely new ways – connecting friends together on MySpace, giving voice to blogs, transforming video games, enabling political satire, integrating voice and video into instant messaging, enabling people with disabilities to access a host of new accessibility tools not previously possible, allowing one telephone number to reach all your phones, enabling new privacy communication tools, ushering in a new era of voice recognition based information retrieval tools, and integrating click to dial functionality into mapping and other web sites.

These exciting technologies are emerging as a result of the Commission's pro-growth, pro-innovation policies that for 20 years have (through the ESP exemption) ensured that Internet communications are not saddled with the broken access charge regime. They simply wouldn't be possible if voice enabled Facebook applications had to charge by the minute, or charge people differently depending where on which friends they are communicating with and where they live in the country.

II. In confirming that IP to PSTN and PSTN to IP traffic is classified as information service, the Commission should also confirm the right of carriers to interconnect for purposes of terminating VoIP traffic on the PSTN

Interconnecting carriers have raised important issues in this docket about the need to preserve existing 251 interconnection rights and responsibilities. To address these concerns, the Commission should clarify that nothing in the order disturbs section 251 interconnection rights and obligations regardless of the classification of the traffic, as the Commission did in its *Time Warner Cable Interconnection Order*.[2] A telecommunications carrier's right to interconnect turns *only* on whether it is providing a "telecommunications service" to the VoIP provider,[3] not on the regulatory classification of the VoIP provider (the CLEC customer).

In declaring VoIP providers to be information service providers, the VON Coalition urges the Commission to clarify that section 251 of the Communications Act allows CLECs to obtain interconnection and interconnection agreements that enable them to provide wholesale

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1 *See Computer I Order: Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services*, Final Decision, 28 FCC2d 267, 21 Rad. Reg.2d (P & F) 1561 (1971).

2 *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) ("*TWC Interconnection Order*").

3 *TWC Interconnection Order* ¶ 14

telecommunications to third parties such as VoIP providers that offer VoIP services to end users. To the extent that any doubt remains about CLEC interconnection rights, the Commission should deny the pending V-Tel Petition[4] and confirm its holding in the *Time Warner Cable Interconnection Order* to ensure that IP-based services can thrive to the benefit of millions of American consumers.

The Commission should firmly locate Title II interconnection rights with telecommunications carriers who sell wholesale services to VoIP providers. A corollary of this declaration is that, to the extent they are regulated at all, application and software providers offering VoIP products and services are Title I entities and thus are afforded none of the rights or responsibilities of their Title II carrier partners. In confirming this regulatory structure, the Commission would act to clearly establish the limits of Title II and provide the Internet communications market a degree of regulatory certainty. It is not in the interest of either new entrants or established incumbents seeking to offer VoIP products and services for continued regulatory uncertainty to exist. As the VoIP industry has experienced over the past few years, the impact of regulation affects whether consumers will have access to innovative features and functionalities offered by VoIP providers at the edge, or if they will have access only to VoIP products that merely mimic the circuit switched offerings of the past.

By virtue of a regulatory environment free from unnecessary telecommunications regulation, VoIP providers will be able to continue investing in transformative software and applications and then partner with telecommunications carriers, who benefit from both the rights and obligations of Title II regulation, to bring these services to consumers. For instance, network operators are able to invest in and provide an economically efficient source for the key components required by application providers to deliver IP services to consumers. These components may include access to the PSTN, numbering resources, and other features of Title II. Focused and clearly defined regulation enables unregulated services to evolve rapidly thereby offering to consumers transformative VoIP products that may resemble telephone service only in the vaguest sense. Not only are such partnerships logical and efficient, they also enable more immediate consumer access to broadband applications and services at lower costs, thus driving many of the FCC's broadband related goals.

III. The Commission should reaffirm that all IP-based voice services, if regulated at all, are subject to exclusive federal jurisdiction.

In the *Vonage Jursidiction Order*,[5] the Commission held that Vonage's over-the-top-VoIP service is jurisdictionally interstate and subject to the Commission's exclusive jurisdiction. The Commission held further that it would reach that same conclusion with respect to *any* VoIP service — including facilities-based VoIP service — that shares certain basic characteristics, the most important of which is the offering of a suite of integrated features and capabilities that allow customers to originate and receive voice communications and access those other features and capabilities simultaneously. In upholding the Commission's decision, the Eighth Circuit likewise

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[4] *See Petition of Vermont Telephone Company for Declaratory Ruling Whether Voice over Internet Protocol Services are Entitled to the Interconnection Rights of Telecommunications Carriers*, WC 08-56, (filed Apr. 11, 2008) ("*VT Telephone Petition*").

[5] *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004).

noted the multiple service features that can come into play simultaneously with VoIP service.[6] Despite the Commission's clearly expressed intent to bring regulatory certainty to VoIP service through the *Vonage Order*, however, a number of state commissions continue to assert authority to regulate both facilities-based and over-the-top VoIP services. The industry needs immediate action by the Commission to ensure that IP-based services – which transcend traditional notions of geography and regulation – are not subject to a patchwork of 50 different regulatory regimes.

IV. To the extent that the Commission does not adopt a comprehensive reform package, and resolves the ISP Remand order separately, the Commission should confirm that IP to PSTN and PSTN to IP voice traffic is not subject to carriers' carrier access rates.

To the extent that the Commission responds to the writ of mandamus on ISP-bound traffic, it should confirm at the same time that access charges do not apply to VoIP traffic. The Commission's previous determinations that "section 251(b)(5) would require reciprocal compensation for transport and termination of all telecommunications traffic, -- i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier" and that "subsection (g) [is] a carve-out provision [to 251(b)(5)]" remain valid with regard to VoIP traffic.[7] Section 251(g) again confirms that the reference to "telecommunications" in Section 251(b)(5) applies to all telecommunications. Section 251(g) temporarily grandfathers the pre-1996 rules applicable to access traffic, including rules governing the "receipt of compensation."[8] This carve out of existing rules from the effects of Section 251 would not be necessary if Section 251(b)(5) did not address the "receipt of compensation" for traffic covered by 251(g). There can therefore be no doubt that Section 251(b)(5) applies to all "telecommunications" involving a local exchange carrier.[9]

Customers who want to use VoIP services need to subscribe as well to broadband services from the LEC or another provider. But applying legacy access charges to VoIP traffic would saddle VoIP services with inefficient costs that could artificially limit their availability. By contrast, applying cost-based termination rates to such traffic instead would minimize uneconomic barriers to the availability of VoIP services -- and the more widespread availability of VoIP services could in turn drive customers to demand the broadband services necessary to make use of VoIP.

V. The Commission should adopt a forward looking phantom traffic solution that does not apply the highest of rates to the most innovative of services

While VoIP technologies may not be the primary cause of so-called phantom traffic problems, some of the proposed "solutions" put forth have the very real potential to stall the vast emerging benefits and limit consumer choices in the future. Many new technologies, like some VoIP services, do not necessarily utilize North American Numbering Plan ("NANP") numbers and

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[6] *The Minnesota Public Utilities Commission v. FCC*, Case No. 05-1069, US Court of Appeals for the Eighth Circuit (citation format needs to be corrected)

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) ("*ISP Remand Order*") at 9166, ¶ 32.

[8] 47 U.S.C. Sec. 251(g).

[9] The ICF has, however, provided additional bases for this conclusion. *See ICF Comments* at 40-42.

have no business reason to track such information in the traditional way that the certain rural LECs have suggested. For the Commission to require the insertion of a number where the software or network does not organically generate a number or the service does not assign one, could require extensive network modifications simply to generate artificial information. For example, many VoIP products or services are not tied inextricably to NANP numbers, which are the foundation of many intercarrier compensation calculations. Further, NANP numbers are not a good proxy for location in an IP world.

With regard to "phantom traffic," the Commission must not permit the terminating carrier to impose the highest applicable rate. To eliminate the concerns that terminating carriers have with regard to what rate should apply, the VON Coalition urges the Commission to follow in its phantom traffic solution the same principles underlying comprehensive reform, i.e. to ensure that rates reflect the economic cost of termination and to eliminate the disparity between the rates to exchange various types of traffic. So long as interconnecting carriers accurately identify themselves to terminating carriers, VoIP traffic must be billed at no higher than the state established reciprocal compensation rate, ratcheting down to the new rate established according to the forward looking cost formula established by the Commission in this order.

The VON Coalition is mindful, however of the need for terminating carriers to have sufficient information in order to bill the appropriate interconnecting carrier. For this reason, any phantom traffic solution should focus on identifying the carrier to be billed and should resolve the compensation component by affirming that terminating carriers are not permitted to impose access charges on any VoIP traffic. Appropriate phantom traffic rules should reflect the following principles:

- Call Signaling Protections for Terminating Carriers
  - All providers in call stream must pass, without modification, signaling details except where not feasible with network technology deployed at the time the call was originated
  - Telecommunications carriers are required to insert valid carrier identification information for billing purposes
  - VoIP providers and carrier partners are not required to insert calling party number where not organically generated by originating party

- Compensation
  - IP to PSTN and PSTN to IP calls are information services - entitled to purchase PSTN access as end users
  - Applicable Terminating rate to be paid by interconnecting carrier: one-way ratchet
    - Year 1: current state established reciprocal compensation rate
    - Next Transition Year: state 251(b)(5) rate established using FCC revised forward looking methodology

VI. The Commission should not adopt a hybrid residential/business USF contribution mechanism, but instead move directly to a numbers based contribution mechanism.

While the VON Coalition supports efforts to create a more equitable and efficient telephone numbers based USF contribution mechanism, we are concerned that the Commission may be considering an approach that distinguishes the treatment of business phone numbers and/or

revenues from residential phone numbers. The Coalition opposes this bifurcated approach as unnecessary and counter-productive. Requiring separate treatment of residential and business numbers and/or revenues would create a host of difficulties. As the communications world becomes more diverse and the boundaries between different categories of service become more blurred, the "residential/business" distinction appears less and less descriptive of the marketplace. Instead, the Commission should swiftly adopt a numbers based contribution mechanism for fee-based services that allow the user to make AND receive calls from the PSTN.

VII. The Commission's USF rules should continue to foster one-way and free services.

Any move to a numbers-based contribution methodology for universal service should not include telephone numbers that foster free and innovative services. The definition of working numbers should be appropriately crafted so that it does not capture innovative and often free Internet services like voice blogs, web based forwarding services, avatars, and community voicemail that have never had to previously contribute. The FCC can help ameliorate certain legal and policy issues with such proposals by clarifying that an Assessable Number is a North American Numbering Plan (NANP) telephone number used for a telephone access service that enables a Final Consumer of Service to make and receive calls and for which the Contributor charges a fee to a Final Consumer of Service.

For example, a web based application that does not provide users with dial tone or an underlying access arrangement, nor does it allow users to make outgoing PSTN calls, but is instead a web-driven set of "Unified Messaging" software applications that allows consumers to integrate and control their existing phone numbers and voice mailboxes through a separate telephone number, should not be captured. Likewise, information services that enable users to receive stored information – such as interactive voice response systems – should not be subject to USF if they use VoIP technology. The Commission should preserve its traditional protection of innovative information services and not subject them to USF fees.

VIII. The Commission should not apply USF to the "Functional Equivalent" of a NANP telephone number.

Some reports have suggested that the Commission's USF contribution mechanism would capture services that use a NANP telephone number or its "Functional equivalent." The term "Functional equivalent" is not defined. Adopting such an ambiguous term could hamper innovation, and stall investment. Instead, if the Commission intends to expand from a numbers based mechanism in the future, it should do so through a Further Notice of Proposed Rulemaking that considers connection based contribution mechanisms in addition to exploring what a successor mechanism might be that is functionally equivalent.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,
/s/
Jim Kohlenberger,
Executive Director
The VON Coalition