to implement these calls centers.[100] The Commission explained that "emergency call centers are an appropriate first step for MSS carriers."[101] VoIP providers, in contrast, have not been afforded an interim step in the process of compliance despite the record clearly demonstrating such alternatives were feasible.[102]

Further, the Commission offered no rational explanation for its deviation from past policy in this case. It gave no weight at all to the nascent stage of the VoIP market, the costs and technical burdens faced by IVPs in seeking to implement E911, or the availability of less burdensome alternatives such as phased implementation or the call center solution adopted for MSS providers. It failed to weigh these costs and burdens against the public benefit of encouraging the deployment of new technologies, although encouragement of new technologies is an express statutory policy that the Commission cannot simply ignore.[103] It even failed to consider some of the recommendations in the NENA proposed legislation that it had endorsed only two years earlier, including the use of a flexible deployment schedule.

The only justification the Commission attempts to offer for its dramatic change in course is its desire to "minimize" the risk of tragedies based upon a handful of reports involving VoIP customers who had difficulty reaching emergency services.[104] Although the Commission is properly concerned with public safety, it had the same concern in the wireless, MSS, and MLTS contexts. Tragically, many wireless users have been and continue to be unable to get help in

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[100] *Id.* ¶ 24.

[101] *Id.* at ¶ 24.

[102] *See* Vonage *Ex Parte* (discussing call center option); *see* Level 3 May 12 *Ex Parte* at 3 (proposing interim E911 requirement on fixed, native services only in top 50 MSAs).

[103] *See* Communications Act of 1934, Section 7, 47 USC § 157.

[104] *Order* ¶ 36 n.119.

emergencies due to weaknesses in the E911 system.[105] The risk to the public is a constant in all these cases, and cannot alone explain the Commission's decision to discount cost, technical, and market factors considered in earlier decisions.

II. ENFORCEMENT OF THE RULES WILL CAUSE IRREPARABLE HARM

Movants will suffer irreparable harm if the rules take effect, and then are vacated on appeal, through loss of goodwill and interruption of customer relationships if Movants are required to discontinue serving a substantial number of customers to comply with the rules.

The harm that Movants will suffer in the absence of a stay is "both certain and great; ... actual and not theoretical."[106] As explained in the Statement of Facts, the Commission's rules are formulated in such a manner that full compliance is impossible without interrupting customer service, thereby making it inevitable that Movants' reputation and position in the marketplace will be harmed.[107] The harm caused by this requirement is unavoidable.

Moreover, the harm to Movants would not be compensable after an appellate court rules on the merits of the appeal. Although "economic loss does not, *in and of itself*, constitute irreparable harm,"[108] economic losses that would be unrecoverable in the absence of a stay can qualify as irreparable.[109] Here, the harm that Movants will suffer is fundamentally an injury to their

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[105] NENA posts on its website a list of wireless 911 tragedies where emergency personnel were unable to locate callers using wireless phones. Wireless 9-1-1 Tragedies, *available at* http://www.nena.org/Wireless911/Tragedies.htm. Similar events occurred in the 2000-2001 time-frame in Detroit, at the same time the Commission considered and ultimately granted wireless carrier requests for extensions of a five year compliance timeframe, and have continued since. Jim Schaefer, *Rescuing 911*, Detroit Free Press, March 5, 2001; *Search for 911 Cell Phone Caller Ends in Death*, Herald News (May 17, 2005).

[106] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[107] Talley Decl. ¶¶ 38-40, 42; Bhatia Decl. ¶¶ 37-39, 42-45; Rose Decl. 31-33, 35; Grieve Decl. ¶¶ 34-36, 38.

[108] *Wisconsin Gas Co. v. FERC*, 758 F.2d at 674. (emphasis supplied).

[109] *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

reputations in the marketplace.[110] Both current and potential customers will be alienated from Movants due to the impact of the rules; even if the rules are later vacated, the hostility will remain, and will continue to harm Movants' commercial interests indefinitely.[111]

The Commission has required IVPs to provide E911 service and fulfill other requirements "as a condition of providing service to a consumer."[112] No exceptions are allowed, whether for cost, technical impossibility, refusal by third parties to permit completion of E911 calls over their facilities, or any other cause. Therefore, if an IVP cannot satisfy each and every requirement of the rule as to a particular consumer, it must refuse to serve that customer, even if this means cutting off service to existing subscribers.[113] If any IVP attempts to evade this requirement, the Commission has threatened to impose "cease and desist orders," *Order* ¶ 51, which would have the same effect of cutting off service to customers. Because Movants' services can be accessed from any broadband Internet connection, this rule effectively requires them to be prepared to route a 911 call to any selective router that serves any location that has broadband access, regardless of whether the IVP currently has or has ever had a customer at that location. No provider of nomadic services can possibly provide 100% nationwide coverage, nor can it prevent customers from accessing their service in locations that are not covered, so the rules will require disconnection of customers unless stayed.[114]

Although the loss of customers will produce immediate financial harm to Movants in the form of lost revenues and profits, it will also cause lasting—and irreparable—harm to Movants'

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[110] Talley Decl. ¶¶ 39-40; Bhatia Decl. ¶ 44; Rose Decl. ¶¶ 32-33.; Grieve Decl. ¶¶ 35-36.

[111] Talley Decl. ¶ 40; Bhatia Decl. ¶ ¶43-44; Rose Decl. ¶¶ 32-33, 35; Grieve Decl. ¶¶ 35-36, 38.

[112] *Order* ¶ 47.

[113] Talley Decl. ¶¶ 36-38; Bhatia Decl. ¶ 36, 41; Grieve Decl. ¶ 34; Rose Decl. ¶ 31,

[114] *See* AT&T May 9 *Ex Parte* at 3; Talley Decl. ¶ 30, 33; Bhatia Decl. ¶ 32, 35.

goodwill and market reputation. A customer whose service is disconnected by Movants inevitably will blame Movants, not the FCC, for the inconvenience and expense suffered as a result of having their telephone service cut off.[115] Even if a customer actually loses service because of its own failure to report accurately their physical location, they will likely blame Movants. Prospective customers who are refused service will likely remember that they tried to sign up and could not, rather than the technical legal explanation for the refusal. These consumers will perceive Movants as unreliable service providers, and many undoubtedly will communicate this to their friends and neighbors.[116] Accordingly, Movants' ability to attract and retain customers in the future will be injured.

This type of harm to a business' relationship with its customers and to its reputation in the marketplace is recognized as irreparable by the courts. Numerous cases establish that "the loss of goodwill and potential loss of current and future customers can constitute irreparable harm,"[117] that loss of the ability to provide a unique product "almost inevitably creates irreparable damage to the good will of the distributor,"[118] and that, even where there is a possible damages remedy, the economic losses that result from the exclusion of the claimant from a profitable business relationship are so difficult to estimate that irreparable harm is established.[119] Here, of

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[115] Talley Decl. ¶ 39; Bhatia Decl. ¶ 37; Rose Decl. ¶ 32; Grieve Decl. ¶ 35.

[116] Talley Decl. ¶ 39; Bhatia Decl. ¶ 43; Rose Decl. ¶ 33; Grieve Decl. ¶ 36.

[117] *Independent Wireless One Corp. v. Charlotte*, 242 F. Supp. 2d 409, 416 (D. Vt. 2003) (citing *Tom Doherty Assocs., Inc. v. Saban Entm't*, 60 F.3d 27, 30 (2d Cir. 1995)).

[118] *Reuters Ltd. v. UPI*, 903 F.2d 904, 907-08 (2d Cir. 1990).

[119] *Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003). *See also, e.g., United States v. Bowman*, 341 F.3d 1228, 1237 (11th Cir. 2003) ("the harm that a business might suffer due to loss of goodwill after being prohibited from selling certain items available from competitors in neighboring towns pending a trial regarding the constitutionality of the ordinance proscribing the sale of the items was 'irreparable'"); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 740-42 (8th Cir. 2002) ("Loss of intangible assets such as reputation and goodwill can constitute irreparable injury"); *Stuhlbarg Int'l. Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evi-

course, there is no potential damages remedy to mitigate the harm, because the Commission cannot be held liable for adopting unlawful rules.[120]

Indeed, it is obvious as a practical matter that harm to Movants' reputation with consumers cannot be remedied after the fact. If Movants' customers are angered by disconnection of their service, or if potential customers are led to believe that the company is unreliable because it refuses to provide service in some cases, these perceptions are sure to linger in the market long after the appeal of the Commission's rules is decided.[121] A court order can vacate unlawful rules, but it cannot order consumers to forget what they have experienced or heard about a company. Accordingly, interim relief is essential to prevent irreparable harm to Movants and other IVPs.

III. A STAY WILL NOT SUBSTANTIALLY HARM OTHER INTERESTED PARTIES, AND WILL SERVE THE PUBLIC INTEREST

Movants combine their discussion of these two factors because the "interested parties" that the Commission seeks to protect through its rulemaking are the members of the general public who use interconnected VoIP services, and therefore any analysis of "substantial harm" to these users necessarily overlaps with the public interest analysis. The requirement that the agency "carefully balance the harms to the parties, is intended to ensure that the [agency] 'choose[s] the course of action that will minimize the costs of being mistaken.'"[122] In other words, "the real issue in this regard is the degree of harm" that will be suffered by Movants or

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dence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm"); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) ("Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill"); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992) (competitive losses and losses of customer goodwill constitute irreparable harm).

[120] *See* 28 U.S.C. § 2680(a); *see also United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755 (1984).

[121] Talley Decl. ¶ 40; Bhatia Decl. ¶ 44; Grieve Decl. ¶ 35; Rose Decl. ¶ 32.

[122] *Scotts Co. v. United Indus.*, 315 F.3d 264, 284 (4th Cir. 2002), citing *American Hosp. Supply Corp. v Hosp. Prods. Ltd.*, 780 F.2d at 589, 593 (7th Cir. 1986).

others if the stay "is *improperly* granted or denied."[123] Further, to the extent the balance of harms is in equipoise, the agency may still grant the stay because Movants have demonstrated a likelihood of success on the merits.[124]

As noted earlier, the stated purpose of the Commission's rules is to minimize the risk of "tragedies" involving VoIP customers who are unable to access 911 services. The limited stay sought by Movants will not impair that goal, while it will prevent the substantial irreparable harm described in the preceding section.

A. The Order's Notice and Affirmative Acknowledgement Provisions Significantly Alleviate the Risks of Harm to Other Interested Parties

As described above, the Commission's rules required Movants, within thirty days of the effective date of the Order to 1) "advise every subscriber ... of the circumstances under which E911 service may not be available ... or may be in some way limited by comparison to traditional E911 service;" 2) "obtain ... affirmative acknowledgement by every subscriber ... of having received and understood this advisory;" and 3) distribute to all subscribers "warning stickers and other appropriate labels" stating that E911 service "may be limited or not available."

Each Movant distributed the required labels and sent advisories to all of its customers by the July 29, 2005, deadline.[125] As of September 21, 2005, each Movant has obtained affirmative acknowledgement from over 90% of its subscriber base.[126] Further, Movants each continue to

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[123] *Id.* (emphasis in original).

[124] *See Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998) citing *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 620 (D.C. Cir. 1971) ("It often happens that ... one party or the other will be injured whichever course is taken. A sound disposition ... must [then] depend on a reflective and attentive appraisal as to the outcome on the merits").

[125] Talley Decl. ¶¶ 15-24; Bhatia Decl. ¶¶ 17-27; Grieve Decl. ¶¶ 13-24; Rose Decl. ¶ 13-18.

[126] Talley Decl. ¶ 24 (more than 90%); Bhatia Decl. ¶ 27 (94%); Rose Decl. ¶ 18 (97.2%); Grieve Decl. ¶ 24 (98%).

reach out to customers that have to date failed to submit the required acknowledgement and take other active measures to promote subscriber acknowledgment.[127]

The extensive notification efforts being undertaken by Movants will ensure that all customers—whether they affirmatively acknowledge or not—will be aware of any potential limitations on their 911 access. The Commission should allow IVPs to use alternative means of providing E911 service to such customers, even where such service is not the ideal solution as set forth in the Commission's rules.

B. Compelled Disconnection Poses the Greatest Risk to Public Safety

Absent a stay, Movants would have to *disconnect* service to those who reside in areas of the United States where compliance with the rules is not possible by November 28. Disconnection of service obviously would *increase*, not *decrease*, the risk that an individual customer would have difficulty reaching a PSAP in a true emergency. Also, because IVPs have no way to verify a customer's self-reported location, customers may report the *wrong* address to their providers to avoid having their service disconnected, which will make it even harder to locate them in an emergency.[128] Further, requiring numerous IVPs to disconnect large numbers of customers simultaneously would create a severe risk of harm to the public interest, as other carriers could be overwhelmed by a sudden flood of number porting requests.[129]

"Considering the harms that would flow from an injunction entered in error" requires the agency to weigh its interest in making 911 and E911 available to customers within 120 days against Movants' interest in ensuring that the customers it currently serves continue to receive

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[127] Talley Decl. ¶ 23-24; Bhatia Decl. ¶ 26-27; Rose Decl. ¶¶ 17-18; Grieve Decl. ¶¶ 23.

[128] Bhatia Decl. ¶ 14.

[129] Bhatia Decl. ¶ 37.

service (including some form of 911 service) during the pendency of the appeal.[130] If the appeal on the merits vindicates Movants' position, any customers whom Movants could not serve during the pendency of the appeal would be irreparably harmed. Conversely, if the agency wrongly grants the stay and the Commission later prevails on appeal, the harm to Movants' customers would be virtually nil—they will continue to receive service, will have received extensive notice of the capabilities and limitations of that service for emergency calling, and will have had access to 911 emergency calling (although not the E911 capability that Movants cannot immediately provide Nationwide).

Further, while there is a governmental interest in protecting the public, that interest does not automatically outweigh all other considerations of the cost of compliance, the benefits to consumers of new technologies, and the magnitude of the risk being addressed by the new rules. The Commission has allowed wireless carriers to implement E911 requirements over a long period, despite tragedies and failures with wireless E911. Indeed, the Commission acknowledges that many consumers do not have access to 911 service or do not have PSAPs that support E911.[131] Given the Commission's failure to address these gaps in the nation's E911 system, a claim that the public interest demands 100% nationwide compliance within 120 days for a single, relatively small industry sector is unconvincing. The public interest is better served by requiring VoIP providers to make some form of 911 service available to their customers while they implement commercial E911 solutions on a reasonable and achievable implementation schedule.

Thus, in this case the balance of equities and the public interest favors maintenance of the status quo, particularly where the Commission forces IVPs to disconnect customers where E911 compliance is otherwise impossible. If, as the Commission claims, public safety is its preeminent

[130] *See Scotts*, 315 F.3d at 285.

[131] *Order* ¶ 7.

concern, it will grant the limited stay requested herein to preserve customers' access to some emergency service rather than require disconnection.

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Commission stay the effectiveness of 47 CFR § 9.5(b) and (c), to the extent they require full implementation of E911 access for every customer within 120 days after the effective date of the Order.

Movants emphasize that, notwithstanding this request, they each will continue the utmost effort to deploy full E911 capability to all users where it is technically and economically feasible to do so.

Respectfully submitted,

Richard M. Rindler
SWIDLER BERLIN LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 424-7500
Facsimile: (202) 424-7645

Counsel for Nuvio Corp., Lightyear Network Solutions, LLC, Lingo, Inc. and i2 Telecom International, Inc.

DECLARATION OF JASON P. TALLEY

1. My name is Jason Talley. I am over the age of 18 and competent to provide the testimony herein. I have personal knowledge of the facts set forth in this Declaration.

2. I am employed by Nuvio Corporation ("Nuvio") as Chief Executive Officer and I am co-founder of the Company.

3. The purpose of this Declaration is to explain why, in the absence of a stay, Nuvio will be immediately and irreparably harmed by enforcement of the Voice over Internet Protocol ("VoIP") "E911" requirements established in the Commission's First Report and Order in WC Docket Nos. 04-36 and 05-196 ("*Order*"). In particular, I will describe Nuvio's efforts to comply with the customer notification and affirmative acknowledgement requirements of Rule 9.5. I will also describe Nuvio's attempts to comply with the requirement of routing all 911 calls to the appropriate public safety agency as of November 28, 2005.

4. As I will show, full compliance with this rule is impossible for reasons outside the Company's control. If the rule is not stayed, Nuvio will be unable to continue lawfully to provide service to approximately 70% of its customers. It is very unlikely that customers will voluntarily return to Nuvio's service later, even if the FCC's rules are later vacated, after having had that service disconnected, so the harm to Nuvio will be irreparable.

A. Nuvio's VoIP Services

5. Nuvio's VoIP service is an Internet application that enables its customers to communicate by voice over the Internet, both with other users of the service and with users of

ordinary telephones on the public switched telephone network. Nuvio provides services to residential and business customers.

6. For business customers, Nuvio provides a hosted multi-line service for small to medium business users that want to outsource their communications needs. Such customers are responsible for providing their own Internet connection. In some instances Nuvio provides specialized equipment for use with its service, but customers may also access this service through the use of a software application installed on a laptop computer. The only information Nuvio has about the customer's connection and whether the customer is using specialized equipment or a software application is the Internet protocol address used to route information on the Internet. The specialized device and software applications will work using any Internet connection. Nuvio customers have employed this technology to allow their employees to work from multiple different locations such as: the primary office location of the customer, remote offices, home offices, and on business travel. It is possible for customers that use either the specialized devices or the software application to use the service from any location where there is an Internet connection.

7. Nuvio's VoIP service is portable for both residential and business customers. So long as a Nuvio customer has access to an Internet access line, the Nuvio customer can make use of the service anywhere in the United States or from any Internet connection anywhere in the world. The customer does not have to obtain Internet access from Nuvio to make use of the service.

8. Also, Nuvio's service allows customers in one geographic area to use telephone numbers that are associated with distant or non-local areas. For example, a Nuvio customer who lives in Washington, DC may have a telephone number assigned from Los Angeles, California;

and that same customer could use the service from any location in the world where there is Internet access.

9. By July 29, 2005, the Commission's *Order* required providers of "interconnected two way VoIP services" like Nuvio to: 1) "specifically advise every subscriber, both new and existing, prominently and in plain language, of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service;"[1] 2) "obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood this advisory;"[2] and 3) distribute to all existing and new subscribers "warning stickers and other appropriate labels" stating that E911 service "may be limited or not available."[3]

10. Within 120 days after the effective date (by November 28), all interconnected VoIP providers must: 1) "as a condition of providing that service to a consumer," provide that consumer with E911 service as required by the *Order*;[4] (2) "transmit all 911 calls, as well as ANI [Automatic Number Identification] and the caller's Registered Location for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location ...;"[5] 3) route "[a]ll 911 calls ... through the use of ANI and, if necessary, pseudo-ANI, via the dedicated Wireline E911 Network";[6] (4) make the

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1 *Order* at ¶ 48.

2 *Id.*

3 *Id.*

4 *Id.* at ¶ 47.

5 *Id.* App. B at 47, *to be codified at* 47 C.F.R. § 9.5(b)(2).

6 *Id.* ANI is defined as "Automatic Number Identification." Pseudo Automatic Number Identification ("Pseudo-ANI") means "[a] number, consisting of the same number of digits as ANI, that is not a North American Numbering Plan telephone directory number and may be used in place of an ANI to convey special meaning. The special meaning assigned to the

Registered Location "available to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority from or through the appropriate automatic location information (ALI) database;"[7] (5) "[o]btain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized; (6) "[p]rovide ... end users one or more methods of updating their Registered Location ... [which] must allow an end user to update the Registered Location at will and in a timely manner"; and (7) "submit a letter to the Commission detailing ... compliance with [the 120-day requirements]."[8]

11. The Commission's *Order* does not allow Nuvio to route 911 traffic using means that would be alternatives to the Wireline E911 Network. According to the *Order*, where there is a selective router in place, an interconnected VoIP provider must route 911 calls through the selective router. This requires a company like Nuvio to install elements into its network that are not currently part of its service. Nuvio would prefer to explore methods of routing 911 calls directly to PSAPs via the Internet with real-time address information. Nuvio sent letters to regional Bell operating companies to explore such type of arrangements and filed a plan for delivery of 911 calls in this manner with the Commission but did not receive any reply from either the regional Bell operating companies or the Commission.

12. The Commission's *Order* explicitly prohibits interconnected VoIP providers from allowing customers to "opt-out" of E911 services or requiring customers to opt-in to E911 services. Therefore, Nuvio cannot limit its 911 service to particular geographic areas in which it markets the service – *even if a customer agrees to this limitation.* Instead, interconnected VoIP

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pseudo-ANI is determined by agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system."

[7] *Id.* App. B at 47, *to be codified at* 47 C.F.R. § 9.5(b)(4).

[8] *Id.* at ¶ 79; *Id.* App. B at 47, *to be codified at* 47 C.F.R. § 9.5(b)(2).

service providers must ensure that E911 service is available from any location where the customer may roam. The only option apparently available to a provider whose customer tries to register a service location at which the provider cannot comply with the E911 requirements is to disconnect that customer's VoIP service completely.

13. Due to the portable nature of the VoIP services offered by Nuvio, coupled with the requirements of the *Order*, the Commission's rules effectively require Nuvio to have VoIP E911 capability throughout the entire United States, its territories and possessions by November 28, 2005, because a Nuvio customer may use the service from any location where broadband Internet access is available.

14. Also, in many instances, the existing Wireline E911 Network cannot process calls originated from devices that allows for the use of non-local telephone numbers. Because Nuvio's service allows 911 calls from customers whose telephone number is not "local" to their actual geographic location, these calls cannot be processed without additional steps. The same problem exists for wireless telephones. In order to resolve this issue, pseudo-telephone numbers are assigned to the VoIP call when an emergency call is placed. The use of pseudo-numbers requires an entity to administer such numbering resources. In certain parts of the country, the Regional Bell Operating Company ("RBOC") has assumed that role. But in other areas the entity responsible for assigning such resources has not been established. In these areas, it is highly unlikely that Nuvio will have access to the numbering resources it needs to implement an E911 solution for non-native numbers by November 28, 2005.

B. Nuvio's Efforts to Comply With the Commission's Customer Notification and Affirmative Acknowledgement Rules

15. Since the Commission adopted the *Order*, Nuvio has devoted significant resources to attempting to comply with the Commission's new rules, and changed its operating procedures as required by those rules.

16. Nuvio has adopted changes to its new customer subscription process to comply with the customer notice requirements of the *Order*. Nuvio continues to modify its systems to allow its customers to provide registered location information. Nuvio has also revised its terms of service to reflect its current 911 offerings, and all new customers must agree to the revised terms of service to complete the subscription process. Nuvio developed a process to track and record the affirmative acknowledgements received back from customers.

17. Nuvio engaged in a massive campaign to inform its existing subscriber of the E911 limitations associated with its service, even though customers were advised of the limitations associated with E911 service at the time of initial sign up prior to the Commission's adoption of Rule 9.5.

18. Nuvio revised its online account manager that customers use so that they could review the requisite affirmative acknowledgement and provide the same when logging on to their account.

19. The administrator for each of the Company's business, multi-line and multi-phone accounts was provided the requisite notification via e-mail on July 15, 20, and 26, 2005. Each e-mail contained an Internet hyperlink loaded from the Nuvio web-server that takes the customer to a web page with the E911 customer notification, and requests the customer's affirmative acknowledgement. When a particular multi-line, multi-phone business customer did not respond

to the e-mail notification by July 21, 2005, Nuvio provided notice through postal mail on July 23 and 25.

20. All Nuvio customer accounts were e-mailed a copy of the Company's customer notification of 911 and E911 service limitations on July 15, 20, 26, and 29, 2005. Follow up e-mails were also sent on August 2, and 22, and October 20, 2005. Each e-mail contained an Internet hyperlink loaded from the Nuvio web-server that takes the customer to a web page with the E911 customer notification and requests the customer's affirmative acknowledgement.

21. A paper notice containing the Company's customer notification was mailed July 23 and 25, 2005 via the U.S. Postal Service (or an equivalent service) to all customers. The notice contained several different options for the user to acknowledge receipt of the notice. Specifically, customers may 1) go to Nuvio's website, 2) dial a toll-free number and enter a unique identifier, 3) return a signed form via fax, or 4) return a signed form via postal mail.

22. As of July 14, 2005, Nuvio directs customers who have not yet provided an acknowledgement and who are attempting to log on to their account to the notification and acknowledgement on Nuvio's website. Nuvio's subscribers cannot access their account without first providing the acknowledgement.

23. As detailed above, Nuvio has sent multiple e-mails, letters and voice messages to its subscribers in order to notify and to obtain affirmative acknowledgement from customer that they understood the E911 limitations associated with the VoIP service. Nuvio also had customer service representatives attempt to contact those customers that had not provided affirmative acknowledgements. Customers could respond and provide affirmative acknowledgement by phone, fax, mail and through the website.

24. As of October 15, Nuvio has received affirmative acknowledgement from more than 90% of its customers that they have received and understood the notice explaining the current limitations of Nuvio's 911 service.

C. Nuvio's Efforts to Comply With the Commission's 120-Day Requirements

25. Nuvio began its efforts to comply with the Commission's 120-day requirements by investigating what it would require in terms of resources and time to deploy and E911 solution nationwide.

26. Nuvio quickly determined that we did not have the resources, capital or time to create and deploy our own dedicated E911 network with a nationwide footprint. Nuvio is a privately-held company with 24 employees. Nuvio's financial and personnel resources are not adequate to meet a requirement that imposes obligations nationwide without the assistance of third parties.

27. To deploy its own E911 solution that would comply with the Commission's *Order*, Nuvio would have to obtain certification as a telecommunications company in all 50 states, as well as all United States territories and possessions. Nuvio would then have to enter into interconnection agreements with the regional Bell operating companies, *i.e.,* BellSouth, Qwest, SBC and Verizon, as well as incumbent providers of local exchange service in order to gain access to the selective routers that comprise the 911 system. It would be logistically impossible for Nuvio to contact, negotiate, and contract with all the necessary parties to implement and manage a nationwide network-based solution. Even if Nuvio had the capital and resources to engage in such an endeavor – which it does not – Nuvio would not be able to

complete this process by November 28, 2005. Accordingly, it quickly became apparent to Nuvio that the Company would have to rely on the efforts of third-party solution providers.

28. Nuvio contacted several third parties offering limited geographic solutions that would comply with the Commission's rules. Nuvio considered a number of different solutions offered by a variety of providers including Global Crossing Limited, Intrado Inc., Level 3 Communications, Inc., and TeleCommunication Systems, Inc. There were a variety of limitations associated with each service offering. One solution provider's service was limited to updating location information and address verification services. This particular solution provider did not offer any 911 call delivery services. At the time that Nuvio investigated a different party's offering, the solution provider did not have the ability to accommodate portable VoIP services nor would it function with non-local telephone numbers. While this vendor communicated to Nuvio that it was developing a more capable solution, but the vendor later changed course. To the best of my knowledge, its only offering at this point requires the use of another party in order for Nuvio to acquire all of the services needed to route 911 calls. Nuvio also considered another solution that only functioned with telephone numbers assigned by this particular provider and is geographically limited to the provider's service footprint. It quickly became apparent that none of these vendors had a complete solution.

29. After months of discussion with various providers concerning their proposed E911 solutions, and protracted contractual discussions with one vendor in particular, Nuvio entered into an agreement with one vendor in October, 2005, to provide an E911 solution by November 28, 2005. This vendor's service is a relatively comprehensive solution that includes address updating and verification, as well as call routing functionality. The vendor and Nuvio are

still establishing systems that allow for dynamic address updating and validation of addresses provided by Nuvio customers.

30. Based on representations made by Nuvio's third party solution provider, Nuvio has determined that it may be possible to provide E911 services in compliance with the Commission's rules in the majority of the top 20 Metropolitan Statistical Areas ("MSAs")in the continental United States and a few areas outside of the top 20 MSAs by November 28, 2005. However, Nuvio will not have a nomadic solution in place if the customer takes the VoIP service to a location in some markets within the top 20 MSAs and virtually any location outside of the top 20 MSAs in the continental United States. Nuvio is unaware of any third party provider that is offering a solution that will cover the entire United States (including Alaska and Hawaii), the territories and possessions, by November 28, 2005. Indeed, Nuvio is unaware of any third-party solution provider that is offering a VoIP E911 solution that will cover the continental United States by November 28, 2005.

31. At this time, Nuvio does not know when it will be possible to provide E911 services throughout the United States as Nuvio is wholly reliant on third party providers as well as on incumbent providers of telephone service that must allow the third party solution providers access to the existing emergency services network ("Wireline E911 Network").

32. A major impediment in adopting an E911 solution that will comply with the Commission's mandate is the vagueness associated with the Commission's E911 rules that makes it impossible for Nuvio to know whether the contracts we are entering into will actually satisfy the Commission's rules.

33. Nuvio's vendor will not certify that its services will comply with the Commission's *Order*. Currently, Nuvio's vendor is forecasting that it will have a solution

compliant with the *Order* in place in 116 of the 922 MSAs that comprise the continental United States by the end of the first quarter of 2006. However, according to the vendor's estimate, the vendor was to have rolled out 911 service compliant with the *Order* in 47 MSAs, in addition to the 20 initial MSA, by the end of September, 2005, which has not yet occurred.

34. Even if Nuvio's vendor does not have a solution in a particular market, and another company does, Nuvio's vendor insists on contract terms that require Nuvio to give the vendor 90 days to implement a solution prior to using the services of the other company. Should the vendor fail to meet the 90-day deadline, the vendor may use a different party; but, as soon as Nuvio's vendor deploys a solution in that particular market, Nuvio must migrate to that solution. This clause effectively bars Nuvio from contracting with another provider, because other providers are likely to insist on their own minimum term commitments.

35. All third party providers with whom we have discussed E911 solutions require exclusive commitments and none will certify whether the services they offer will comply with the Commission's rules.

D. Consequences of Nuvio's Inability to Comply with Rule 9.5(b) and (c)

36. I understand that section 9.5 of the Commission's rules, with which Nuvio must comply effective on November 28, 2005, will require Nuvio to provide every existing subscriber with E911. Since full compliance is impossible, Nuvio will face the risk of regulatory violations and ensuing penalties, loss of business reputation and loss of customer goodwill. As currently interpreted, by November 28, 2005, Nuvio will either have to disconnect those customers who we can no longer serve in conformance with the Commission's rules or suffer whatever enforcement actions and penalties the Commission decides to impose. Currently, about 70% of

our customers are located in areas where Nuvio will not be in compliance with the rules on November 28, and other customers may move to such locations later.

37. In order to comply with the Commission's rules, as well as allow its customers the ability to seek an alternative communications provider, Nuvio must begin notifying those customers of pending disconnection by November 14, 2005. Nuvio believes this will allow its customers barely enough time to seek alternative service arrangements before termination of Nuvio's service.

38. It is my understanding that the Commission can impose substantial monetary penalties for noncompliance with its regulations. The possible regulatory violations by Nuvio and the Commission's possible imposition of fines against Nuvio for violating regulations that are impossible to comply with would have immeasurable consequences that could not be remedied by monetary compensation. Nuvio's goodwill and business reputation would be severely damaged. Nuvio will take whatever steps are needed to avoid being in violation of the rules, even if the Commission were to insist that it must disconnect customers to do so.

39. If Nuvio is forced to disconnect customers in order to comply with Rule 9.5, it may also endanger the safety of those customers that have their service turned off, thereby exposing both the customers and Nuvio to additional harm. Customers who have their service turned off by Nuvio will certainly blame Nuvio, not the Commission, for the inconvenience and expense they suffer from having their phone service shut off. Customers will perceive Nuvio as unreliable and will undoubtedly share these opinions with friends, neighbors and other acquaintances. This will impair Nuvio's ability to attract new customers and retain its existing ones — even those who were not disconnected. The resentment toward Nuvio felt by these customers will not likely dissipate, even after an appeal of the Commission's rules is decided.

Rather, the perception created by the disconnections forced by construing rule 9.5 as requiring disconnection will linger in the market long after the legality of the rules has been adjudicated.

40. It is highly unlikely that Nuvio will later be able to convince customers to return to Nuvio's service at some future time after disconnection. Customers disconnected by Nuvio will most likely believe that Nuvio is an unreliable provider due to their disconnection experience. Further, Nuvio's customers will immediately have to find a new provider of communications services. Many times the most advantageous pricing that a customer can acquire is in the form of a term commitment of at least a year, but in many cases of several years. Such term commitments generally require customers to pay substantial fees to terminate the contract early. For these reasons, it is highly unlikely that customers will return to Nuvio's service after disconnection.

41. Further, those customers that are disconnected will not be able to reach emergency services by dialing 911 in an emergency or to engage in non-emergency essential communication (such as children checking in with their parents, etc.) because they will have no phone service, at least for some period of time until they can arrange new service. Thus, the risk that individual customers will not be able to reach an emergency operator in an emergency and that additional emergencies may be created will increase if the Commission forces Nuvio to disconnect service to customers.

42. If Nuvio is required to disconnect those customers where it can't provide E911 service in compliance with the Commission's rules, Nuvio will suffer irreparable harm to its business in the form of a significant loss of its customer base, loss of future financing, inability to fulfill its contracts as a customer of telecommunications carriers, loss of reputation and loss of the competitive advantage it has achieved over other providers of VoIP services.

I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

CEO

Jason P. Talley
Chief Executive Officer
Nuvio Corporation

Dated: October 21, 2005
Overland Park, Kansas

DECLARATION OF RAVINDRA BHATIA

1. My name is Ravindra Bhatia. I am over the age of 18 and competent to provide the testimony herein. I have personal knowledge of the facts set forth in this Declaration.

2. I am employed by Lingo, Inc. ("Lingo"), a subsidiary of Primus Telecommunications Group, as the President. Lingo is a young company, which was established in 2005 for the sole purpose of providing the services described herein. At this time, Lingo is not publicly traded, and relies upon the revenues from its customer base and funding from its affiliates for financial stability.

3. I have over thirty-five (35) years of experience with the telecommunications and technology industries both in the United States and abroad. I hold a Bachelor of Technology degree in electrical engineering from the Indian Institute of Technology ("IIT") and I am a member of the Institute for Electrical and Electronic Engineers ("IEEE"). Prior to my current position with Lingo, I was the Chairman of Access Providers, Limited, an Australian wireless broadband provider listed on the Australian stock exchange. I have also held executive and senior management positions at Virtual Group Companies (an Australian company), Primus Australia, and MCI (both in the United States and Australia). I began my career with Siemens, and worked for that company in a variety of capacities, in four different countries.

4. The purpose of this Declaration is to explain why, in the absence of a stay, Lingo will be immediately and irreparably harmed by enforcement of the Voice over Internet Protocol ("VoIP") "E911" requirements established in the Federal Communications Commission's (the

"Commission's") First Report and Order in WC Docket Nos. 04-36 and 05-196[1] ("*Order*"). In particular, I will describe and Lingo's efforts to comply with the customer notification and affirmative acknowledgement requirements of Rule 9.5[2]. I will also describe Lingo's attempts to comply with the requirement of providing E 911 (or equivalent) service as of November 28, 2005.

5. As I will show, full compliance with this Rule is impossible for reasons outside the Company's control; therefore, if the Rule is not stayed, Lingo will be unable to continue lawfully to provide service to a significant number of its customers. Specifically, Lingo's third-party solution provider will have an E911 solution that can be used by its subscribers in only 20 of the more than 900 Metropolitan Statistical areas ("MSAs") that comprise the United States. It is very unlikely that customers will voluntarily return to Lingo's service later, even if the Commission's Rules are subsequently vacated, after having had that service disconnected.

A. Lingo's VoIP Services

6. Lingo's VoIP service is an Internet application that enables its customers to communicate by voice over the Internet, both with other users of the service and with users of ordinary telephones on the public switched telephone network. Lingo provides these VoIP services to residential and business customers.

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[1] *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, 2005 WL 323217 (rel. Jun 3, 2005).

[2] Appendix B of the *Order* establishes the final rules, eventually to be published in the Code of Federal Regulations ("CFR"), adopted by the FCC pursuant to the *Order*. Specifically, the Order adopted several FCC Rules to be codified in 47 C.F.R. part 9 (individually referred to as a "Rule", and collectively the "Rules").