Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

JOINT REPLY COMMENTS OF THE NATIONAL EXCHANGE CARRIER ASSOCIATION, INC., THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION, THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES; AND THE WESTERN TELECOMMUNICATIONS ALLIANCE.

The National Exchange Carrier Association, Inc. (NECA), the National Telecommunications Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Western Telecommunications Alliance (WTA) (herein, jointly, the Associations) submit this Reply to initial comments filed in the above-captioned proceeding.[1]

Commenters focus mainly on the Federal Communications Commission's (FCC or Commission) tentative conclusion that providers of interconnected Voice over Internet Protocol (VoIP) should pay regulatory fees.[2] Most either support or acquiesce to the Commission's authority to impose such fees. The Associations likewise support the imposition of regulatory fees on interconnected VoIP providers.

This proceeding, however, also affords the Commission an opportunity to confirm that interconnected VoIP services competing with traditional local and long distance

[1] *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, FCC 07-55 (rel. Apr. 18, 2007) (NPRM).

[2] *Id.* at ¶ 10.

telephony are by their very nature telecommunications services. In this Reply the Associations[3] urge the Commission to resolve the increasing number of disputes surrounding the nature of interconnected VoIP services by promptly confirming that these services are in fact telecommunications services.

I. Parties Acknowledge That The Commission Can Require VoIP Providers To Pay Regulatory Assessment Fees.

In its *2007 Regulatory Fees NPRM,* the Commission tentatively concluded it should begin assessing regulatory fees on providers of interconnected Voice over Internet Protocol (VoIP) services.[4] The Commission based its determination both on the "broad mandate" of Section 9 of the Act[5] and the Title I ancillary jurisdiction analysis supporting the Commission's 2006 decision to apply universal service contribution requirements to providers of interconnected VoIP services.[6,7]

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[3] The National Exchange Carrier Association, Inc. (NECA) is a non-stock, non-profit association formed in 1983 pursuant to the Commission's Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq*. NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 incumbent local exchange carriers (ILECs) that choose to participate in these arrangements. The National Telecommunications Cooperative Association (NTCA) represents more than 575 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service ILECs and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Act. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing over 550 small ILECs serving rural areas of the United States. Its members include both commercial companies and cooperatives and collectively serve over 3.5 million customers. All OPASTCO members are rural telephone companies as defined in the Act. The Western Telecommunications Alliance (WTA) is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. Most members serve fewer than 3000 access lines overall and fewer than 500 access lines per exchange.

[4] *Id.* at ¶ 10.

[5] *Id.* at ¶ 5, *citing* 47 U.S.C. § 159(1).

[6] *Id., citing Universal Service Contribution Obligations for Providers of Interconnected Voice Over Internet Protocol (VoIP) Service*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541, ¶46 (2006).

[7] The Commission requested specific comment on whether regulatory fees for interconnected VoIP providers should be assessed on the basis of their revenues (which would be consistent with the method used for providers of telecommunications services) or a numbers-based approach (which would be consistent with the way CMRS providers are assessed regulatory fees). *Id.*

Nearly all commenting parties, including Comcast Corporation (Comcast), the Iowa Utilities Board (IUB), NTCA, and Nuvio Corporation (Nuvio) support (or at a minimum, do not oppose) the Commission's determination it has authority to collect regulatory fees from providers of interconnected VoIP services.[8]

The Associations also support consistent treatment for all providers of services that are the functional equivalent of traditional telecommunications services, including the assessment of regulatory fees and similar intercarrier compensation obligations. To date, the Commission has required these providers to contribute to universal service funding mechanisms and to comply with the E911, CALEA and CPNI rules applicable to telecommunications service providers.[9] These requirements are well within the Commission's legal authority and consistent with its policy of consistent regulatory treatment.[10] Accordingly, interconnected VoIP providers are subject to the Commission's jurisdiction and should be assessed regulatory fees.

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[8] Comcast Comments at 2; Iowa Utilities Board (IUB) Comments at 2; NTCA Comments at 1; Nuvio Corporation Comment at 1. These parties differ in their preferred potential assessment mechanisms, however. NTCA, for example, favors use of a revenues-based approach while others (*e.g.*, Comcast & IUB) favor some type of per-subscriber or per-number approach. See NTCA Comments at 2, 6; Comcast Comments at 2; IUB Comments at 2.

[9] *Universal Service Contribution Obligations for Providers of Interconnected Voice Over Internet Protocol (VoIP) Service*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541, ¶46 (2006) (2006 Interim Contribution Methodology Order); *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245 (2005) at ¶¶ 48, 73 (VoIP E911 Order); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, Second Report and Order and Memorandum Opinion and Order, FCC 06-56 (released May 12, 2006), 21 FCC Rcd 5360 (2006) (CALEA Second Report and Order); *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 07-32 (rel. Apr. 4, 2007) at ¶56 (CPNI Order).

[10] Letter to Marlene H. Dortch, FCC, from Joseph Douglas, NECA, CC Docket No. 01-92 (May 2, 2007), attachment, at 8. (NECA May 2, 2007 Letter).

The VON Coalition (VON) and the Wireless Communications Association International, Inc. (WCA) oppose the imposition of regulatory fees on interconnected VoIP providers.[11] Citing the legislative history of Section 9 of the Act, these parties assert that Congress intended only to permit the Commission to impose regulatory fees on holders of Commission licenses or certificates of authority.[12] VON and WCA argue that, unlike Section 254(d) of the Act, Section 9 contains no language expressly authorizing the Commission to impose regulatory fees on "other providers of interstate telecommunications."[13]

The Commission should disregard these arguments as meritless. The plain language of Section 9 does not limit the general authority of the Commission to collect regulatory fees only from entities holding FCC licenses or certificates of authority. Furthermore, Section 9 provides the Commission with "broad authority" to impose regulatory fees in keeping with the public interest. Indeed, the only entities excepted from Commission authority under Section 9 are government, nonprofit, and amateur radio operator licensees.[14]

Both VON and WCA further contend that the assessment proposal fails to analyze the extent to which interconnected VoIP providers actually impose regulatory burdens on the Commission, and fails to give affected parties sufficient notice as required under the Administrative Procedure Act.[15]

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[11] VON Coalition (VON) Comments at 3; Wireless Communications Association International, Inc. (WCA) Comments at 4.

[12] VON Comments at 3-4; WCA Comments at 4.

[13] VON Comment at 6-7; WCA Comment at 4-5.

[14] *See* Communications Act of 1934, as amended, § 9, codified at 47 U.S.C. § 159.

[15] VON Comment at 13; WCA Comment at 5.

VON and WCA do not deny that interconnected VoIP providers impose burdens on the Commission. The Commission may field consumer complaints regarding VoIP accessibility, advertising and marketing, billing, rates, early termination, quality of service, E911, do not call and slamming, even though VoIP complaints are not yet listed separately in the Commission's quarterly reports.[16] Furthermore, the provision of interconnected VoIP services is a growing industry.[17] Assessing interconnected VoIP providers will fund increased enforcement actions and speed up resolution of consumer complaints, both of which are in the public interest.

The plain language of Section 9 of the Act does not require the Commission to engage in an item-by-item analysis of regulatory benefits and burdens simply to establish regulatory fees for interconnected VoIP providers. In fact, if the Commission were to perform such an analysis, given the complexity of regulatory issues associated with interconnected VoIP services, it might well find that proportionately *greater* fees should be assessed in this instance. As regulatory considerations concerning interconnected VoIP providers before the Commission continue to increase (as is evidenced by the growing number of *ex parte* contacts and proceedings), it is reasonable for the Commission to calculate regulatory fees for interconnected VoIP providers in the same manner as for other entities currently regulated as telecommunications services providers.[18]

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[16] *See e.g.*, *Quarterly Report on Informal Consumer Inquiries and Complaints Received*, News Release (May 9, 2007).

[17] NTCA Comments at 4.

[18] NTCA, for example, contends that the Commission should assess interconnected VoIP providers based on their revenues consistent with the methods used for interstate telecommunications service providers and with the VoIP providers' universal service fund obligations. NTCA Comments at 2.

II. Now Is The Time For The Commission To Confirm that Interconnected VoIP is a Telecommunications Service

Interconnected VoIP providers should not be exempted from regulatory fees (nor permitted discounted fees) merely because the Commission is considering the regulatory status of interconnected VoIP services. This dispute does, however, provide yet another illustration of the importance of confirming the status of interconnected VoIP services as telecommunications services at the earliest possible date.

In its *IP-Enabled Services NPRM*, the Commission made plain that

> any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[19]

The Commission noted in that proceeding that interconnected VoIP services are increasingly substituted for traditional voice services.[20] In considering later whether to apply E911, CALEA and USF contribution obligations to providers of interconnected VoIP services, the Commission fundamentally relied on the fact that these providers' services are viewed by customers as substitutes for traditional telecommunications services.

Most recently, in support of its decision to impose CPNI obligations on interconnected VoIP providers, the Commission made the critical finding that interconnected VoIP services from the perspective of a customer making an ordinary

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[19] *IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004) at ¶33.

[20] 2006 Interim Contribution Methodology Order, at ¶48.

telephone call "*are virtually indistinguishable*" from traditional telecommunications services.[21]

Under the Telecommunications Act as well as traditional common carrier law, the question of "whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service." [22] At this point there is no further room for doubt that interconnected VoIP services, which are marketed to end users and purchased as direct substitutes for traditional long distance and local telephony services, are in fact "telecommunications services" under the Act and are therefore treatable as such, regardless of whether the Commission issues an affirmative classification decision in the IP-Enabled Services proceeding or elsewhere.

As a practical matter, however, because the Commission has not yet affirmably stated this fact, it is difficult or impossible for local exchange carriers to obtain compensation for terminating increasing volumes of VoIP-originated traffic, largely interstate in nature, for which access charges ordinarily would be paid.[23] Many interconnected VoIP providers continue to claim they provide "enhanced" services and should therefore be treated as end users even when offering services (such as "IP-in-the-middle") that the Commission has already determined to be telecommunications services.[24] Some carriers supposedly offering IP-originated services are brazen enough to admit they terminate interstate calls on the PSTN, but flatly refuse to pay access charges, citing the pendency of the Commission's IP-Enabled Services proceeding as

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[21] CPNI Order at ¶ 56 (emphasis added).

[22] Appropriate Framework for Broadband Access to the internet over Wireline Facilities, CC Dock No. 02-33, 20 FCC Rcd 14853 (2005) at ¶ 103-104.

[23] *See* NECA May 2, 2007 Letter, WC Docket 01-92, attachment, at 2-4.

[24] Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276 (Sep. 21, 2005) at 5 (pending).

authority for this absurd proposition.[25] This flies in the face of established Commission policy that service providers sending traffic to and utilizing the resources of the PSTN, regardless of the technology they use, should be required to pay for such usage and should be subject to similar compensation obligations.[26]

The Commission, therefore, should promptly classify interconnected VoIP services and confirm that access charges are applicable to VoIP calls that make use of the public switched telephone network. VoIP providers should be held accountable for access charges under the same principles of equity and nondiscrimination that the Commission applied to USF contribution rules. Interconnected VoIP providers offering the functional and marketplace equivalents of traditional telecommunications services should not be permitted to avoid intercarrier compensation obligations simply on the basis of using different technology.[27]

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[25] *Id.*

[26] *IP-Enabled Service*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004), at ¶ 33.

[27] "Suppose you see a bird walking around in a farm yard. This bird has no label that says 'duck'. But the bird certainly looks like a duck. Also, he goes to the pond and you notice that he swims like a duck. Then he opens his beak and quacks like a duck. Well, by this time you have probably reached the conclusion that the bird is a duck, whether he's wearing a label or not." <http://en.wikipedia.org/wiki/Duck_test> (last visited May 11, 2007).

III. Conclusion.

The Commission should use its authority under Section 9 of the Communications Act and its Title I ancillary jurisdiction to extend the regulatory fee obligation to interconnected VoIP providers. Furthermore, the FCC should promptly confirm that these services are telecommunications services subject to access charges.

Respectfully submitted,

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May 11, 2007

CERTIFICATE OF SERVICE

I, Adrienne Rolls, certify that a copy of the foregoing Reply Comments of the National Exchange Carrier Association, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance in MD Docket No. 07-81, FCC 07-55, was served on this 11th day of May 2007 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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