Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application of Reporting Requirements	)	ET Docket No. 04-35
For Disruptions to Communications	)	
to Broadband Internet Service Providers	)	WC Docket No. 05-271
and Interconnected Voice over Internet	)	
Protocol Service Providers	)	GN Docket Nos. 09-47, 09-51, 09-
	)	137

COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
WESTERN TELECOMMUNICATIONS ALLIANCE; and
EASTERN RURAL TELECOM ASSOCIATION

The Public Safety and Homeland Security Bureau (PSHSB) seeks information, in advance of a potential Notice of Proposed Rulemaking, as to whether the Commission should extend current rules governing service disruption reporting requirements to providers of interconnected Voice over Internet Protocol (VoIP) services and broadband Internet Service Providers (ISPs).[1]

In these comments, the above-listed national and regional trade associations, (the "Associations")[2] recommend the Commission promptly and without conducting further

[1] *Public Safety and Homeland Security Bureau Seeks Comment on Whether The Commission's Rules Concerning Disruptions To Communications Should Apply to Broadband Internet Service Providers and Interconnected Voice over Internet Protocol Service Providers*, ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, DA 10-1245 (rel. July 2, 2010) (*Public Notice).* The Commission's service disruption reporting rules are codified under 47 C.F.R. §§ 4.1 – 4.13.

[2] The National Exchange Carrier Association, Inc. (NECA) is responsible for preparation of interstate access tariffs and administration of related revenue pools, collection of certain high-

proceedings issue an order confirming interconnected VoIP providers are subject to the same service outage reporting requirements, and indeed, all other regulatory requirements, as providers of circuit-switched telephone services. With respect to ISPs, however, the Associations respectfully suggest the Commission defer further action until it completes pending proceedings on the appropriate legal framework for regulating broadband Internet access services.

I. BACKGROUND

Under the Commission's current Part 4 rules, wireline, wireless, cable, and satellite service providers are required to provide the Commission with notification of significant service disruptions,[3] but the Commission has not yet specifically addressed whether such requirements apply to interconnected VoIP service providers or ISPs.[4] Recognizing the potential importance of obtaining data on disruptions to interconnected VoIP and ISP services, the National

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cost loop data, and administering the interstate Telecommunications Relay Services (TRS) fund. *See generally,* 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). The National Telecommunications Cooperative Association (NTCA) is a national trade association representing more than 580 rural rate-of-return regulated telecommunications providers. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. The Western Telecommunications Alliance (WTA) is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River. The Eastern Rural Telecom Association (ERTA) is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River.

[3] *Public Notice* at 1. A significant service disruption is an outage that lasts for at least 30 minutes and "potentially affects at least 900,000 user minutes of telephony service; affects at least 1,350 DS3 minutes; [and] potentially affects any special office and facilities; [such as major military installations]; or potentially affects a 911 special facility." 47 C.F.R. § 4.9 (a), (f) (describing outages for wireline and cable carriers).

[4] *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830 (2004) at ¶ 117 (*Part 4 Report and Order)* ("as we stated in the *Notice*, we are not addressing VoIP or public data network outage reporting at this time.").

Broadband Plan (NBP) recommended the Commission initiate a proceeding to extend current reporting requirements to these providers.[5] The Public Notice requests comment on a wide range of items related to these issues, including whether both facilities and non-facilities based interconnected VoIP service providers should be required to provide outage reports[6] and identification of reasonable threshold reporting requirements.[7]

II. DISCUSSION

The Associations strongly recommend the Commission take immediate steps to confirm that the current service disruption reporting requirements apply to interconnected VoIP service providers in the same manner as other providers of interconnected voice telecommunications services. Since 2005, the Commission has applied a variety of specific regulatory requirements to interconnected VoIP service providers, including rules relating to enhanced 911 (E911), CALEA, USF contributions, TRS contributions, regulatory fees, and discontinuance of service notifications.[8] Throughout these proceedings the Commission has consistently determined that

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[5] *Public Notice* at 2.

[6] *Id.* at 3.

[7] *Id.*

[8] *IP Enabled Services*, WC Docket No. 04-36, Report & Order, ¶ 12, May 13, 2009. *See also Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005) at ¶ 42; *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243, *Local Number Portability Porting Interval and Validation Requirements*, WC Docket No. 07-244, *IP-Enabled Services*, WC Docket No. 04-36, *Telephone Number Portability*, CC Docket No. 95-116, *CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues Final Regulatory Flexibility Analysis Numbering Resource Optimization*, CC Docket No. 99-200, Report and Order, Declaratory Ruling, Order on Remand and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) at ¶ 28; *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

interconnected VoIP services are increasingly used to replace analog voice services, and has further determined such services are "indistinguishable" from traditional telephone services from the consumer's perspective. Insofar as interconnected VoIP service providers offer services that directly compete with traditional circuit-switched telephony services and are "like" such services from the end-user's perspective, there is no rational basis for the Commission to treat such service providers differently for regulatory purposes.[9]

The Commission should therefore promptly confirm without conducting additional proceedings that its Part 4 service disruption reporting requirements apply to interconnected VoIP providers in the same manner as to traditional telephone service providers.[10] Doing so will ensure consumers receive the same level of reliability and accountability from interconnected VoIP service providers as they currently do from other voice service providers, such as wireline, wireless, cable, and satellite providers.

Proposed Rulemaking, 22 FCC Rcd 6927 (2007) at ¶ 56; *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 (2009) at ¶ 14.

[9] The Commission has held that the question of whether one service is "like" another service for regulatory purposes significantly depends on customer perception. S*ee, e.g., American Tel. & Tel. Co. (DDS)*, Final Decision & Order, 62 FCC 2d 774 (1977) at ¶ 75a. On appeal, the court of appeals affirmed, rejecting the argument that differences in technology should control. *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 139, n.9 (D.C. Cir. 1980). A finding that two services are "like" one another precludes arguments that one is entitled to differential regulatory treatment. *See, e.g., The Offshore Tel. Co. v. South Central Bell*, Memorandum Opinion & Order, 2 FCC Rcd 4546 (1987) at ¶ 32, *citing American Trucking Associations, Inc. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966), *cert. denied* 386 U.S. 943 (1967) ("The statutory prohibition against unjust discrimination extends to different treatment for like services under like circumstances … ."). To do otherwise invites discrimination based on technology, which the Commission has been trying to prevent in its earlier rulings on the regulatory treatment of interconnected VoIP services. *See supra* n.8.

[10] Under section 1.2 of its rules, the Commission may, "in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2.

Further, there is no basis for distinguishing between facilities-based and non-facilities based interconnected VoIP service providers[11] – both should be subject to the same regulatory requirements. Under the 1996 Act, any provider who offers "telecommunications for a fee directly to the public" is considered to be a telecommunications service provider, regardless of whether they do so over their own facilities or facilities obtained from other providers.[12] The Commission should confirm both facilities-based and non-facilities-based interconnected VoIP providers have the same duties and responsibilities under the Act.[13]

In contrast, application of traditional service outage reporting requirements to ISPs appears to require further study. While ISP's are considered information service providers under

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[11] The term "non-facilities based interconnected VoIP service provider" can be somewhat misleading. According to the *Public Notice* (at 2-3), such provider (*e.g.*, Vonage or Ooma) does not also supply the broadband connection necessary for the VoIP service to operate (*i.e.*, DSL or cable modem). It does not suggest, however, that the VoIP provider does not own, lease, control or operate significant numbers of facilities, *e.g.*, servers and transport links. Moreover, it is quite possible for the VoIP provider to experience a network failure even though the underlying broadband networks (DSL or cable modem) are fully operating, as past history demonstrates. *See, e.g.*, Russell Shaw, *Vonage has major service outage*, IP Telephony (Aug. 3, 2005), http://www.zdnet.com/blog/ip-telephony/vonage-has-major-service-outage/572; Scott Fulton III, *VoIP provider Ooma recovers from complete service outage*, Betanews (Apr. 14, 2009), http://www.betanews.com/article/VoIP-provider-Ooma-recovers-from-complete-service-outage/1239721255.

[12] The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of facilities used."* 47 U.S.C. § 153(46) (emphasis added).

[13] As NECA and the associations have repeatedly emphasized to the Commission, equal regulatory treatment likewise requires the interconnected VoIP providers also pay access charges for interexchange traffic delivered to local exchange carriers for termination. The Commission has amassed a considerable record regarding this issue in related proceedings, but has not acted to resolve extensive controversies surrounding this subject. *See, e.g.*, Paetec Communications v. CommPartners, LLC, No. 08-0397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010), *appeal pending*, No. 10-8002 (D.C. Cir. May 13, 2010). *See also*, UTEX Communications Corporation's Renewed Petition for Preemption, WC Docket No. 09-134 (filed July 13, 2010).

the Commission's current rules,[14] the Commission is currently in the midst of a major proceeding to consider whether ISPs can be regulated under the Communications Act, and if so, what type of regulatory structure should be applied to such providers.[15] The outcome of the Commission's "Third Way" proceeding is likely to have a significant impact on the Commission's ability to apply specific regulatory requirements, including its Part 4 service disruption reporting rules, to broadband ISPs. Therefore it makes sense for the Commission to defer further consideration of this issue until a later date.

III. CONCLUSION

Inasmuch as interconnected VoIP services are used to replace traditional circuit-switched analog telephone services and are perceived by consumers in the marketplace to be functionally identical to such services, the Commission should promptly confirm, without conducting further rulemaking proceedings, that facilities-based and non-facilities-based interconnected VoIP providers are subject to the same mandatory service disruption reporting requirements as traditional wireline telecommunications service providers. However, the Commission should

[14] *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010) at ¶ 21.

[15] *Id.* at ¶¶ 28, 52, 67-68.

defer further consideration of whether such rules should apply to ISPs until it resolves questions regarding its regulatory authority over such providers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 2nd day of August, 2010 by electronic filing and e-mail to the persons listed below.

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