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July 25, 2011

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

Re: Ex Parte Letter in CG Docket No. 11-47; CG Docket No. 10-213

Dear Ms. Dortch:

On July 21, 2011, the Voice on the Net Coalition, represented by Paula Boyd, Microsoft, Laura Peed, Yahoo, Staci Pies, Skype, and the undersigned, met with Vicki Robinson and William Dever, Wireline Competition Bureau, and Eliot Greenwald, Jamel Vinson and Rosaline Crawford, of the Consumer and Government Affairs Bureau, to discuss VON's filings in the above-referenced proceedings.

In particular VON recommended that as the Commission implements the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") and its provisions concerning contributions to the Telecommunications Relay Services ("TRS") Fund by non-interconnected Voice over Internet Protocol ("VoIP") service-providers, we urge the Commission to do so with the same care Congress took in drafting the statute and with due consideration for the radically different business models that will now be covered. To that end, we request that the Commission: (1) not assess TRS fees on non-interconnected services that do not generate interstate end user telecommunications revenues from end user subscribers, which means that if a VoIP service or VoIP

application is offered for free, then no TRS fee would be assessed; (2) not require VoIP providers to disaggregate non-interconnected VoIP services from other services that are offered for a fee; (3) not assess TRS fees on services that receive waivers under Title 1 of CVAA; and, (4) require non-interconnected VoIP providers subject to TRS fees to report their revenue in Block 5, rather than Block 4, of FCC Form 499-A to avoid any misunderstanding about the classification of such services. Where the FCC assesses TRS fees it should: establish a *de minimis* threshold for paying TRS fees to avoid burdening a promising technology that has the potential to provide meaningful utility at very low cost to traditional users of telecommunications and video relay services; and avoid policies that result in "double taxation" with the service provider paying two or more TRS fees. If the FCC feels it needs more time to establish appropriate guidelines for the assessment of TRS fees including the establishment of *de minimis* thresholds, it should consider these issues in a Notice of Inquiry or Further Notice of Proposed Rulemaking.

Non-Interconnected VoIP Services That do not Generate Interstate End User Revenues Should not be Subject to TRS Fees.

The current TRS Fund system reflects traditional telephone technology and a contribution model where fees are based on a percentage of interstate end user revenues for specified services. In directing the Commission to subject providers of non-interconnected services to obligations "that are consistent with and comparable to the obligations of other contributors,"[1] Congress recognized that non-interconnected VoIP services are based on new technologies that use fundamentally different business models

[1] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103(b), 124 Stat. 2751, 2755 (2010) (to be codified at 47 U.S.C. § 616).

that frequently generate no end user revenues for the service being provided. Recognizing these profound differences from traditional offerings, Congress directed the Commission to take into account "whether such services are offered free to the public" when establishing contribution requirements for non-interconnected VoIP providers.[2]

The proposal that best meets these statutory criteria is one that: requires only those non-interconnected VoIP providers who have interstate telecommunications end user revenues to contribute to the TRS Fund; establishes a *de minimis* threshold for eligible VoIP revenues;[3] and refrains from requiring end users who already pay for broadband which includes a TRS fee to contribute to the TRS Fund.[4] This formula, which tracks the current rules for calculating TRS contributions, means that if a provider's end user subscription revenues from the VoIP services are zero then its TRS fees would be zero.[5]

This outcome is fully consistent with the statutory criteria set forth by Congress. Section 103 requires the Commission to establish a system such that the contribution from non-interconnected VoIP providers is "*comparable to* the obligations of other

[2] S. Rep. No. 111-386, at 6 (2010); H.R. Rep. No. 111-563, at 23 (2010).
[3] The Commission should establish a *de minimis* threshold by examining the non-interconnected VoIP market and could consult other thresholds that it has utilized in the USF area. For example, the FCC Form 499-A has a *de minimis* exemption for telecommunications providers from contributing to USF if their annual USF contribution would be less than $10,000. This would exempt any carrier with annual revenue less than $69,444.44 using the FCC's current USF contribution factor of 14.4% for the third quarter of 2011. *See* http://transition.fcc.gov/Forms/Form499-A/499a-2011.pdf
[4] Carriers already have a duty under the current system to avoid the "double taxation" of their customers on TRS and USF and would be able to take on this responsibility in the non-interconnected context as well if the functionality is an application on a device they support.
[5] The Commission should also consider whether a company's implementation costs for the collection and payment of the TRS fee is more than the amount of the TRS fees that will be remitted, then the company should be exempt from having to pay TRS fee. Implementation costs would include changes to billing and collection systems, as well as the additional personnel required to remit the TRS fee. The Commission should bear in mind that many non-interconnected VoIP providers are not today regulated by the Commission.

contributors to such Fund." The apples-to-apples inquiry that yields comparability is an examination of the interstate end user telecommunications revenues of two providers (or classes of providers) to determine the absolute level of end user interstate revenue and then impose a similar percentage charge. In this exercise, if a VoIP provider has zero interstate revenues from the VoIP services, then its TRS obligation is zero. That outcome is fair and reasonable by any measure. A TRS fee is an example of an excise tax -- a fee imposed, usually on a percentage basis, on the revenue gained from the sale of a particular good or service. If an entity did not collect revenue from the sale of specific goods or services, then it has no tax obligation.

FCC Should Not Mandate Disaggregation and Payment of TRS Fees for a VoIP Service That is Part of a Suite of Unrelated Paid Services.

The FCC should not require providers of service offerings to disaggregate non-interconnected VoIP services and remit TRS fees where the VoIP service is part of a suite of other products or services that are offered for a fee. Under this approach, if the provider offers its services, including VoIP applications, in combination with a suite of services that generate revenue, such as video games or other entertainment features, then that provider's TRS Fund contribution would be zero.[6]

Though it may be true that some non-interconnected VoIP providers have other revenue streams and some of those revenues may be remotely related to the VoIP service, other service providers offer products and services that are more closely tied to their VoIP service offerings. For example, many cable companies offer interconnected VoIP,

[6] In addition, a free VoIP application that is included within a bundle or suite of services on which an end user USF fee is assessed should not also be assessed a TRS fee.

but they also gain substantial revenues from end users from services such as multichannel video services, leasing of set-top boxes, program rentals via video-on-demand, broadband connections, etc., that are related to their VoIP offering in that they travel over the same connection. Yet Congress did not suggest that these other revenues should be assessed in determining TRS obligations, or that revenues from the full bundle of services should be considered. Similarly, the FCC should not require providers to disaggregate VoIP service from a bundle of services for the purpose of imposing a TRS fee.

The proposal to impose a TRS fee on only the end user interstate revenues received by a non-interconnected VoIP provider and to not require disaggregation of revenues related to VoIP services meets the statutory criteria set forth by Congress, and also has significant policy benefits. First, this approach is easy to administer by businesses and the Commission because neither non-interconnected VoIP providers nor the Commission need to apply complicated formulas or otherwise attempt to disaggregate revenues attributable to VoIP services when such services are offered in combination with non-VoIP services, such as Internet-based customer services, video games, and other entertainment features. Establishing a system that is fair and easy to administer is especially important given that the TRS Fund historically has been the subject of millions of dollars of fraud, waste, and abuse.[7] In a similar vein of promoting efficiency, the

[7] *See, e.g.*, Majority Staff Report Prepared for the Use of the Committee on Energy and Commerce, U.S. House of Representatives, 111th Cong., *Deception and Distrust: The Federal Communications Commission under Chairman Kevin J. Martin* (Dec. 2008), *available at* http://gallyprotest.org/deception_and_distrust._searchable_version.pdf; United States Department of Justice, *Twenty-six Charged in Nationwide Scheme To Defraud the FCC's Video Relay Service Program* (Nov. 19, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-crm-1258.html.

Commission should establish a *de minimus* level below which a provider does not have to contribute to the program. That approach has worked with traditional telecommunications services and should be utilized here.

Second, this proposal does not impede the use and development of new business models and technologies, nor does it distort consumer behavior. The American public, including people with disabilities, have benefited greatly from the explosive growth of free non-interconnected VoIP services over the last several years. Requiring providers of free non-interconnected VoIP services, including VoIP applications, to pay into the TRS Fund based on revenues from sources other than interstate end user revenues, such as advertising or other services not covered by the CVAA, is not only contrary to the statutory requirements, but also would force a number of companies to either exit the market or begin charging for their services. These charges would encourage consumers to move to alternative communications platforms, such as email and instant messaging services, that are not subject to the TRS Fund contribution requirements and that, therefore, can continue to be offered to the public for free. The end result would be less choice and higher costs for American consumers.

Third, this proposal ensures that any financial burden on non-interconnected VoIP providers is proportionate to the use of the TRS Fund by end users of non-interconnected VoIP services. Under Section 716 of the CVAA, non-interconnected VoIP services must be accessible to and usable by people with disabilities, if achievable.[8] People with

[8] 47 U.S.C. § 617(a)(1), (b)(1).

disabilities generally do not use their non-interconnected VoIP service to connect to TRS services, however. Consequently, requiring contributions for non-interconnected VoIP to the TRS Fund based on revenues from sources other than interstate end user revenues would, in effect, tax people to pay for TRS services that they do not use.

To the extent more time is needed to define de minimus thresholds to protect innovation, the FCC may determine that it would be best to consider those issues in greater detail in a Notice of Inquiry or Further Notice of Proposed Rulemaking.

FCC Should Not Assess TRS Fees on Services That Receive Waivers Under Title 1 of the CVAA.

If the provider of a VoIP application or suite obtains an FCC waiver under Title I of the CVAA for its service and that service is not determined to be an Advanced Communications Service, then the TRS fee should not apply. A waiver confirms that any offering of a non-interconnected VoIP service is insubstantial and not sufficient to result in the imposition of accessibility regulation on the underlying services. Imposing TRS fees on such an offering is likely to adversely impact innovation and the growth of these products and the implementation of incidental or supplemental non-interconnected VoIP services in a bundle of other offerings.

Moreover, as stated previously, it remains contrary to the statutory requirements to assess a TRS obligation on something other than the end user interstate telecommunications revenues of the provider. Thus, if a VoIP provider or VoIP

application provider does not generate revenue from an end user, then no TRS fee should apply.

Interstate End User Revenues for Non-Interconnected VoIP Services Should Be Reported in Block 5 of FCC Form 499-A.

In the Notice of Proposed Rulemaking, the Commission proposes "to require non-interconnected VoIP services to report their interstate end user revenues as 'telecommunications revenues' on the FCC Form 499-A."[9] We appreciate the Commission's clarification that such reporting "would in no way prejudge issues concerning the appropriate regulatory classification of VoIP services" and its reassurance that the Wireline Competition Bureau ("WTB") will revise the form in the future to account for the expansion of the Act's requirements to non-interconnected VoIP. However, we request that the Commission alter its proposal so that non-interconnected VoIP providers can report their revenues in Block 5, Line 510 of Form 499-A, which is used to report the total for the additional revenue breakouts, rather than in Block 4.

As the Commission knows well, when it expanded the Universal Service Fund to include interconnected VoIP providers, a number of state governments and public utility commissions used the fact that such providers are required to file Form 499-A to argue that interconnected VoIP providers should be subject to various state rules and regulations governing telecommunications services.[10] Reporting revenues for non-interconnected VoIP as "additional revenue" in Block 5 in the interim before the WTB is

[9] NPRM, ¶ 19.
[10] *See, e.g.*, California Public Utilities Commission, *Order Instituting Rulemaking on the Commission's Own Motion To Require Interconnected Voice Over Internet Protocol Service Providers To Contribute To the Support of California's Public Purpose Programs*, Rulemaking 11-01-008, 2011 WL 731937 (Cal. P.U.C. Jan. 13, 2011).

able to revise the form would help prevent any prejudgment or misinterpretation of the regulatory classification of non-interconnected VoIP services. Since there is no option for "non-interconnected VoIP" in Line 105 of Form 499-A, reporting revenues as a dollar figure in Block 5 also would help clearly identify the filer as a non-interconnected VoIP provider. This change would have no impact on the nature or quality of the information collected by the Commission but it would have significant benefit for Form 499 filers and avoid unnecessary skirmishes at the state level.

We appreciate the Commission's work on the draft proposals, and we believe that the two clarifications outlined above will help ensure that telecommunications relay services continue to be "available, to the extent possible and in the most efficient manner" to Americans with disabilities.[11] The VON Coalition looks forward to working with you and other stakeholders on this important issue as the Commission implements the CVAA.

Please contact me directly if you have any questions.

Sincerely,

Glenn S. Richards
Executive Director

Cc: Rosaline Crawford
William Dever
Eliot Greenwald
Vicki Robinson
Jamel Vinson

[11] 47 U.S.C. § 225(b)(1).