Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Vermont Telephone Company Petition for Declaratory Ruling Whether Voice Over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers	WC Docket No. 08-56

REPLY COMMENTS OF JOHN STAURULAKIS, INC.

John Staurulakis, Inc. ("JSI") hereby submits these reply comments in response to the invitation of the Federal Communications Commission ("FCC" or "Commission") to comment on the petition filed by Vermont Telephone Company ("VTEL") seeking clarification regarding whether Voice over Internet Protocol ("VoIP") providers are entitled to the interconnection rights of telecommunications carriers.[1]

JSI is a consulting firm offering regulatory, financial and business development services to more than two hundred rate-of-return rural incumbent local exchange carriers ("LECs") throughout the United States and their affiliated companies that provide telecommunications, broadband Internet and video services to rural communities. Through participation in state commission proceedings on behalf of its clients and through assisting its clients in establishing various types of interconnection arrangements, JSI has observed that a great need exists for the

[1] *Pleading Cycle Established for Comments on Vermont Telephone Company's Petition for Declaratory Ruling Regarding Interconnection Rights*, Public Notice, WC Docket No. 08-56, DA 08-916 (rel. Apr. 18, 2008).

FCC to clarify the regulatory framework which governs the provision of VoIP services by cable companies which purportedly provide both telecommunications and VoIP services through various affiliated entities. As demonstrated by the VTEL in its petition and by the responses of commenters, the lack of clarity in this regard has resulted in confusion among telecom carriers, federal and state regulatory bodies and most importantly, consumers. JSI echoes the plea of state commissions and other commenters and urges the Commission to ensure that in granting VoIP providers the privileges of telecommunications carriers, these providers must also assume the concomitant responsibilities.

I. FCC Should Clarify What Constitutes a Telecommunications Carrier for the Purpose of Providing Wholesale Services to an Affiliated VoIP Provider

JSI agrees in part with other commenters that the question raised by VTEL regarding whether or not Comcast Phone of Vermont ("Comcast Phone") is a telecommunications provider is "an evidentiary assessment that should be determined by the Vermont Public Service Board."[2] JSI is extremely concerned, however, that state commissions lack the necessary guidance from the FCC on the issue as to what constitutes a "telecommunications carrier." For example, commenters representing cable providers are quick to point out that "[i]t is absolutely clear under Commission's rules that the Comcast [competitive LEC] entity is entitled to interconnect with VTEL under Section 251 of the Act."[3] These commenters assume that VTEL is unaware of the FCC Bureau's ruling in which it declared that "'telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs . . . for the purpose of providing

[2] Comments of AT&T, Inc. at 2.

[3] Comments of the National Cable & Telecommunications Association at 2.

wholesale telecommunications services' to VoIP providers."[4] While it is true that in the *Time Warner Order*, the Bureau has clearly ruled that entities which satisfy all of the requirements of telecommunications carriers may provide wholesale services to VoIP providers, it is not clear as to what extent that ruling applies when an entity that calls itself a telecommunications carrier provides wholesale service only to VoIP providers which may or may not be affiliated with the entity.

In its comments, Comcast admits that Comcast Phone, the entity that it claims provides wholesale service to its affiliated VoIP provider in Vermont, Comcast IP Phone II, LLC ("Comcast Digital Voice"), "currently provides service to only one customer (Comcast Digital Voice)" and then asserts that this does not disqualify Comcast Phone from being a telecommunications provider because "common carriers routinely offer service packages for 'a single customer [that] are specifically designed to meet the needs of only that customer.'"[5] This assertion, however, is in stark contrast to the FCC's Enforcement Bureau's recent assessment in which it stated,

> Here, Bright House and Comcast have failed to show by a preponderance of the evidence that, with respect to the telecommunications provided to Bright House and Comcast, their affiliated Competitive Carriers publicly hold themselves out as offering those telecommunications indiscriminately to any and all potential customers. The record contains no evidence that the Competitive Carriers affiliated with Bright House and Comcast have ever provided the telecommunications at issue to any entity other than Bright House and Comcast, respectively. The record also lacks any evidence that the Competitive Carriers affiliated with Bright House and Comcast have ever offered the telecommunications at issue in any public written or oral communication, such as a tariff, an advertisement, a brochure, a hand-out, a press release, an industry

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[4] Comments of Time Warner Cable, Inc. at 2-3 citing *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunicaitons Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) ("*Time Warner Order*").

[5] Comments of Comcast Corporation at 8, n.24. *citing MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990). As explained further under Section II below, Comcast is a "fixed" VoIP provider and differs significantly from the type of VoIP service provided by Vonage which is "nomadic."

> trade-show presentation, or a website posting. This absence of any public written or oral offering, coupled with the absence of any non-affiliated customers, is dispositive.
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> Bright House and Comcast rely heavily on the facts that their affiliated Competitive Carriers have obtained state certificates and interconnection agreements, arguing that those documents constitute public declarations of their willingness to provide telecommunications indiscriminately to all potential customers. Their arguments overlook the black-letter proposition that an entity may be a common carrier (*i.e.*, an entity that provides 'telecommunications service') with respect to some forms of telecommunications and not others. The Competitive Carriers' state certificates and interconnection agreements may suggest that the Competitive Carriers publicly offer some forms of telecommunications, but there is no evidence in the record that those documents constitute a public offering of the particular telecommunications provided by the Competitive Carriers to Bright House and Comcast.
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> Bright House and Comcast also rely heavily on declarations filed in this proceeding of corporate officers asserting that their Competitive Carriers will serve all similarly situated customers indiscriminately. This *post-hoc* attempt to 'self-certify' their common carrier status, though not inconsequential, falls short. Objective evidence regarding the substance of the Competitive Carrier's conduct trumps these belated characterizations of the Competitive Carriers' alleged subjective intent.
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> Thus, in sum, we recommend that the Commission conclude that the record fails to demonstrate that, with respect to the telecommunications provided to Bright House and Comcast, the Competitive Carriers affiliated with Bright House and Comcast provide 'telecommunications service' under the Act.

Unless and until the Commission addresses the Enforcement Bureau's recommendations, state commissions that are considering interconnection matters in which the provision of VoIP services are concerned may view any inquiry into whether the carrier meets the federal qualifications of a telecommunications carrier as a "barrier to competition" as the Vermont Department of Public Service has indicated in its comments.[6] This is indeed unfortunate as

[6] Comments of the Vermont Department of Public Service at 2.

VTEL has clearly stated in its petition that it "welcomes competition" and "fully supports policies that enhance such competition."[7]

In addition to addressing the use of an apparent sham affiliate to self-declare common carrier status and thereafter attempt to apply the determinations found in the *Time Warner Order*, the Commission should also address the application of Section 51.100(b) of the Commission's Rules, which states: "A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well."[8] This rule implies that a telecommunications carrier may not use an interconnection arrangement solely for the exchange of information service (and by extension any other non-telecommunications service). To the extent Comcast's affiliate is exchanging information service or VoIP service which is not yet classified as a telecommunications service,[9] the Commission should provide guidance of its rule that requires the exchange of telecommunications service over a specific interconnection arrangement (e.g., specific trunk connections) prior to using the same interconnection arrangement for the exchange of non-telecommunications traffic. Absent FCC guidance on this matter, the treatment of non-telecommunications traffic, including VoIP traffic, will reach another impasse with incumbent LECs who hold the view that this rule requires the exchange of telecommunications service over the specific interconnection arrangement sought by interconnecting telecommunications carriers.

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7 *Vermont Telephone Company's Petition for a Declaratory Ruling Regarding Interconnection Rights*, WC Docket 08-56, Petition (filed April 11, 2008) ("VTEL Petition").

8 47 C.F.R. § 51.100(b).

9 As noted by commenters, the regulatory classification of VoIP services has been pending for quite a while. *See, e.g.*, Comments of the California Public Utilities Commission ("California PUC") at 4 citing *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, NPRM, rel. Mar. 10, 2004.

For example, in order to arrange for interconnection with a telecommunications carrier, the traffic which will be exchanged through the arrangement must be a telecommunications service offering. In some instances, entities which are certificated by state commissions as telecommunications carriers may provide only transport that does not generate telecommunications traffic passing through the specific interconnection arrangement in question. In other instances, entities may provide wholesale arrangements to only VoIP providers. In either of these scenarios, no telecommunications traffic passes through the specific interconnection arrangement; consequently, there can be no entitlement to Section 251/252 interconnection under current FCC rules.[10]

II. FCC Should Ensure that VoIP Providers are Not Able to Use Regulatory Uncertainty to Advance Their Own Agendas

In its comments, the California PUC raises concerns that the FCC's lack of clarity regarding regulatory treatment of VoIP services has "left some important questions unanswered, giving carriers the opportunity to argue different theories at different times, thus creating a regulatory void where neither the FCC nor states oversee their actions."[11] The California PUC laments that VoIP providers are "tak[ing] advantage of the lack of clarity in FCC policies to advance their own interpretations" and cites an example in which Global NAPs was able to obtain a California Certificate of Public Convenience and Necessity "only to argue later that it

[10] *See* Comments of Feature Group IP at 9 ("Under 47 C.F.R. § 51.100(b) once a carrier is interconnected under § 251 and is offering a telecommunications service, then it is free to provide any other service [a]s well through that interconnection"). Please note that according to 47 C.F.R. § 51.100(b), the non-telecommunications service must be provided through the same interconnection arrangement between the two parties under which the telecommunications service is provided.

[11] *See* Comments of the California PUC at 6.

did not owe compensation to other carriers because the traffic in question was 'VoIP' in nature, and thus not subject to the interconnection agreement and to state oversight."[12]

Similarly, in its comments, the Washington Utilities and Transportation Commission ("Washington Commission") urges the FCC to "resolve the continuing ambiguity surrounding the regulatory status and statutory classification of VoIP-based service offerings and their service providers."[13] The Washington Commission recommends that the FCC extend interconnection rights to VoIP providers "by treating them as telecommunications carriers provided they are also required to assume the responsibilities and obligations of telecommunications carriers as well."[14]

One of the most egregious examples of how VoIP providers are using regulatory uncertainty to advance their own agendas is the way that cable companies have taken advantage of the lack of clarity regarding whether "fixed" VoIP services such as those provided by cable companies should be afforded the same treatment as has been afforded Vonage in the Commission's *Vonage Order*.[15] As noted by the Washington Commission, by "federalizing" the provision of VoIP service, "the FCC effectively thwarted state commissions' ability to address legitimate matters related to VoIP services, including the interconnection issues raised in the VTEL Petition."[16] Yet, as demonstrated by the FCC's Office of General Counsel ("OGC") in a Brief for Respondents filed on behalf of the Commission before the United States Court of

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[12] *Id.*

[13] Comments of the Washington Commission at 1.

[14] *Id*. at 3.

[15] *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), aff'd, Minnesota Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007) ("*Minnesota PUC Decision*"). In a fixed VoIP service, the location of the user is clearly identified and does not move from the location where customer's terminal equipment is located. This differs from Vonage's service which is "nomadic."

[16] Comments of the Washington Commission at 2.

Appeals for the Eighth Circuit, the FCC has yet to "federalize" fixed VoIP services provided by cable companies.[17] In its Brief, the OGC responded to an issue raised by the New York State Department of Public Service regarding the provision of fixed VoIP services by cable companies and explained that the FCC made a "prediction" in the Vonage Order by stating that "it was 'highly unlikely' that 'it would fail to preempt state regulation' of VoIP services that 'share similar basic characteristics' with DigitalVoice."[18] In the Brief, the OGC declared, "[t]he FCC's decision nowhere addresses fixed VoIP services, nor did the FCC have before it any particular state regulation seeking to regulate such services, …."[19] These statements made in the Brief were cited by the Eighth Circuit Court when it made its *Minnesota PUC Decision*. In this context, the court declared

> [t]he order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction. . . . Indeed, as we noted, the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the Vonage order.[20]

The concerns raised by these state commissions that VoIP providers are taking advantage of the lack of clarity in FCC policies to advance their own interpretations are based in strong public interest concerns. When cable companies have obtained state certification to provide telecommunications services and then discontinue the provision of local exchange and exchange access services to its customers so that it can provide VoIP services to those customers under a separate unregulated entity, customers become extremely confused. For example, attached to the

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[17] *Brief for Respondents, Minnesota Public Utilities Commission, et al. v. FCC,* Nos. 05-1069, 05-1122, 05-3114 & 05- 3118 (8th Cir.) ("Brief").

[18] *Id. at* 63.

[19] *Id.* at 22.

[20] *Minnesota PUC Decision*, 483 F.3d 570 at Section III *citing Universal Service Contribution Methodology,* 21 F.C.C.R. at 7546 ¶ 56.

VTEL petition are sample notices that were sent to customers by Comcast which fail to identify that the state certified Comcast entity, Comcast Phone, is no longer providing voice telecommunications service and that a new entity, Comcast Digital Voice will now be providing the service. Instead, the notice to the consumer states that one entity - Comcast "is changing its telephone service offerings" and does not provide any information to consumers that the customer is switching among separate companies.[21] Such confusion is harmful to the consumer and leads to frustration and ill-will directed at all providers of communications. FCC guidance on this matter will benefit carriers and consumers throughout the nation.

III. Conclusion

As demonstrated herein, lack of clarity regarding what constitutes a telecommunications carrier for the purpose of providing wholesale services to an affiliated VoIP provider and ambiguities surrounding the regulatory status of VoIP providers have created confusion among telecom carriers, federal and state regulatory bodies and consumers. Accordingly, JSI urges the Commission to fully address these issues and ensure that if VoIP providers are to be granted the privileges of telecommunications carriers; these providers must also assume the concomitant responsibilities.

Respectfully submitted,

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June 9, 2008

[21] Vermont Telephone Petition, Exhibit 2.