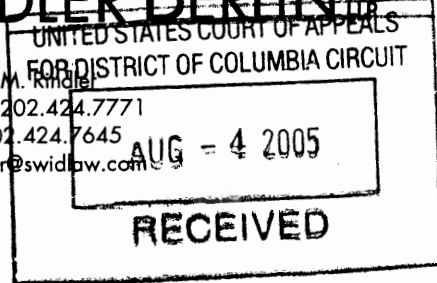


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VIA COURIER

August 4, 2005

The Honorable Mark J. Langer
Clerk, United States Court of Appeals, D.C. Circuit
E. Barrett Prettyman United States Courthouse, Room 5423
333 Constitution Ave., N.W.
Washington, DC 20001

Re: Case No. 05-1248, Petitioner Nuvio Corp. Motion for Expedited Consideration

Dear Mr. Langer:

On behalf of Nuvio Corporation, enclosed for filing are an original and four (4) copies of its Motion for Expedited Consideration.

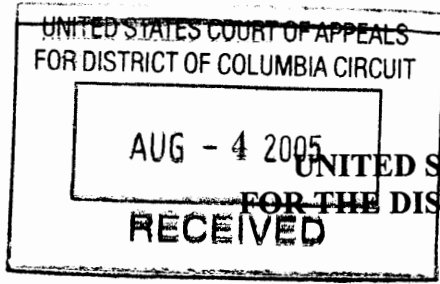
Kindly date-stamp and return the enclosed extra copy of the filing in the envelope provided. Please contact me at (202) 424-7771 if there are any questions concerning this filing. Thank you for your assistance.

Sincerely,

Richard M. Rindler

Counsel for Nuvio Corporation

Enclosures



IN THE
 UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUVIO CORPORATION,)	
)	
<i>Petitioner,</i>)	
)	
v.)	Case No. 05-1248
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and the UNITED STATES OF AMERICA,)	
)	
<i>Respondents.</i>)	
)	

MOTION FOR EXPEDITED CONSIDERATION

Pursuant to Federal Rule of Appellate Procedure 27, and Local Rule 27, Nuvio Corporation (“Nuvio”) respectfully requests that this Court expedite consideration of Nuvio’s pending petition for review of the Federal Communications Commission’s (“FCC” or “Commission”) rules adopted in *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116 (released June 3, 2005) (the “*Order*”). Before filing this Motion, Counsel for Nuvio consulted with the other petitioner, VoicePulse, who does not object to Nuvio’s motion. The Commission however, informed counsel for Nuvio that it does not consent to expedited consideration of this appeal.

FACTS

The *Order* at issue requires the provision of emergency dialing services known as Enhanced 911 (“E911”) in connection with voice over internet protocol (“VOIP”) telephony by November 28, 2005. E911 service is a specific form of emergency dialing service whereby

telephone calls, including the telephone number and physical address of the caller, are automatically delivered to 911 dispatch operators over dedicated telephone lines using a selective router owned (except in rare cases) by the Incumbent Local Exchange Carrier (“ILEC”) in the area. The selective router determines to which Public Safety Answering Point (“PSAP”) (also referred to as “911 center”) the call should be routed by looking at the originating telephone number with which it associates a fixed geographic location. VoIP calls, on the other hand, frequently cannot be automatically associated with a fixed geographic location.

VoIP is a voice application provided over the Internet by which consumers can communicate verbally with other VoIP users or with users of the traditional public telephone network by dialing ordinary ten-digit “telephone” numbers. VoIP users are able to obtain telephone numbers that are not tied to their geographic location — thus, a VoIP user in California may obtain a telephone number with the 212 area code normally associated with New York and make calls from California, or elsewhere, using that number (these numbers are typically called “non native” numbers). Further, the equipment for VoIP is smaller than most laptop computers and often is portable, therefore enabling consumers to use their VoIP service anywhere they can obtain a broadband connection (typically called “nomadic” VoIP).¹

The ability of VoIP service providers to offer E911 dialing service to date has been thwarted by several factors: first, because VoIP services may be used nomadically and customer’s “telephone numbers” are not associated with geographic addresses, but rather with IP addresses, VoIP service providers are not able to ascertain with any certainty where their customers are located when they place calls. Further, because selective routers were developed for the traditional wireline network in which telephone numbers are associated with fixed

¹ “Fixed” VoIP services are those that cannot be used portably or that are sold with the caveat that the user should not attempt to move the service to other locations.

geographic locations, these routers are not able to accept and route VoIP calls to the proper PSAPs without major technological adjustments or workarounds on the ILECs' systems.

Despite the clear record evidence that the technological obstacles are nowhere near being overcome, on June 29, 2005, the Commission published in the Federal Register the rules adopted by the *Order* under review, requiring VoIP service providers to provide E911 service to their customers within 120 days of the date the rules became effective. 70 Fed. Reg. 37273-37288. The rules became effective on July 29, 2005. Thus, the challenged *Order* requires the provision of E911 by VoIP service providers no later than November 28, 2005.

ARGUMENT

I. THE COURT SHOULD EXPEDITE CONSIDERATION OF THIS CASE

Expedition is appropriate when “the decision under review is subject to substantial challenge” and “delay will cause irreparable injury.” D.C. Cir. Handbook of Practice and Internal Procedures at 34. The Court also expedites cases “in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition.” *Id.* All of these criteria are satisfied here.

Nuvio fully supports the FCC's goal of protecting public safety, but respectfully submits that some of the specific requirements of the *Order* are subject to substantial challenge because they are unreasonable, arbitrary, and because technically infeasible, are capricious in light of the underlying record before the Commission, the existing technology and the Commission's own experience at similar regulation. Compliance with the Commission's Order requires a massive undertaking involving development of new technical capabilities, negotiation and implementation of new contractual agreements with carriers, technology vendors, and over 6,000 PSAPs and the deployment of new technology and technological fixes throughout the country —

all by November 28, 2005. Moreover, in its rush to adopt those rules, the Commission has put in place a regime whereby the impossibility of compliance with the *Order* will cause customers automatically to be deprived of choice — namely, their choice to avail themselves of VoIP services despite the fact that they affirmatively have chosen to do so after extensive disclosures regarding the limitations of the emergency dialing services they now are provided.

The *Order* is subject to substantial challenge in part because it adopted this aggressively short timetable in the face of overwhelming and undisputed evidence in the record that 120 days was an insufficient period in which to complete the massive undertaking required to comply with the *Order*.² Because of the inherent portability of many two-way interconnected VoIP services, the *Order* effectively places on each VoIP provider a requirement to provide E911 service everywhere in the United States since customers can utilize their service from any location where broadband Internet access services are available. The record establishes that a complete E911 solution that encompasses “non native” and “nomadic” VoIP services is not currently “technically or operationally feasible.”³ Even where companies currently provide 911 service for “fixed” VoIP they either do not deliver 911 service directly to the emergency operators at the 911 center,⁴ or their service is limited to certain markets in the United States,⁵ or service is

² See BellSouth Telecommunications, Inc. (“BellSouth”) *Ex Parte*, at 1 (filed May 12, 2005) (“It is unrealistic to expect” that the challenges of nomadic VoIP “will be fully implemented . . . by the end of the year.”) Subsequently, at the urging of “Commission staff,” BellSouth clarified its statement, claiming that its comments applied only to a certain solution rather than the “interim” solutions that were possible. Nonetheless BellSouth conceded that “changes may need to be made” in order to provide nomadic 911. See BellSouth *Ex Parte* Letter, filed May 16, 2005 at 1; National Emergency Number Association (“NENA”) *Ex Parte* at 4-5 (filed May 11, 2005) (“Full availability” of NENA standard access could require another 6-12 months, even if “fast tracked,” in addition to the 120 days required in the Order.) Other parties, including an incumbent LEC, suggest an 18-month timetable would be more realistic. See Qwest Communications, Inc. (“Qwest”) *Ex Parte* at 1-2 (filed May 12, 2005); EarthLink, Inc. (“Earthlink”) *Ex Parte* at 1-2 (filed May 12, 2005).

³ See Level 3 Communications, Inc. (“Level 3”) *Ex Parte* at 2-3 (filed May 12, 2005); Qwest *Ex Parte* at 1-2 (filed April 12, 2005) (describing that VoIP E911 trial in King County, Seattle, Washington “was not successful due to problematic technical issues”); Verizon Communications, Inc. (“Verizon”) *Ex Parte* at 1-2 (filed May 11, 2005).

⁴ Verizon *Ex Parte* at 2-3 (filed May 11, 2005).

provided with the caveat that the user should not move the service.⁶ Parties advised the Commission that if compliance were required where “access does not exist today, it would be tantamount to ordering the discontinuance of service to existing customers” to whom the limited VoIP E911 solutions on the market can not be offered.⁷

The Commission has conceded that “certain VoIP services pose significant E911 implementation challenges.” *Order* ¶ 25. For example, the Commission acknowledged that VoIP providers “have no reliable way to discern from where their customers are accessing the VoIP service,” thus precluding the VoIP provider from offering 911 calling service with automatic location information similar to that available from traditional wireline carriers. *See id.* While the Commission has stated that it “expects” the obligations imposed in the *Order* to “speed” the development of services and technology to enable improved VoIP E911 services by November 28, the *Order* aims to follow the precedent of the Commission’s imposition of E911 obligations on mobile wireless services; obligations which, despite the passage of more than 10 years since their imposition, still remain unfulfilled. *See id.*; *see also Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Joint Petition of CTIA - The Wireless Association™ and the Rural Cellular Association for Suspension or Waiver of the Location-Capable Handset Penetration Deadline, filed June 30, 2005 (requesting that the FCC suspend the December 31, 2005 deadline

⁵ *See Order* at ¶ 38 n.124 (citing Level 3 May 12 *Ex Parte* Letter at 2, stating that Level 3’s VoIP 911 solution is only available in 60% of the United States and only for “native” numbers.)

⁶ *See Comcast Corporation, Inc. (“Comcast”) Ex Parte.*, at 2 (filed May 12, 2005).

⁷ AT&T *Ex Parte* Letter, at 2-3 (filed May 9, 2005).

for wireless carriers to have 95 percent of their customers using a handset capable of providing location data for E911).⁸

Where the mobile wireless industry requires in excess of 10 years to meet its E911 obligations, the *Order* here expects VoIP providers to provide nationwide E911 access in 120 days. Within the 120 day period that concludes November 28, VoIP providers must negotiate with a host of entities on which the Commission's *Order* imposes no legal obligation to act rapidly or cooperatively: with incumbent LECs who own and control the wireline E911 network necessary to deliver 911 calls to the correct PSAP; with competitive local exchange carriers who, unlike Nuvio and other VoIP Providers, have the legal right to require that ILECs provide to them access to the Wireline E911 network; with approximately 6,000 PSAPs to ensure delivery and acceptance of Nuvio's 911 traffic; and with technology vendors that are struggling to overcome the technical challenges to complying with the *Order* such as non-native numbers and nomadic VoIP. While *the Order* suggests that solutions to the compliance challenge posed by the *Order* already exist, *see e.g. Order* ¶ 38, the *Order* recognizes that the wholesale VoIP 911 service to which it alludes is limited by geography as well as technical capability. *Id.* n. 124 *citing* Level 3 May 12, 2005 *Ex Parte* Letter (current service limited to "native" numbers and only in 60% of U.S.)

The record before the FCC shows that it will take substantially longer than 120 days for the VoIP industry to overcome the obstacles to a nationwide E911 solution that addresses non-

⁸ The Petition observes that "Implementation of the Commission's wireless E911 requirements has proven to be far more complex and costly than any of the stakeholders anticipated when the Commission first defined these requirements." The Petitioners claim that "the majority of ... carriers will not be able to satisfy the 95 percent penetration threshold by the end of this year... The primary hurdle to handset exchanges is that Phase II E911 service is not yet available in most U.S. communities." Petition at 6. Notably the Petition cites a Wall Street Journal Report that "only six states and the District of Columbia have accomplished the upgrades necessary to receive and utilize location data sent by wireless callers in most places in the state. Sixteen states have upgraded less than ten percent of their counties and six of those have not finished a single county." *citing* Anne Marie Squeo, Cellphone Hangup: When You Dial 911, Can Help Find You?, WALL ST. J., May 12, 2005, at A1.

native and nomadic services. While Nuvio intends to continue its intensive efforts to achieve compliance with the *Order*, even its best efforts are unlikely to create complete compliance, dependent as they must be on undeveloped technology and the rapid cooperation of third parties on which the *Order* imposes no enforceable obligations. In the event Nuvio and other VoIP Providers are unable to comply, the *Order* arguably requires them to disconnect existing customers even though those customers have received and continue to receive extensive disclosures regarding the differences between the emergency dialing services being provided to them at present and those that are provided to users of wireline E911 service.⁹ Absent disconnection, Nuvio will face potentially severe penalties for noncompliance and an associated diminishment of its business reputation. Thus, Nuvio's business is threatened with irreparable harm that can arise in a just a few short months from either an FCC-forced disconnection of its customers or noncompliance enforcement penalties.

Finally, forced disconnection of customers who already understand the limitations of the emergency dialing services being provided to them and that reside in areas where it is not possible for Nuvio to comply with the *Order* is contrary to the public interest. Therefore, these customers, who are "persons not before the Court," have an unusual interest in prompt disposition of this appeal, including their right to continue to receive VoIP services with knowledge of whatever emergency dialing limitations may exist with respect to that service. Thus, Nuvio respectfully asks that this Court expedite review of the *Order*, and enter such

⁹ In fact, in a recent Public Notice released by the Commission's Enforcement Bureau, the Commission made clear that it expects VoIP service providers to disconnect customers if they do not comply with the rules set out in the *Order*. According to the *Order*, VoIP service providers must obtain the affirmative acknowledgement from 100% of their customers that customers have read and understood the limitations associated with 911 services available through VoIP telephony. See *Order*, Appendix B, Rule 9.5(e)(2). The Enforcement Bureau's clarification provides that if VoIP providers are unable to obtain affirmative acknowledgement from 100% of their customers by August 29, 2005, VoIP service providers must disconnect such customers by August 30, 2005. See *Enforcement Bureau Provides Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning the July 29, 2005 Subscriber Notification Deadlines*, WC Docket Nos. 04-36 and 05-196, Public Notice, DA 05-2085 (July 26, 2005).

expedited briefing schedule as it deems appropriate, so that this Court can address the merits of Nuvio's appeal before November 28, 2005.

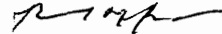
CONCLUSION

For the aforementioned reasons, Petitioner Nuvio's Motion for Expedited Consideration should be granted.

Respectfully submitted,

Nuvio Corporation

By:



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Its Attorney

August 4, 2005

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), Petitioner Nuvio Corporation certifies as follows:

A. Parties and Amici

The Petitioner is:

Nuvio Corporation (05-1248)

Respondents are the Federal Communications Commission and the United States of America.

There are no Intervenors at this time.

B. Rulings Under Review

Petitioner seeks review of the Federal Communications Commission's ("FCC") *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116 (released June 3, 2005) (the "*Order*"). On June 29, 2005, a summary of the *Order* was published in the Federal Register at 70 Fed. Reg. 37273-37288.

C. Related Cases

On July 11, VoicePulse Inc. filed a petition for review of the FCC's *Order* (FCC 05-116) in this Court (Case No. 05-1247).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of this Court, Nuvio Corporation (“Nuvio”) states as follows: Nuvio provides Voice Over Internet Protocol (“VoIP”) services interconnected with the public switched telephone network. Nuvio is a privately held corporation. No publicly held corporation holds a 10% or greater interest in Nuvio, directly or indirectly.

CERTIFICATE OF SERVICE

I, Richard M. Rindler, hereby certify that a copy of the foregoing Motion was served by hand delivery this 4th day of August, 2005, on each of the parties in the attached list.



Richard M. Rindler

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