

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

In the Matter of

Communications Assistance for  
Law Enforcement Act

and

Broadband Access and Services

ET- 04-295

RM-10865

COMMENTS OF NUVIOCORPORATION

Summary

In the discussion below, Nuvio Corporation (“Nuvio”) makes the following major points:

1. ***Evenhanded Application:*** If the Commission decides to assign obligations pursuant to The Communications Assistance to Law Enforcement Act (“CALEA”) to Voice over Internet Protocol (“VoIP”) providers, in order to be effective, it would have to do so evenhandedly and assign obligations to all VoIP providers *and*, by the same logic, to all providers of packetized data communications services – for instance, all instant messaging and all on-line chat room services. To rule otherwise would invite terrorists and criminals to circumvent lawful surveillance by using VoIP providers or other services ostensibly exempt from CALEA.
2. ***Financial Assistance:*** In past circumstances, for example, the assigning of CALEA obligations to wireless Time Division Multiplex (TDM) providers, affected parties received financial support from the government in order to make their networks amenable to CALEA. Nuvio urges the Commission to study that precedent here and to advocate support for such financial assistance from existing Department of Justice (“DOJ”) funds or new appropriations as may be necessary to give effect to the country’s homeland security priorities.
3. ***VoIP is a New Paradigm for Assisting Law Enforcement:*** The advent of VoIP and its growth as an alternative to traditional voice communications requires a completely new evaluation of how law enforcement interacts with communications networks. In important ways, VoIP simplifies legitimate law enforcement surveillance of network traffic. To apply old norms and rules to a new system will be inefficient and will produce suboptimal results for the public and the law enforcement community entrusted with public safety and national security.

## **Discussion**

### **1. The Commission Should Apply Any CALEA VoIP Obligations Evenhandedly**

The Commission lately has wrestled with declaratory ruling petitions addressing how different kinds of VoIP are or should be classified under the Telecommunications Act of 1996 – whether as telecommunications services or information services. The Commission has decided that one particular VoIP service, Free World Dialup (“FWD”), offered by pulver.com, is not a telecommunications service, relying in part on the “closed” nature of the network offered by FWD. By contrast, the FCC has ruled that VoIP services offered by AT&T are telecommunications services, relying in part on the fact that the services touch the Public Switched Telephone Network (“PSTN”) in at least some instances.

Whatever the merits of this classification system and its underlying rationales may be for purposes of assessing and assigning some obligations under the Telecommunications Act of 1996, the FCC should not apply this parsing approach to CALEA obligations. Nuvio acknowledges the legitimate need of the law enforcement community to obtain access to networks carrying voice communications in authorized circumstances. That being the case, it makes no sense, and would be counterproductive, to assign those obligations selectively depending upon the “closed” or “open” nature of the network, or whether the service is classified as telecommunications service or information service. Not only does this draw lines that favor some VoIP providers over others commercially by selectively imposing public interest mandates; far more importantly, creating loopholes with respect to CALEA obligations will only mean that those who wish to escape surveillance will seek out and gravitate to VoIP providers whose services are exempt from CALEA obligations. This is not

in the public interest. Nuvio strongly urges the FCC to impose such CALEA obligations as it deems appropriate for VoIP providers to *all* VoIP providers.

Nor is this logic bounded by VoIP offerings. Terrorists and criminals intent on keeping their communications out of channels subject to CALEA will easily discern opportunities to communicate in real time via the instant messaging services offered by AOL and MSN, for example – unless these services are also subjected to CALEA obligations. Likewise, live chat functionalities commonly available on-line, for example, through Yahoo!, could provide a loophole attractive to those intent upon avoiding surveillance. The logic of applying CALEA obligations to VoIP dissolves unless these means of communications are accessible to CALEA surveillance, too. Naturally, expanding CALEA to these other services and providers raises a host of issues, including many touching upon the privacy of the legitimate, law-abiding users of these services and customers of these providers. This underscores the importance of proceeding carefully with full awareness of the consequences of going down the path of applying CALEA obligations to VoIP providers as the first step down this path.

## **2. Financial Assistance for CALEA Implementation in VoIP is Essential and Appropriate**

Nuvio, as a growing VoIP provider, is prepared to accept the responsibility of assisting the law enforcement community pursuant to CALEA insofar Nuvio believes that CALEA implementation is in the public interest and in the interest of homeland security. Since CALEA implementation with respect to VoIP is in the public interest, it is appropriate for the federal government to extend financial assistance to VoIP providers implementing this mandate. There is precedent for extending such assistance; specifically, federal assistance to TDM wireless providers for implementation of CALEA obligations. Extending such assistance will ensure prompt implementation of any CALEA obligations that the FCC

decides to apply while minimizing the risk that honoring the CALEA mandate will slow propagation of increasingly popular VoIP services. Nuvio urges that the FCC make its adoption of any new CALEA obligations on the part of VoIP providers contingent upon the availability of funding through the Department of Justice, including newly appropriated funds if necessary.

### **3. VoIP is a Paradigm Shift for CALEA; New Thinking is Required**

The law enforcement community's job in conducting legitimate surveillance may become substantially easier and more efficient as to execution with the advent and increasing adoption of VoIP. No longer will physical proximity or access to switches or facilities be important to execution of a warrant; secure web-enabled interfaces will permit swift and efficient remote access from virtually any location by properly authorized personnel. This may be especially relevant in the execution of national jurisdiction warrants under the USA PATRIOT Act.

Given these circumstances, the FCC ought to consider carefully how it accomplishes the aims of CALEA with respect to VoIP. The advantage of considering the applicability of CALEA early in the adoption cycle of VoIP is a substantial process advantage. Nuvio looks forward to working with the Commission to redefine the law enforcement community's interface with voice communications service providers.

Respectfully submitted

//signed//

Jason P. Talley  
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Nuvio Corporation

//signed//

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