

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

In the Matter of)
)
)
Request for Review by InterCall, Inc. of) CC Docket No. 96-45
Decision of Universal Service Administrator)
)

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (“VON”) submits the following comments in response to the Commission’s public notice regarding two petitions seeking reconsideration¹ of the Commission’s *InterCall Order*.² As a coalition of leading VoIP companies on the cutting edge of developing innovative voice and Internet services, VON is uniquely positioned, both in the economy and in this proceeding, to speak on behalf of providers of emerging technologies that integrate information services and voice communications.

VON echoes the concerns raised by the Reconsideration Petitions that the Commission’s analysis in the *InterCall Order* changed the standard for what constitutes an integrated information service, in the course of one company’s USAC appeal. Alternatively, to the extent that the Commission declines to reconsider its holding in the *InterCall Order*, VON is

¹ *Comment Sought on Petitions for Reconsideration and Clarification of the Commission’s InterCall Order Filed by Global Conference Partners, A+ Conferencing Ltd., Free Conferencing Corporation, and The Conference Group*, Public Notice, CC Docket No. 96-45, DA 08-1875 (rel. Aug. 8, 2008); *Petition for Partial Reconsideration and Clarification of the InterCall Order of Global Conference Partners*, CC Docket No. 96-45 (filed July 30, 2008); *Petition for Reconsideration of A+ Conferencing, Ltd., Free Conferencing Corporation, and The Conference Group*, CC Docket No. 96-45 (filed July 30, 2008) (collectively “Reconsideration Petitions”).

² *See Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731 (2008) (“*InterCall Order*”).

particularly concerned about the broad language in the decision and the potential for confusion about the regulatory status of integrated information services that are factually dissimilar to InterCall's service. Accordingly, VON calls upon the Commission to clarify that decision in the following two ways. *First*, the Commission should confirm that this decision applied existing precedent, and did not adopt a new test for what constitutes an integrated information service. *Second*, the Commission should clarify the reach of the InterCall decision to make clear it does not cover information services that include a functionally integrated voice communications function. By making these simple clarifications, the Commission can quell the regulatory uncertainty inadvertently caused by the *InterCall Order*, which otherwise will stifle investment and innovation in valuable new products and services.

I. THE *INTERCALL ORDER* DID NOT ADOPT A NEW TEST FOR WHAT CONSTITUTES AN INTEGRATED INFORMATION SERVICE.

Even if the Commission declines to reconsider the holding of the *InterCall Order*, the Commission should confirm that this decision did not supplant established Commission and Supreme Court precedent, but rather applied it to determine the proper statutory classification and regulatory obligations of the service at issue. Otherwise, the broad language in the *InterCall Order* could be misread as adopting an unprecedented and unworkable new test for what constitutes an integrated information service.

In requiring InterCall to contribute to the Universal Service fund, the Commission held that the “audio bridging services provided by InterCall are telecommunications.”³ As the Commission explained, “the purpose and function of the bridge is simply to facilitate the routing of ordinary telephone calls” and that “this results in ‘no more than the creation of the

³ *InterCall Order*, 23 FCC Rcd at 10734 (¶ 7).

transmission channel chosen by the customer.”⁴ Importantly, the Commission reasoned that the additional features “offered in conjunction with InterCall’s conferencing service” including customer usage and billing information, muting, recording, erasing, and accessing operator services “do not alter the fundamental character of InterCall’s telecommunications offering so that the entire offering becomes an information service.”⁵ Citing the *Prepaid Calling Card Order*,⁶ the Commission found that these features are “not sufficiently integrated into the offering” because “the customer can still conduct its conference call with or without accessing these features.”⁷

VON is concerned that, without further clarification, the Commission’s fact-specific determination that InterCall’s services are not sufficiently integrated could be misinterpreted as an overly-restrictive new test for what constitutes a functionally integrated service. Such a test would deviate from established precedent, impose unwarranted regulation on innovative functionally integrated information and telecommunications services, and foster regulatory uncertainty that will stifle investment and innovation in information services.

The Commission and the Supreme Court previously have made clear that the “key question” for bundled telecommunications and information services is “whether the telecommunications transmission capability is ‘sufficiently integrated’ with the information service component ‘to make it reasonable to describe the two as a single, integrated offering.’”⁸

⁴ *Id.* ¶ 11.

⁵ *Id.* ¶ 13.

⁶ See *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7295-96, (¶¶ 14-15) (2006) (“*Prepaid Calling Card Order*”).

⁷ *InterCall Order*, 23 FCC Rcd at 10735 (¶ 13).

⁸ *Prepaid Calling Card Order*, 21 FCC Rcd at 7295 (¶ 14) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005)) (“*Brand X*”).

Where information service features are “functionally integrated” with telecommunications services, the product is an information service, *even though* it contains a telecommunications transmission component.⁹ Distinguishing such functionally integrated services, the Court delineated the limited circumstances in which bundling is insufficient: two services packaged together are insufficiently integrated where the “‘transparent’ information transmitted in the ensuing call [is] only *trivially dependent* on the information service” accompanying it.¹⁰

Whether information and telecommunications services are functionally integrated is necessarily a product specific, fact-based determination. As the Commission has recognized, determining “whether a service bundle is ‘sufficiently integrated’ to merit treatment as a single service” can “be difficult.”¹¹ It is not a simple matter of “whether subscribers use all of the functions provided as part of the service.”¹² Rather, the Commission must comprehensively analyze the specific services at issue, taking into consideration the “nature of the functionality” offered to the end user, and the relationship of the information service features to any telecommunications transmission component.¹³

As VON understands the *InterCall Order*, the Commission did not intend to break from this approach or otherwise establish a new test for functional integration. Rather the Commission applied existing precedent to the audio-bridging services at issue, and based on the

⁹ See *Brand X*, 545 U.S. at 967; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4824 (¶ 41) (2002) (“*Cable Modem Order*”); *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11539-40 (¶ 80) (1998) (“*Universal Service Report*”).

¹⁰ *Brand X*, 545 U.S. at 998 (emphasis added).

¹¹ *Prepaid Calling Card Order*, 21 FCC Rcd at 7295 (¶ 15).

¹² *Cable Modem Order*, 17 FCC Rcd at 4822 (¶ 38).

¹³ See *Universal Service Report*, 13 FCC Rcd at 11537 (¶75); *Cable Modem Order*, 17 FCC Rcd at 4821-23 (¶¶ 36-40); *Prepaid Calling Card Order*, 21 FCC Rcd at 7294-96 (¶¶ 13-15).

nature of those services, focused on the ability of a customer to conduct a conference call – a traditional telecommunications service – with or without accessing the accompanying information service features. VON asks that the Commission make clear that this focus was a function of the facts and the InterCall service at issue, and not meant to supplant Supreme Court and Commission precedent.

We are confident that the FCC would not rewrite its test for the regulatory classification of bundled information and telecommunications services by implication in the context of a request for review of a provider-specific USAC decision rather than in the course of an industry-wide rulemaking that provided clear notice of the sweeping changes under consideration.¹⁴ Furthermore, making the regulatory classification of a bundled service turn only on whether consumers can use the telecommunications component with or without additional information features is untenable for both legal and policy reasons.

To begin with, it would upend precedent, directly conflicting with the Commission’s *Cable Modem Order* decision, in which the Commission found cable modem service to be an information service “regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”¹⁵ Indeed, many integrated information services have information service features that can be toggled on and off by the consumer independent of the transmission component of the service. Additionally, such an over-inclusive test would arguably call into question the regulatory treatment of cable modem service and other Internet access services, all of which, as a factual matter, may be used with or without accessing information service features. Indeed, providers could be forced to reevaluate the

¹⁴ 5 U.S.C. § 553(b), (c).

¹⁵ *Cable Modem Order*, 17 FCC Rcd at 4822-4823 (¶ 38).

regulatory classification of any service that includes a transmission component but allows the user to turn on or off certain non-transmission functions.

Moreover, permitting regulatory classifications to change on the basis of how the consumer chooses to use a service is unworkable in practice. Service providers do not control a consumer's use of the service, but could nonetheless find their regulatory treatment turning on these third-party decisions. Perhaps most troubling, such a subjective test could result in classification decisions that vary by user session, creating an unworkable system that would, as a practical matter, force providers to treat even their most innovative services as highly-regulated telecommunications.

Finally, such a test would discourage flexibility and convergence by raising concerns over regulatory classification that will discourage development of services that incorporate voice communications and/or permit users to choose which features to use. By clarifying that the *InterCall Order* simply applies existing precedent to InterCall's services, and did not adopt a new test, the Commission can end this confusion and prevent such unintended consequences.

II. THE COMMISSION SHOULD CLARIFY THAT THE *INTERCALL ORDER* APPLIES ONLY TO SIMILARLY- SITUATED AUDIO-BRIDGING SERVICES AND DOES NOT BROADLY COVER ALL INFORMATION SERVICES THAT HAVE A VOICE COMMUNICATION COMPONENT.

The Commission should also clarify the scope of the *InterCall Order*. In holding that InterCall is a telecommunications provider, the Commission found that the “fundamental character” of InterCall's service is one which allows “end users to transmit a call (using telephone lines), to a point specified by the user (the conference bridge), without change in the form or content of the information as sent and received (voice transmission).”¹⁶ Again, as the Commission explained, “the purpose and function” of the service is “simply to facilitate the

¹⁶ *InterCall Order*, 23 FCC Rcd at 10734-35 (¶¶ 11, 13).

routing of ordinary telephone calls.”¹⁷ The Commission stated that its holding would apply to all similarly-situated providers, which it defined as “stand-alone teleconferencing providers as well as integrated teleconferencing providers.”¹⁸

That language, however, is potentially ambiguous. VON understands the term “integrated” teleconferencing providers as used in paragraph 26 of the *InterCall Order* to refer to providers of audio-bridging services that also own transmission capability, and not to refer to providers that offer information services with a functionally integrated voice communication feature. On reconsideration, the Commission should make clear that its decision: (a) only applies to services like InterCall’s: audio-bridging services, for which the fundamental character of the service is to “simply to facilitate the routing of ordinary telephone calls,” allowing “end users to transmit a call (using telephone lines), to a point specified by the user (the conference bridge), without change in the form or content of the information as sent and received (voice transmission);”¹⁹ and (b) does not apply to information services that allow end users to change the form or content of the information sent and received, even if the service includes a functionally integrated voice communication component.²⁰

This clarification is needed to prevent the *InterCall Order* from being misread to cover unregulated information services that may also offer functionally integrated voice communication features. *Brand X* and the Commission’s precedents make clear that services with core features that entail the processing, altering, changing, or protocol conversion of information are information services, even if they are provided via an underlying

¹⁷ *Id.*

¹⁸ *Id.* ¶ 26.

¹⁹ *Id.* ¶¶ 7, 11.

²⁰ For example, the *InterCall Order* plainly does not, and should not, cover forms of conferencing other than audio-bridging services.

telecommunications transmission component. VON submits that this conclusion does not change merely because the information service may also include an integrated voice communication feature.

Without such clarification, the *InterCall Order* could be misread to create confusion about the regulatory status of a whole host of information services. The inclusion of PSTN voice transmission could be incorrectly perceived as sufficient to treat services that fundamentally alter communications as telecommunications services.²¹ Voice has been integrated into a wide range of information services, and the Commission should not discourage these technological developments by inadvertently suggesting that enabling voice transmission over the PSTN can convert an unregulated service into a regulated service. Indeed, innovation has already brought a variety of beneficial information services to the market and many of these incorporate or may in the future incorporate voice transmission that interconnects with the PSTN. For example, many virtual collaboration web and video conferencing services that allow participants in different locations to work collaboratively to share and edit documents and other information also include a voice transmission component. Similarly, many of the most popular video game products enable multiplayer gaming with an in-game voice communications component. Many web-based services aimed at increasing communications access for persons with disabilities by, for example, converting voice to text or text to voice may wish to enable transparent voice transmission in some circumstances. And click to call services that enable voice communications are increasingly being built into consumer and social networking websites. While the Commission was not addressing such services in this proceeding, the ambiguous

²¹ Of course, the *InterCall Order* on its face cannot be read to cover voice communication services that do not interconnect with the PSTN. See *id.* ¶¶ 11, 26 (applying decision to similarly-situated services that “transmit a call (*using telephone lines*)” (emphasis added)).

language in the *InterCall Order* could create regulatory uncertainty about the classification of such services if they do interconnect with the PSTN and could discourage these and other services from including provision of voice communication features that interconnect with the PSTN. To prevent this, the Commission should confirm that the *InterCall Order* covers only audio-bridge conferencing services like InterCall's service.

III. THE COMMISSION SHOULD END THE UNCERTAINTY CAUSED BY THE INTERCALL ORDER.

As discussed above, the broad language of the *InterCall Order* could be misread as adopting a new test for integrated information services or misapplied to services that are factually different from the audio-bridging services at issue. Inadvertently, therefore, the Commission's enforcement proceeding against InterCall has created uncertainty about its regulation of information services that include a voice communication feature. The Commission should take the opportunity on reconsideration to end this confusion.

Without a clear understanding of the Commission's test for what constitutes a functionally integrated information service, pervasive regulatory uncertainty will chill investment and innovation in precisely the kind of services demanded by American businesses and consumers. As it stands, the *InterCall Order* creates an unnecessary risk of inconsistent or overbroad regulation. The services most affected are innovative new products and services, such as virtual collaboration services that allow multiple people in different locations to process, alter, and change information, and which may include PSTN voice communication functions. Such services have real and increasing value in today's economy, making workplaces more efficient and productive while providing environmental benefits by cutting down on commuting. In addition, they allow companies to reach out to and benefit from the expertise of employees in rural, harder-to-reach locations.

Finally, to ensure that the Commission's regulatory classification decisions are not constrained by concerns about the sustainability of the Universal Service Fund, the Commission should immediately adopt comprehensive numbers-based universal service reform.²² This simple step will ensure that the Commission is free to make critical regulatory classification decisions without concern over their effect on universal service policy.

VON shares concerns raised by the Reconsideration Petitions about the *InterCall Order*. To the extent that the Commission declines to reconsider its holding, the Commission must, at a minimum, end the uncertainty arising from the *InterCall Order*. On reconsideration, the Commission should make clear that the *InterCall Order* follows *Brand X* and Commission precedent rather than supplanting it. And it should clarify that the *InterCall Order* applies to similarly situated audio-bridging services, but not to factually dissimilar information services with a PSTN voice communication component.

Respectfully submitted,

/ s /

Jim Kohlenberger
THE VON COALITION
5411 Alta Vista Rd.
Bethesda, MD 20814
(703) 237-2357

September 8, 2008

²² See, e.g., VON Coalition Reply Comments, CC Docket No. 96-45 (filed Apr. 18, 2003); VON Coalition Reply Comments, CC Docket No. 96-45 (filed May 13, 2002).