

BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA



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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
(Filed January 13, 2011)

OPENING COMMENTS OF VERIZON AND VERIZON WIRELESS

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s.htm](http://www.cpuc.ca.gov/PUC/Telco/Consumer+Information/surcharge
s.htm) [last accessed Mar. 7, 2011]4

Pursuant to the Order Instituting Rulemaking (OIR) in the above-referenced proceeding, Verizon¹ submits these Opening Comments on the OIR.

I. INTRODUCTION

The Commission should not require Voice over Internet Protocol (“VoIP”) providers to collect and remit state universal service fund (“SUSF”) surcharges in California. Imposing legacy telephone taxes on new communications technologies would discourage growth and investment in this new technology, contrary to California’s statutory telecommunications policy. Moreover, the Commission’s own data conclusively demonstrate that there is no shortage of funds to support California’s universal service programs. In fact, the data show exactly the opposite: the programs enjoy ample funding support — so much so that the Commission has decreased total SUSF surcharges by 52% since 2006. Accordingly, there is no need to tax VoIP providers and their customers in order to support universal service in California.

In addition, the Commission lacks the statutory authority under the Moore Act and related Public Utilities Code provisions to impose SUSF collection-and-remittance requirements on VoIP providers. The OIR’s tentative conclusion that VoIP providers are “telephone corporations” under the Public Utilities Code is contrary to law. In fact,

¹ For purposes of this filing, “Verizon” includes:

- a) These wholly owned subsidiaries of Verizon Communications Inc. operating in California: Verizon California Inc. (U-1002-C), MCI Communications Services, Inc., d/b/a Verizon Business Services (U-5378-C), MCImetro Access Transmission Services, d/b/a Verizon Access Transmission Services (U-5253-C), TTI National, Inc., d/b/a Verizon Business Services (U-5403-C), Teleconnect Long Distance Services & Systems Company, d/b/a Telecom*USA (U-5152-C), Verizon Enterprise Solutions LLC (U-5658-C), Verizon Long Distance LLC (U-5732-C), and Verizon Select Services Inc. (U-5494-C); and,
- b) These entities doing business as “Verizon Wireless” in California: Cellco Partnership (U-3001-C), California RSA No. 4 Limited Partnership (U-3038-C), Fresno MSA Limited Partnership (U-3005-C), GTE Mobilnet of California Limited Partnership (U-3002-C), GTE Mobilnet of Santa Barbara Limited Partnership (U-3011-C), Los Angeles SMSA Limited Partnership (U-3003-C), Modoc RSA Limited Partnership (U-3032-C), Sacramento Valley Limited Partnership (U-3004-C), Verizon Wireless (VAW) LLC (U-3029-C), and WWC License L.L.C. (U-3025-C).

in the analogous area of E911 surcharges, the Legislature recently determined that legacy statutory definitions applicable to “communication by telephone” are inadequate to cover new technologies like VoIP. Accordingly, if the Commission concludes that SUSF assessment of VoIP providers is necessary — despite the disincentives to investment and innovation that would result — then the Commission must obtain an express Legislative grant of authority in order to achieve that limited purpose, just as the Legislature did with respect to E911 surcharges.

II. ARGUMENT

A. THE COMMISSION SHOULD NOT AS A POLICY MATTER REQUIRE VOIP PROVIDERS TO COLLECT AND REMIT SUSF SURCHARGES.

1. Taxing New Technologies Will Discourage Investment and Innovation, Contrary to California’s Telecommunications Policy.

Imposing legacy telephone taxes on VoIP providers and customers will result in higher prices, discourage innovation and investment, and ultimately harm consumers — all of which undermine California’s pro-growth, pro-investment telecommunications policy. Such taxes discourage customers from adopting new, innovative services that spur competition in the communications market and thus deter providers from investing to deploy and offer such services. The result is bad for customers and contrary to California’s statutory telecommunications policy, which requires the Commission (among other things):

(c) To encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.

(e) To promote economic growth, job creation, and the substantial social benefits that will result from the

rapid implementation of advanced information and communications technologies by adequate long-term investment in the necessary infrastructure.²

The lack of a policy rationale for taxing VoIP providers and their customers is particularly apparent where, as here, there has been no demonstration that universal service would otherwise be unavailable or unaffordable, that alternatives to traditional wireline service do not exist, or that wireline carriers could not provide service without such funds. For these reasons, the Commission should not require VoIP providers to collect and remit SUSF surcharges in California.

2. The Commission Does Not Need to Impose Legacy Telephone Taxes on VoIP Customers as California’s Universal Service Programs Are Stable and Sustainable at Current Funding Levels.

In addition to the disincentives to innovation and investment that would result by taxing VoIP providers and their customers, the Commission’s own data conclusively show that there is no need to do so, as each of the state’s universal service programs is stable and sustainable at current funding levels. The OIR acknowledges this point, noting the Commission’s 2008 finding that there is “no significant, near-term threat to the current intrastate surcharge methodology.”³ This finding remains true today. In fact, from 2006 to 2010, state universal service funding requirements actually *decreased*; accordingly, the Commission *reduced* the total SUSF surcharge by approximately 52%, as shown in Table 1:

² Pub. Util. Code § 709, subds. (c), (e).

³ OIR at 3, n.4, citing *Rulemaking on the Commission’s Own Motion to Review the Telecommunications Public Policy Programs, Rulemaking (R.) 06-05-028*, Interim Decision Addressing California Teleconnect Fund, Payphone Enforcement and Public Policy Payphone Programs, and the Deaf and Disabled Telecommunications Program, D.08-06-020 (June 12, 2008).

Table 1: California SUSF Surcharge Rates From 2006 to 2010⁴

Effective	Lifeline	DDTP	CHCF-A	CHCF-B	CASF	CTF	Total
12/01/2010	1.150%	0.200%	0.000%	0.450%	0.00%	0.079%	1.879%
05/01/2010	1.150%	0.200%	0.110%	0.450%	0.00%	0.079%	1.989%
01/01/2010	1.150%	0.200%	0.130%	0.450%	0.00%	0.079%	2.009%
12/01/2009	1.150%	0.200%	0.130%	0.450%	0.250%	0.079%	2.259%
06/01/2008	1.150%	0.200%	0.130%	0.250%	0.250%	0.079%	2.059%
01/01/2008	1.150%	0.200%	0.130%	0.250%	0.250%	0.130%	2.110%
04/01/2007	1.150%	0.370%	0.210%	1.300%	N/A	0.130%	3.160%
08/01/2006	1.290%	0.050%	0.210%	2.000%	N/A	0.130%	3.680%
01/01/2006	1.290%	0.270%	0.210%	2.000%	N/A	0.130%	3.900%

Further illustrating the lack of any funding issue, the Communications Division recently issued a draft resolution that would further reduce the CHCF-B surcharge rate from 0.45% to 0.30% effective May 1, 2011, based on its conclusion that the program “has a surplus of funds and that the surcharge should be reduced to better match revenues with expenses.”⁵ The Communications Division found that such a reduction “should allow the CHCF-B fund to have sufficient revenues to cover program expenditures while reducing the surplus in the fund.”⁶ Under these circumstances,

⁴ See “Surcharges and Taxes” – “CPUC Mandated Telecommunications All-End-User Surcharges” section of the Commission’s website at <http://www.cpuc.ca.gov/PUC/Telco/Consumer+Information/surcharges.htm> [last accessed Mar. 7, 2011].

⁵ Draft Resolution T-17311, Approval of the California High Cost Fund-B Fund Surcharge Rate of 0.30% Effective May 1, 2011, issued Feb. 22, 2011, at 3.

⁶ *Id.* at 5, Finding ¶ 8.

there is no reason for the Commission to fear a funding shortage, and thus no reason for it to consider expanding the funding base to VoIP providers and their customers.

B. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO REQUIRE VOIP PROVIDERS TO COLLECT AND REMIT SUSF SURCHARGES.

1. The Moore Act’s Requirements Apply Only to “Telephone Corporations.”

The Legislature defines the nature and scope of the Commission’s authority to design and implement each of the universal service programs that are the subject of this proceeding.⁷ The Legislature sets the objectives of each program and the manner by which they are funded. The principal statute that defines the Commission’s authority with respect to universal service is the Moore Universal Telephone Service Act.⁸ As the OIR correctly observes, the Moore Act and related statutory provisions impose certain universal service requirements on “telephone corporations,” including the requirement to collect from their end-user customers a surcharge based on a percentage of the customer’s charges for intrastate services.⁹ The requirements of the Moore Act and related provisions apply only to “telephone corporations,”¹⁰ as defined by the Public Utilities Code; the Commission lacks the authority to impose such requirements on providers that are not “telephone corporations.”

⁷ See OIR at 13–14.

⁸ See Pub. Util. Code §§ 871 *et seq.*

⁹ See *id.* at §§ 270 *et seq.* (establishing funds for each universal service program in California applicable to “telephone corporations”)

¹⁰ See, e.g., *id.* at § 871.5(d) (“The furnishing of lifeline telephone service is in the public interest and should be supported fairly and equitably by every *telephone corporation*, and the commission, in administering the lifeline telephone service program, should implement the program in a way that is equitable, nondiscriminatory, and without competitive consequences for the telecommunication industry in California.”) See also *id.* at § 270(b) (“Moneys in the funds are the proceeds of rates and are held in trust for the benefit of ratepayers and to compensate *telephone corporations* for their costs of providing universal service.”) (Emphasis added.)

2. VoIP Providers Are Not “Telephone Corporations.”

In an attempt to extend the SUSF surcharge-collection requirements of the Moore Act to VoIP providers, the OIR tentatively concludes — incorrectly — that VoIP providers are “telephone corporations” under the Public Utilities Code.¹¹ This tentative conclusion is incorrect for two principal reasons.

First, the OIR fails to provide any statutory analysis to support the tentative conclusion. Instead, the OIR merely recites the applicable statutory definitions, which provide that any person or entity that owns, controls, operates, or manages assets that facilitate “communication by telephone” is a “telephone corporation.” The OIR then asserts — without any explanation or support — that these definitions are broad enough to include VoIP providers “for purposes of this proceeding.”¹² The OIR fails to explain how the Commission could purport to apply such a legacy definition to a technology that was not even invented or imagined at the time the definition was adopted by the Legislature over half a century ago. Indeed, the “modern” version of Public Utilities Code section 233, which defines “telephone line” and includes the operative language — “communication by telephone” — was enacted in 1951 and remains unchanged to this day. The OIR fails to cite any California legal authority showing that the Legislature intended VoIP providers to fall within this legacy definition. In fact, VoIP providers are not and never have been “telephone corporations” under the Public Utilities Code, and the Commission lacks the authority to “deem” a new technology to be a “telephone corporation.”

¹¹ See OIR at 27.

¹² See *id.* at 27, quoting Pub. Util. Code §§ 233 (defining “telephone line”), 234 (defining “telephone corporation”).

Second, the tentative conclusion contradicts recent legislation showing that the Legislature never intended to apply legacy statutory definitions to VoIP providers. That legislation — Senate Bill (SB) 1040 — was enacted in 2008 and requires interconnected VoIP providers to collect and remit E911 surcharges from their end users in California. Specifically, SB 1040 amended the Revenue and Taxation code to add a definition of “VoIP service” — mirroring the FCC’s definition — and to require VoIP providers, as defined, to collect E911 surcharges based on “the VoIP safe harbor factor established by the FCC to be used to calculate the service supplier’s contribution to the federal Universal Service Fund.”¹³ Prior to SB 1040, the Legislature assessed E911 surcharges solely on suppliers of intrastate “telephone communication services.”¹⁴ The Legislature determined that this preexisting definition — which mirrors the “communication by telephone” language in Public Utilities Code section 233 — provided no basis to require VoIP providers to collect E911 surcharges from their end users; accordingly, the Legislature articulated its express purpose and intention to “expand the definition ... to include any person supplying Voice over Internet Protocol (VoIP) service to any service user in this state.”¹⁵ This is clear evidence that the Legislature does not consider VoIP to fall within preexisting, legacy “telephone

¹³ Rev. & Tax Code § 41020, subs. (a)(2), (b)(1)(C).

¹⁴ Cal. SB 1040 (Kehoe) (2008) (Legislative Counsel’s Digest).

¹⁵ *Id.* Emphasis added. See also Rev. & Tax Code §§ 41007(a)(1)–(2), 41009 (amending the Rev. & Tax Code to define “service supplier” and “service user” for purposes of E911 surcharges to include both (1) “intrastate telephone communications services” and (2) “VoIP service”); *id.* at § 41019.5(a) (“It is the intent of the Legislature that telephone quality communication utilizing VoIP shall not be regulated by the enactment of Senate Bill 1040.... The sole purpose of this act is to ensure that all forms of telephonic quality communications that connect to the ‘911’ emergency system contribute ... and that this act may not be used by a court or administrative body for any purpose other than to interpret and apply this part.”)

communications” definitions; otherwise, the Legislature would not have needed to amend the Code to require VoIP providers to collect E911 surcharges.

Under fundamental principles of statutory construction, the Commission cannot ignore this legislative intent and arbitrarily read two similar code references (one relating to SUSF surcharges, the other to E911 surcharges) to mean different things. The “first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.”¹⁶ In so doing, the “words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.”¹⁷ Under these established principles, it would be error for the Commission to read “communication by telephone” in the SUSF-surcharge context to encompass VoIP providers, when the Legislature has already determined that analogous language with respect to E911 surcharges was *not* broad enough to include VoIP providers.¹⁸

¹⁶ *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (Cal. Sup. Ct. 1987) 43 Cal. 3d 1379, 1386–87.

¹⁷ *Id.*, citing *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844; *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; see also *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484–485.)

¹⁸ In addition, designating VoIP providers as “telephone corporations” under the Public Utilities Code would also violate this Commission’s own prior decision — repeatedly reaffirmed — to allow the FCC to determine the appropriate regulatory framework for VoIP. See D.06-06-010 at 3 (“Our investigation centered on determining the appropriate regulatory framework for VoIP. Since the FCC has determined that it is charged with that role and is exercising its authority, we conclude that it is premature for us to assess what our regulatory role over VoIP will be and to address the issues raised in this investigation.”); see also D.09-07-019 at n. 28 (declining to apply service quality regulations to VoIP providers because “in deference to the FCC’s pending rulemaking regarding VoIP and other IP-

3. The Commission Should Seek Legislative Guidance Given Gaps in Its Legal Authority to Require VoIP Providers to Assess SUSF Surcharges.

The discussion above shows that the Legislature never intended VoIP providers to fall within the legacy statutory definition of “telephone corporation.” Regardless, the Commission is correct to ask “whether we need to reach this conclusion in order to achieve [the Commission’s] limited purposes here.”¹⁹ The answer is no, the Commission is not in a position to reach this conclusion in order to resolve this proceeding. Rather, in separate legislation adopted in 1994 — Assembly Bill (AB) 3643 — the Legislature provided the Commission with clear guidelines with respect to reforming universal service in an era of “increasing competition in telecommunication services markets and newly emerging telecommunications technologies.”²⁰ AB 3643 expressly instructs the Commission to “report to the Legislature” with any “recommendations for legislative action” that the Commission finds necessary to implement its reforms.²¹ The Commission should follow these instructions and seek Legislative guidance before making any new rules with respect to VoIP providers in this proceeding — certainly before taking the unnecessary and unlawful step of deeming VoIP providers to be “telephone corporations” under the Public Utilities Code — as such an outcome may have implications far beyond the discrete issue of whether VoIP providers to collect and remit SUSF surcharges in California.

enabled services, this Commission has not adopted any final decision regarding the regulatory treatment of these services.”)

¹⁹ OIR at 28.

²⁰ Cal. AB 3643 (1994) at § 1(b), cited in OIR at 12, 13.

²¹ *Id.* at § 2(c) (“The commission shall complete its investigation and report to the Legislature its findings and recommendations for legislative action ... no later than January 1, 1996.”)

III. CONCLUSION

The Commission should not require VoIP providers to collect and remit SUSF surcharges from their customers. There is no need to broaden the funding base, as California's universal service programs are stable and sustainable at current levels. Imposing a legacy telephone tax on VoIP customers will serve only to discourage investment and innovation in this new communications technology. Nor can the Commission ignore the limitations on its statutory authority that prevent it from imposing new universal service obligations on VoIP providers, including the recent Legislative determination that legacy "telephone communication" statutory definitions do not apply to VoIP. Accordingly, the Commission cannot enforce new SUSF obligations on VoIP providers absent an express grant of authority from the Legislature, similar to the Legislature's recent precedent with respect to E911 surcharges.

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