

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)

**REPLY COMMENTS OF VERIZON AND VERIZON WIRELESS  
ON THE ORDER INSTITUTING RULEMAKING**

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March 22, 2011

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Pursuant to the Order Instituting Rulemaking (OIR) in the above-referenced proceeding, Verizon<sup>1</sup> submits these Reply Comments on the OIR.

## I. INTRODUCTION

Proponents of taxing VoIP for state universal service are unable to cite any need for additional universal service funds in California since, as Verizon previously demonstrated, each of the state's programs is stable and sustainable at current funding levels. Thus, their proposal is not only devoid of supporting facts, it is contrary to the Uniform Regulatory Framework (URF) principle that a clear need be identified before the Commission adopts new regulatory mandates. Requiring VoIP providers to collect and remit state universal service fund (SUSF) surcharges will serve only to discourage investment and innovation in new technologies that are expanding communications options for consumers — which would not be a sensible universal service policy.

If, however, the Commission is determined to proceed with this counterproductive approach, then it should remain narrowly focused on the OIR's explicitly "limited" and "modest" goal of determining whether interconnected VoIP providers should collect and remit state universal service surcharges. There is no need to wade into the contentious issue of federal VoIP preemption in order to address this limited objective. Instead, the Commission should focus on whether California law

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<sup>1</sup> For purposes of this filing, "Verizon" includes: 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), Verizon Select Services Inc. (U-5494-C); 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).

provides the necessary authority to answer the question raised by the OIR. It does not.

Current state law precludes the Commission from expanding state universal service contribution requirements to VoIP providers. Despite the unsupported, conclusory interpretations of some proponents, the Legislature does not consider VoIP providers to be “telephone corporations” that the Commission may regulate under the Public Utilities Code. The Legislature plainly demonstrated this fact when it recently expanded the E911 statute to apply to interconnected “VoIP service” and gave it a separate and distinct definition from the preexisting language that was limited to “intrastate telephone communication services.” If, despite the lack of any showing of need to expand the USF contribution base, the Commission wishes to tax VoIP customers with universal service surcharges, then it should seek similar legislation to achieve this specific, limited objective.

A legislative solution enjoys widespread support among commenters and will avoid the controversy associated with needlessly attempting to misinterpret legacy statutory definitions to deem VoIP providers to be “telephone corporations.” Indeed, CPD and TURN seek to use this issue as a pretext to “expand the scope” of this rulemaking and — ultimately — impose state common-carrier regulations on VoIP. CPD’s and TURN’s actions contradict the Commission’s explicit instructions that this OIR remain narrowly focused on state universal service issues and should be rejected on that basis alone.<sup>2</sup> A legislative solution would have the added benefit of avoiding any need to respond to CPD’s and TURN’s improper scoping proposals.

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<sup>2</sup> Verizon will address CPD’s and TURN’s proposals further in response to CPD’s separate motion on the subject since they raise the same procedural and substantive issues.

## II. ARGUMENT

### A. TAXING VOIP PROVIDERS AND THEIR CUSTOMERS WOULD UNDERMINE, NOT PROMOTE, UNIVERSAL SERVICE.

Proponents of taxing VoIP providers and their customers through universal service fund contributions fail to provide any evidence demonstrating any need for additional universal service revenues.<sup>3</sup> Although proponents cite the URF principles of competitive neutrality and regulatory parity, they overlook the first URF principle: Is there a need for new regulation?<sup>4</sup> As Verizon previously demonstrated, the answer is no. As this Commission's own data conclusively show, each of the state's universal service programs is stable and sustainable at current funding levels — so much so that from 2006 to 2010, the Commission *reduced* the total SUSF surcharge by approximately 52%.<sup>5</sup> There is, therefore, no reason to tax VoIP providers and their customers. The Commission should do all it can to encourage the continued evolution of VoIP and broadband networks in general. That means giving companies the freedom to innovate and invest without unnecessary regulatory burdens, like the universal service contributions proposed here. At a time when investment is critical to jump-start California's economy, this proposal would be exactly the wrong action to take and should not be adopted.

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<sup>3</sup> See, e.g., Response of Pacific Bell Telephone Company, etc. (Mar. 7, 2011) ("AT&T Opening Comments") at § II.A (asserting the "important public policy objective" of imposing SUSF surcharge requirements on VoIP providers but not demonstrating any actual need for the same); Greenlining Opening Comments on OIR (Mar. 7, 2011) ("Greenlining Opening Comments") at 1 (asserting "no reason not to proceed" with mandatory SUSF assessment of VoIP but providing no supporting data or rationale); Disability Rights Advocates Opening Comments on OIR (Mar. 7, 2011) ("Disabra Opening Comments") at 1–2 (same).

<sup>4</sup> *Order Instituting Rulemaking On The Commission's Own Motion To Assess and Revise The Regulation Of Telecommunications Utilities*, Rulemaking (R.) 05-04-005, Decision 06-08-030 ("URF Order") at 30–35 (holding that regulators should rely on competition, over regulation, whenever possible to promote consumer interests).

<sup>5</sup> See Verizon Opening Comments on OIR (Mar. 7, 2011) ("Verizon Opening Comments") at 3–5 and Table 1.

**B. THE COMMISSION MUST OBTAIN LEGISLATIVE APPROVAL BEFORE IT MAY REQUIRE VOIP PROVIDERS TO COLLECT AND REMIT STATE UNIVERSAL SERVICE SURCHARGES.**

**1. The Commission Lacks State Law Authority To Require VoIP Providers to Collect and Remit SUSF Surcharges.**

As Verizon has explained, because VoIP providers are not “telephone corporations” as defined in the Public Utilities Code, the Commission lacks the authority under the Moore Universal Telephone Service Act and related provisions to impose universal service surcharge requirements on VoIP providers.<sup>6</sup> Contrary to AT&T’s argument, this analysis holds true for all VoIP providers, whether they are so-called “fixed VoIP” or “nomadic VoIP.”<sup>7</sup> Verizon thus disagrees with AT&T’s proposal for a potential evidentiary hearing and discovery on the nature and extent of particular VoIP providers’ facilities in order to classify them under the Public Utilities Code.<sup>8</sup> On the contrary, such an inquiry would provide no useful insight into the matter since, as discussed, there is no evidence that the Legislature intended to include *any* type of VoIP provider within the definition of “telephone corporation.” The Commission thus lacks statutory authority to require universal service surcharges from *any type* of VoIP provider.

In an unlawful attempt to bridge this gap in the Commission’s legal authority, proponents of universal service surcharges for VoIP assert that the statutory definition of “telephone corporation” adopted by the Legislature in 1951 — including the operative language “communication by telephone” — is “broad” enough to incorporate IP-based

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<sup>6</sup> See Verizon Opening Comments at § II.B. No party argues that the Commission can apply Moore Act requirements on entities that are not telephone corporations.

<sup>7</sup> See AT&T Opening Comments at 10, 16.

<sup>8</sup> See *id.*

voice communications.<sup>9</sup> But the Legislature 60 years ago could never have intended for VoIP to fall within this legacy statutory definition. Indeed, the recent E911 legislation proves as much.<sup>10</sup> In that instance, the Legislature correctly determined that comparable “telephone communication services” language in the E911 statute was *insufficiently* broad to cover VoIP providers.<sup>11</sup> The Legislature, therefore, added a definition of “VoIP service” to the Revenue and Taxation Code in order to impose E911 surcharge requirements on VoIP providers. Importantly, the Legislature gave “VoIP service”<sup>12</sup> its own definition — *separate and distinct* from the preexisting language applicable only to intrastate “telephone communications services.”<sup>13</sup> These actions show that the Legislature does not consider VoIP service to be “communication by telephone” — otherwise, there would have been no need to amend the statute to require E911 surcharges for VoIP in the first place. This clear, recent expression of Legislative intent contradicts proponents’ conclusory assertions that legacy statutory definitions can be lawfully “reinterpreted” to apply to VoIP.

## **2. The Lack of a Funding Shortage Provides Ample Time to Obtain Legislation Authorizing SUSF Surcharges for VoIP.**

Assuming the Commission is determined to impose SUSF surcharges on VoIP providers and their customers despite the resulting disincentives to investment and

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<sup>9</sup> See, e.g., TURN Opening Comments at 6; Comments of the Division of Ratepayer Advocates Regarding the Requirement for Interconnected VoIP Providers to Contribute to the Support of California’s Public Purpose Programs (Mar. 7, 2011) (“DRA Opening Comments”) at 4, quoting Pub. Util. Code § 233 (defining “telephone line”). See also Pub. Util. Code § 234 (defining “telephone corporation”).

<sup>10</sup> See Cal. Senate Bill (SB) 1040 (Kehoe) (2008).

<sup>11</sup> See *id.*

<sup>12</sup> See Rev. & Tax. Code §§ 41016.5(a). Notably, this definition applies to all interconnected VoIP service, whether it be fixed or nomadic, facilities-based or over-the-top.

<sup>13</sup> Compare Rev. & Tax Code § 41010 (defining “intrastate telephone communication services”) *with id.* at § 41016.5(a) (defining “VoIP service”). The two definitions are separate and distinct.

innovation, the Commission should seek legislation that would allow it to achieve this limited objective without the need to “reinterpret” legacy statutory definitions erroneously and with uncertain results. Such a legislative solution enjoys widespread support among commenters.<sup>14</sup> Indeed, AT&T notes that Assemblyman Buchanan has already introduced a bill in this session — AB 841 — that would provide the Commission with the necessary authority. The Commission and all stakeholders have ample time to work out a Legislative solution since, as Verizon previously demonstrated, California’s universal service programs enjoy stable and sustainable revenues at current levels, and there is no shortage of funds.

**3. The Commission Does Not Need to Speculate About the Scope of Federal Preemption of State VoIP Regulation to Achieve its Limited Objective.**

Several parties comment generally on the nature of this Commission’s regulatory authority over VoIP providers and the extent to which this Commission is preempted by applicable federal law. AT&T, CCTA, Comcast, and SureWest, for example,<sup>15</sup> see a highly limited role for state regulation of VoIP given the *Vonage Preemption Order*.<sup>16</sup> As AT&T notes, that order remains in full force and effect and preempts “all state telephone company regulations, including certification requirements, and all regulation applicable to certificated entities” for VoIP, except as expressly

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<sup>14</sup> See, e.g., CALTEL Opening Comments at 2; CCTA Opening Comments at 4, 7; AT&T Opening Comments at 13; Verizon Opening Comments at 9.

<sup>15</sup> See, e.g., AT&T Opening Comments at § II.A.2; CCTA Opening Comments at 4–6; Opening Comments of Comcast Phone of California, LLC (Mar. 7, 2011) at 1; Comments of SureWest Telephone and SureWest Televideo on OIR (Mar. 7, 2011) (“SureWest Opening Comments”) at § III.

<sup>16</sup> *Vonage Holdings Corporation 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, ¶ 1, n. 30 (2004) (“*Vonage Preemption Order*”), *aff’d*, *Minn. Pub. Utils. Comm’n v. FCC* (8<sup>th</sup> Cir. 2007) 483 F.3d 570.

permitted by the FCC such as in its recent *Declaratory Ruling*.<sup>17</sup> On the other hand, proponents of state VoIP regulation such as TURN take a broader view of the Commission’s regulatory authority. They assert that federal law preempts only “specific entry and rate regulations on VoIP carriers due to uncertainty at the federal level.”<sup>18</sup>

Verizon agrees that the *Vonage* order preempts states from applying traditional “telephone company regulations” to VoIP — regardless of platform and regardless of whether the service is considered fixed or nomadic — except as expressly permitted by the FCC. But this Commission need not address the extent to which states are preempted under the *Vonage* order in order to resolve this proceeding, nor should it. As the Commission made clear in its OIR, its “limited,” “modest” objective here is to determine whether VoIP providers should be required to collect and remit SUSF surcharges.<sup>19</sup> Although the Commission cannot adopt such a requirement here, the Commission could recommend it to the Legislature without fear of preemption in light of the FCC’s *Declaratory Ruling* allowing SUSF assessment of nomadic VoIP providers.<sup>20</sup> Accordingly, there is no need to speculate about the scope of federal VoIP preemption. The relevant issue before this Commission is whether state law authorizes the Commission to adopt such requirements; and as discussed, it does not. Accordingly,

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<sup>17</sup> AT&T Opening Comments at 5.

<sup>18</sup> Opening Comments of the Utility Reform Network on OIR (Mar. 7, 2011) (“TURN Opening Comments”) at 7.

<sup>19</sup> OIR at 2, 23.

<sup>20</sup> In the Matter of Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, WC Docket No. 06-122, Declaratory Ruling, FCC 10-185 (Released Nov. 5, 2010) (“*Declaratory Ruling*”) at ¶ 1.

statutory changes are needed before the Commission may proceed, if it chooses to do so despite the negative policy implications previously discussed.

### III. PRELIMINARY COMMENTS ON IMPLEMENTATION ISSUES

Since legislative amendments are needed before the Commission may establish SUSF collection-and-remittance requirements for VoIP providers, it would be premature to comment comprehensively on implementation issues at this time.

Accordingly, the Commission should give parties an additional opportunity for comment once questions regarding its state-law authority to proceed are addressed. In addition, Verizon agrees with AT&T that parties should be given a reasonable period of time to implement the billing changes needed to effectuate SUSF collection-and-remittance requirements for VoIP providers, if such requirements are adopted.<sup>21</sup> In the meantime, Verizon offers these preliminary comments on implementation issues.

#### A. THE FCC ALLOWS ALL VOIP PROVIDERS TO CHOOSE FROM AMONG THREE PERMISSIBLE METHODS OF CALCULATING “INTRASTATE” REVENUES.

DRA incorrectly asserts that the FCC’s *VoIP Universal Service Order*<sup>22</sup> prohibits fixed VoIP providers from using the FCC’s interim safe-harbor allocation factor as a way to calculate “intrastate” revenues.<sup>23</sup> Instead, DRA asserts that the order requires fixed VoIP providers to “provide universal service surcharge contributions based on their actual intrastate revenues.”<sup>24</sup> DRA is wrong.<sup>25</sup> In fact, as the OIR correctly

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<sup>21</sup> See AT&T Opening Comments at 8.

<sup>22</sup> Universal Service Contribution Methodology Proceeding, Report and Order of Proposed Rulemaking (WC Docket No. 06-122) (2006) 21 FCC Rcd 7518 (“*VoIP Universal Service Order*”).

<sup>23</sup> DRA Opening Comments at 5.

<sup>24</sup> *Id.*

<sup>25</sup> In supposed support of these incorrect assertions, DRA does not cite the *VoIP Universal Service Order* itself, but instead purports to quote from the “Instructions to the Telecommunications Reporting Worksheet, Form 499-A” that was attached to the order. See DRA Opening Comments at 6, n. 11. In

recognizes,<sup>26</sup> the FCC's *VoIP Universal Service Order* permits all interconnected VoIP providers — which per the FCC's definition in 47 C.F.R. § 9.3 can be fixed or nomadic — to choose from among three options when calculating interstate revenues:

52. Interconnected VoIP providers must report and contribute to the USF on all their interstate and international end-user telecommunications revenues. To fulfill this obligation, interconnected VoIP providers have three options: (1) they may use the interim safe harbor established in this Order; (2) they may report based on their actual interstate telecommunications revenues; or (3) they may rely on traffic studies, subject to the conditions described below.

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56. While, as stated above, interconnected VoIP providers may report their actual interstate telecommunications revenues, we recognize that some interconnected VoIP providers do not currently have the ability to identify whether customer calls are interstate and therefore subject to the section 254(d) contribution requirement. ... Therefore, an interconnected VoIP provider may rely on traffic studies or the safe harbor described above in calculating its federal universal service contributions. Alternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls. ...<sup>27</sup>

Accordingly, the FCC does not require fixed VoIP providers to calculate “actual intrastate revenues” to determine the amount of SUSF contributions, nor does it permit states to so require, as DRA incorrectly claims. In fact, such a state requirement would plainly and directly contradict federal universal service contribution rules and thus be

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addition, DRA adds a parenthetical statement to the quotation suggesting that the FCC's instructions apply to all filers of “interconnected VoIP service.” *Id.* In fact, this parenthetical does not appear in the original text but was added by DRA and made to appear as if it were a statement made by the FCC. The Form 499-A instructions form attached to the *2006 VoIP Universal Service Order* actually reads, “All (~~interconnected VoIP service~~) filers must report the actual amount of interstate and international revenues for these services.” *Id.* (Parenthetical statement erroneously added by DRA stricken.) DRA's assertions are incorrect and should be disregarded.

<sup>26</sup> See OIR at 20.

<sup>27</sup> *VoIP Universal Service Order* at ¶¶ 52, 56, cited in OIR at 20. Emphasis added.

preempted.<sup>28</sup> The Commission should disregard DRA's erroneous statements to the contrary.

**B. THE COMMISSION SHOULD UTILIZE A SIMPLIFIED REGISTRATION FORM FOR SUSF ASSESSMENT OF VOIP PROVIDERS.**

If the Commission requires VoIP providers to collect and remit SUSF surcharges, and if it believes it needs a registration requirement to implement and enforce such contributions, then it should use a simplified registration form such as that which currently exists for self-registrants, as SureWest proposes.<sup>29</sup> The form attached to the OIR would achieve the Commission's limited goal. TURN's vague and unsupported proposal for "a more detailed CPCN-like process" similar to wireless registration<sup>30</sup> represents nothing more than regulation for regulation's sake and should be rejected as inconsistent with the limited objective of the OIR.

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<sup>28</sup> DRA also errs in its assertion that VoIP traffic studies must be pre-approved by FCC staff. In fact, the DC Circuit reversed this original FCC requirement. See *Vonage Holdings Corp. v. FCC* (D.C. Cir. 2007) 489 F.3d 1232, 1243–44, *citing* 47 U.S.C. § 254(d) (overturning FCC pre-approval requirement for VoIP traffic studies since the FCC previously declined to impose such a requirement on wireless providers and thus a contrary holding would violate the statutory requirement to apportion USF obligations on "an equitable and nondiscriminatory basis.")

<sup>29</sup> See SureWest Opening Comments at 3.

<sup>30</sup> TURN Opening Comments at 7.

#### IV. CPSD'S AND TURN'S PROPOSALS TO EXPAND THIS PROCEEDING AND REGULATE VOIP ARE UNLAWFUL AND MUST BE REJECTED

CPSD<sup>31</sup> and TURN<sup>32</sup> — ignoring the explicit language in the OIR that this proceeding is limited to whether state universal service surcharges should be assessed upon VoIP<sup>33</sup> — propose to “expand the scope” of this proceeding to impose all manner of common-carrier regulations on VoIP.<sup>34</sup> As support, CPSD and TURN cite the OIR’s tentative conclusion that VoIP providers are “telephone corporations” under the Public Utilities Code — a conclusion that Verizon has already demonstrated is unlawful and unjustified. In fact, CPSD’s and TURN’s actions are more accurately characterized as an attempt to use the “telephone corporation” issue as a pretext to “hijack” this proceeding into totally new and unrelated subject matter, and thereby undermine the Commission’s explicit instructions to keep this OIR limited to the narrow issue of whether to require SUSF contributions from VoIP providers. Such an outcome would directly contradict the Commission’s objectives in the OIR and for that reason alone it should be rejected. CPSD’s and TURN’s<sup>35</sup> actions also provide further reason why the

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<sup>31</sup> See Comments of the Consumer Protection and Safety Division (Mar. 7, 2011) (“CPSD Opening Comments”) at *passim*, citing CPSD Petition for Modification of the Scope of Rulemaking to Include Consumer Protection. CPSD’s petition was originally filed on March 3, 2011 but was rejected and re-filed as a motion on March 8. Responses to CPSD’s motion are due on April 4, 2011, per the assigned ALJ’s e-mail ruling issued March 10.

<sup>32</sup> See TURN Opening Comments at 4.

<sup>33</sup> OIR at 2, 23 (“Our *limited objective* in this Rulemaking is to ensure that the California universal service programs are supported in a competitively and technological neutral manner, and that contributions to the programs are sufficient to preserve and advance universal service. \*\*\* *Our objective in this proceeding is modest*: it is to make the funding for and contribution base of California’s universal service programs technology neutral.”). Emphasis added.

<sup>34</sup> CPSD’s and TURN’s proposals raise the same procedural and substantive issues as contained in CPSD’s March 8, 2011 motion, and the ALJ has provided parties until April 4 to respond to that motion. Accordingly, Verizon will respond further on these issues in its April 4 response.

<sup>35</sup> As additional support for expanding the scope of this proceeding, TURN asserts that “numerous states have already grown tired of waiting for the FCC to clarify its position and, out of necessity, made their own findings as to jurisdiction over VoIP carriers,” citing four examples — Missouri, Kansas, Nebraska and Maine. TURN Opening Comments at 5. TURN is wrong and, in fact, those four states’ laws support Verizon’s position that legislative changes are needed before the Commission can assess

Commission should not attempt to reinterpret legacy statutory definitions to apply to VoIP. Instead of trying to fit the square peg of VoIP into the round hole of legacy statutory classifications — an exercise that will lead only to continuing litigation and uncertainty — the Commission should seek an express grant of authority from the Legislature in order to achieve its limited objective, as discussed above.

March 22, 2011

Respectfully submitted,



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universal service surcharges on VoIP providers. TURN also neglects to mention that at least seventeen states (including DC) have explicitly preempted state utility regulation of VoIP services, including Alabama, Delaware, the District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, and Virginia. Verizon will address this matter further in its April 4 response to related CPSP motion.

**CERTIFICATE OF SERVICE**

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 711 Van Ness Avenue, Suite 300, San Francisco, California 94102; I have this day served a copy of the foregoing, **REPLY COMMENTS OF VERIZON AND VERIZON WIRELESS ON THE ORDER INSTITUTING RULEMAKING** by electronic mail to those who have provided an e-mail address and by U.S. Mail to those who have not, on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22<sup>nd</sup> day of March, 2011 at San Francisco, California.

*/s/ Christine M. Becerra*  
CHRISTINE M. BECERRA

R.11-01-008