**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

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| Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Comcast Phone of California, LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses. | Investigation 13-10-003 |

# MOTION TO DISMISS OF COMCAST PHONE OF CALIFORNIA, LLC (U-5698-C) AND ITS RELATED ENTITIES

Suzanne Toller
Jane Whang
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: suzannetoller@dwt.com
janewhang@dwt.com

Peter Karanjia
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3401
Tel. (202) 973-4200
Fax. (202) 973-4499
Email: peterkaranjia@dwt.com

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**MOTION TO DISMISS OF COMCAST PHONE OF CALIFORNIA, LLC (U-5698-C)**
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## I. INTRODUCTION AND SUMMARY

Pursuant to Rule 11.2 of the California Public Utilities Commission's ("Commission" or "CPUC") Rules of Practice and Procedure, Comcast Phone of California, LLC (U-5698-C) ("Comcast Phone") and Related Entities named in the OII[1] (collectively, "Comcast") move to dismiss this Order Instituting Investigation ("OII") on the ground that the proposed enforcement action constitutes an improper and extra-jurisdictional inquiry and attempt to regulate Voice over Internet Protocol ("VoIP") services.

The Commission's OII seeks to determine whether Comcast should be subjected to fines and potentially other liability for inadvertently releasing certain directory listings of Comcast Phone IP II, LLC's ("Comcast IP") California residential customers who had elected non-

[1] The "Related Entities" named as respondents to the OII are: Comcast Phone, LLC, Comcast Cable Communications Management, LLC, and Comcast IP Phone II, LLC. Comcast demonstrates in this motion that the Commission lacks jurisdiction to proceed with the OII against any of the Comcast entities named as respondents in the OII. Comcast reserves all rights to assert additional grounds for objecting to the Commission's jurisdiction over the entities named in the OII other than Comcast Phone (i.e., those entities that, unlike Comcast Phone, do not hold a Certificate of Public Convenience and Necessity from the Commission).

published/non-listed status for their XFINITY telephone service, a VoIP service ("VoIP Listings"). The provisions of law on which the OII relies for the Commission's authority to commence this proposed enforcement action are Public Utilities Code sections 2891.1 and 451[2] and the California Constitution, Article I (Right to Privacy). As explained below, however, this investigation is prohibited by recently enacted Public Utilities Code section 710 and is contrary to the longstanding policy in this State against applying traditional utility regulation to VoIP and other IP-enabled services.

Specifically, section 710 prohibits the Commission from "exercis[ing] regulatory jurisdiction or control" over VoIP and IP-enabled services, except as expressly authorized under federal or state law. Like the Internet in general, VoIP services are evolving at a rapid pace, and in section 710, the California Legislature strongly reaffirmed the policy (consistent with this Commission's prior decisions) that regulation should not impede the development of such innovative services that are increasingly driving investment and economic growth in California and across the nation. While the Commission is authorized to track and report to the Legislature and the Federal Communications Commission ("FCC") any informal complaints about VoIP services *that it receives*, the CPUC's exercise of regulatory jurisdiction over VoIP services in the proposed enforcement action clearly runs afoul of the express ban on regulation of VoIP services.

Moreover, none of the narrow exceptions cited in the OII to section 710's broad prohibition on exercising jurisdiction over VoIP services applies in this case: (i) the Commission cannot regulate VoIP services pursuant to sections 2891.1 and 451, as those provisions are not laws of "general applicability," nor does the Commission have authority to enforce the privacy

[2] Unless otherwise noted, all statutory references are to the California Public Utilities Code.

provisions of the California Constitution; (ii) Comcast Phone's alleged role in the release of the VoIP Listings is irrelevant, as section 710 prohibits any regulation of VoIP ***services*** and that prohibition applies regardless of whether the ***entity*** providing service holds a Certificate of Public Convenience and Necessity ("CPCN") from the Commission; and (iii) applying section 710 to this matter does not involve a retroactive application of law because section 710 is a procedural law that does not impose any new liabilities and affirms the existing legal framework of not regulating VoIP as a traditional utility service. In fact, any attempt by the Commission to apply the Public Utilities Code or Article I of the Constitution to VoIP services now – contrary to its precedent – constitutes an impermissibly retroactive application of law against Comcast. Because the OII's proposed enforcement action plainly exceeds the Commission's jurisdiction, it should be dismissed as a matter of law.

Comcast respectfully requests that the assigned Administrative Law Judge and/or assigned Commissioner promptly issue a ruling on the threshold question of jurisdiction – a pure question of law. In the interim, discovery and any other enforcement action in this docket should be stayed. As a matter of logic and sound administrative decision-making, serious questions about jurisdiction should be addressed before proceeding to the merits.[3] Parties should not be required to expend considerable resources and time on matters over which the Commission ultimately lacks authority.

Alternatively, Comcast requests that the Commission dismiss this proceeding on prudential grounds. The California State Attorney General's Office of Privacy Protection is actively investigating the VoIP Listings Release. In contrast to the CPUC, the California

[3] *See, e.g., Jurupa Valley v. Riverside,* D.13-09-030, *mimeo* at 3 (because motion "raises jurisdictional issues, before considering the merits of the issues raised by the Complaint, the Commission must first determine whether it has jurisdiction to hear this Complaint.").

Attorney General ("Attorney General's Office") has clear authority to enforce laws of general applicability against a wide range of companies and individuals, and is not barred from conducting its investigation under section 710. Comcast firmly believes that the Attorney General's Office is the appropriate agency to conduct an investigation of this matter. Deferring to the Attorney General's concurrent investigation would avoid lengthy disputes over jurisdictional issues, promote administrative efficiency, and avoid potential conflicts between the two agencies' proceedings – while ensuring that customers' privacy interests are well-protected.

## II. BACKGROUND

### A. Regulatory Background

#### 1. FCC and CPUC Precedent Declining to Regulate VoIP Services

As a new technology with characteristics that deviate from traditional telephone service, VoIP service[4] has never been subject to the traditional framework applied by the FCC or this Commission to regulated utility services. While the FCC initiated a proceeding in 2004 to consider whether VoIP and IP-enabled services should be subject to classic common carrier regulation,[5] the agency has to date refrained from classifying VoIP as "telecommunications services."[6] Similarly recognizing that VoIP is an innovative and rapidly evolving

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[4] Pub. Util. Code Section 239 defines "VoIP service" as a service that uses Internet Protocol to, among other things, enable real-time, two-way voice communication; requires a broadband connection from the user's location; and permits a user to receive a call originating on the public switched telephone network and to terminate calls on the public switched telephone network. Pub. Util. Code Section 239.

[5] *See In the Matter of IP-Enabled Services,* Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (2004).

[6] In a series of orders, the FCC has imposed certain obligations on VoIP services (such as universal service and 911 requirements). *See, e.g., IP-Enabled Services;* 911 *Requirements for IP-Enabled Service Providers,* WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) *(VoIP E911 Order)* (E911), *aff'd, Nuvio Corp. v. FCC,* 473 F.3d 302 (D.C. Cir. 2006); *Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service*; 1998 *Biennial Regulatory Review Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for*

communications service, this Commission has consistently declined to regulate VoIP services. As early as 2006, for example, the CPUC explained that it would be premature to attempt to regulate VoIP services "[s]ince the FCC has determined that it is charged with selecting the appropriate regulatory framework for VoIP] and is exercising its authority."[7] Since then, the Commission consistently declined to exercise jurisdiction over VoIP services and notably never conducted a proceeding resulting in a final, appealable order finding that VoIP services are a regulated "telephone service" or that it had lawful jurisdiction over the unclassified service.[8]

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*Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization, Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services,* WC Docket Nos. 04-36, 06-122, CC Docket Nos. 90-571, 92-237, 95-116, 9645, 98-170,98-171, 99-200, NSD File No. L-OO-72, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518,7536, para. 34 (2006), *aff'd in part and rev'd in part, Vonage Holdings Corp. v. FCC,* 489 F.3d 1232 (D.C. Cir. 2007). The FCC has never classified VoIP as a "telecommunications service," however, and accordingly has never applied the full panoply of Title II common carrier regulation under the Communications Act to VoIP services.

[7] *OII to Determine the Extent to which the Public Utility Telephone Service Known as VoIP Should be Exempted from Regulatory Requirements*, D.06-06-010, *mimeo* at 3; *see also id.*, *mimeo* at 5 ("we have not found an immediate need to address VoIP consumer protection issues."); *OIR into the Service Quality Standards for All Telecommunications Carriers*, D.09-07-019, fn. 28, *mimeo* at 12 (stating that "[s]hould the FCC define the role of state commissions over VoIP, the Commission will determine the applicability of its service quality standards at that time.").

[8] *See* CPUC Resolution ALJ-215, *mimeo* at 3 (dismissing on appeal a slamming citation against Time Warner Cable Information Services, a provider of VoIP services); *OIR into Reliability Standards for Telecommunications Emergency Backup Power Systems,* D.08-09-014 (declining to revisit decision about whether to leave VoIP services unregulated); *Faridi v. Time Warner Cable Information Services,* D.09-05-033, *mimeo* at 2 (dismissing a complaint against Time Warner's cable/VoIP service on basis that "we have not asserted jurisdiction over TWC and TWC Digital for consumer complaints"); D.06-06-010, *mimeo* at 5 ("we have not found an immediate need to address VoIP consumer protection issues."). Although a 2011 CPUC decision *commencing a rulemaking* "tentatively conclude[d]" that VoIP service providers were "telephone corporations" for the limited purpose of imposing surcharges on such services, (s*ee* OIR 11-01-008, at 27-28), the Commission's *final decision* did not adopt that conclusion (as the Legislature passed a law specifically authorizing the Commission to impose surcharges on VoIP services). *See OIR to Require Interconnected VoIP Service Providers to Contribute to the Support of California's Public Purpose Program,* D.13-02-022; Pub. Util. Code section 285. Indeed, the Commission's final decision in Rulemaking 11-01-008 rejected the Consumer Protection and Safety Division ("CPSD") request to apply consumer protection rules to VoIP providers, finding that the recently enacted Section 710 "effectively resolved all of the matters" in CPSD's request. D.13-02-022, *mimeo* at 4.

### 2. Enactment of Public Utilities Code Section 710

On September 28, 2012, the Governor of California signed into law SB 1161, which amended the Public Utilities Code to add (among other things) a new section 710.[9] The express purpose of the legislation is to "reaffirm California's current policy of regulating Internet-based services *only as specified* by the Legislature."[10] The legislative history acknowledges that the "CPUC has never regulated VoIP or IP-enabled services like traditional telephone service," and states that the bill was designed to ensure that California adheres to the longstanding (state and federal) policy of "preserv[ing] the vibrant and competitive free market" for Internet and other interactive computer services.[11] In particular, the Legislature found that "[t]he success of the innovation economy" – of which VoIP services are an integral part – "is a result of an open and competitive environment that has provided California consumers and businesses with a wide array of choices, services, and prices."[12] To safeguard the "current regulatory structure" – which has enabled "[t]he Internet and Internet Protocol-based (IP-based) services [to] flourish[]"[13] – section 710 broadly prohibits the Commission from regulating VoIP services, unless it is "expressly" authorized to do so by statute.[14]

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[9] Chapter 733, Stats. 2012 ("SB 1161"). The law became effective on January 1, 2013.

[10] SB 1161, section (1)(b) (emphasis added).

[11] Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012, (Hearing April 17, 2012) at 6.

[12] SB 1161, section 1(a)(4).

[13] SB 1161, section 1(a)(4).

[14] Pub. Util. Code section 710(a) ("[t]he commission *shall not* exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c)) (emphasis added).

### B. Facts Regarding the VoIP Listings Release

Comcast IP provides VoIP services under the "XFINITY" brand to residential customers in California.[15] In October 2012, two XFINITY voice customers contacted Comcast, expressing concerns that their non-published and non-listed directory listings[16] had been published.[17] After undertaking an internal investigation, Comcast discovered that a processing error had caused the inadvertent release of listings from July 2010 through December 2012 for certain XFINITY voice customers who had requested that their numbers be non-published and non-listed ("VoIP Listings Release").[18] In December 2012, Comcast corrected the process error and took steps to prevent future publication of its VoIP service customers' non-published/non-listed numbers.[19] Beginning in January 2013, Comcast also notified all affected customers of the release and implemented a process for refunding customers the amounts they had paid for non-published/ non-listed service while their VoIP Listings were inadvertently published.[20] Comcast also established an internal team to develop and implement a directory listing reconciliation process.[21]

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[15] *See* OII at 4; Staff Report at 6, 11. *See also OIR to Require Interconnected VoIP Service Providers to Contribute to the Support of the California's Public Purpose Programs*, Rulemaking 11-01-008, at 7 ("All Comcast's voice customers are now served by the company's brand of VoIP"); *In re Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice over Internet Protocol Services Providers and Broadband Internet Services Providers,* Report and Order, 27 FCC Rcd 2650, 2653-54, para. 6 (referencing Comcast's service as an example of Interconnected VoIP); Pub. Util. Code section 239.

[16] "Non-published" means a customer's subscriber list information is withheld from published directories and directory assistance, and "non-listed" means a customer's information is withheld from published directories, but available in directory assistance. Comcast Response to DR 1-1.

[17] Comcast Response to DR 6-2.

[18] *See* OII at 3; Comcast Response to DR 5-6.

[19] Comcast Response to DR 1-5.

[20] Comcast Responses to DRs 1-2, 1-7 and 1-10.

[21] Comcast Response to DR 1-7.

Also in January 2013, Comcast proactively and voluntarily notified the Commission and the Attorney General's Office of the VoIP Listings Release. In February 2013, the Commission's Safety and Enforcement Division ("SED") issued the first of six "informal" data requests to Comcast seeking further information regarding the release.[22] Although Comcast consistently maintained in its responses to the SED that the Commission lacks authority to pursue enforcement action (including commencing an investigation into this matter) under section 710, Comcast has cooperated with the Commission by voluntarily responding to more than 60 individual data requests and providing ongoing updates to previously provided responses. All of this has been taking place against the backdrop of Comcast's full cooperation with a parallel investigation into the VoIP Listings Release by the Attorney General's Office. Because the Attorney General is the State's chief law enforcement officer charged with enforcing all state laws (including consumer protection and privacy laws in California),[23] Comcast has not disputed the authority of the Attorney General's Office to investigate this matter. In fact, as stated above and detailed below, it is Comcast's firm belief that the Attorney General's Office is the appropriate government agency to investigate this matter.

### C. The OII

Notwithstanding Comcast's repeated arguments that the Commission lacks jurisdiction to conduct a regulatory action concerning the VoIP Listings Release, the Commission opened this investigation to consider whether Comcast Phone and "Related Entities" violated section 2891.1, section 451, and the California Constitution's right to privacy (Cal. Const., Art. I, section 13). The Commission asserts that it has jurisdiction to commence enforcement action against

[22] SED issued its seventh data request to Comcast on October 25, 2013.

[23] *See* Cal. Const. Art. V, section 13 (providing that Attorney General is entrusted with "see[ing] that the laws of the State are uniformly and adequately enforced.").

Comcast on the following grounds: (i) Comcast Phone is a regulated entity and was allegedly involved in the release insofar as it was a party to a contract with the vendor that distributed the VoIP Listings; (ii) it "appears that" section 710 does not bar the Commission's investigation because the law cannot be applied retroactively; and (iii) even if section 710 applies to this matter, it allows for the enforcement of laws of "general applicability" and the Commission may enforce section 2891.1, section 451, and privacy rights under the California Constitution as laws of general applicability. As explained below, the Commission's arguments lack merit and the OII must be dismissed.

## III. THE COMMISSION MUST DISMISS THE OII AS A MATTER OF LAW BECAUSE IT LACKS JURISDICTION TO PURSUE THE PROPOSED ENFORCEMENT ACTION

As explained below, the Commission's investigation into Comcast's inadvertent release of VoIP Listings is plainly foreclosed by statute and contrary to legislative policy.

### A. The Plain Text of Public Utilities Code Section 710 Forbids the CPUC from Regulating VoIP Services Without Express Statutory Authorization.

#### 1. Section 710(a) Unambiguously Prohibits Regulation of VoIP Services.

It is undisputed that the inadvertently released directory listings are for VoIP services.[24] Section 710 of the Public Utilities Code strictly circumscribes the Commission's jurisdiction over VoIP services. Specifically, it provides in relevant part:

> The commission *shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services* except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c).[25]

[24] *See* OII at 4, 15 (acknowledging that the telephony service involved is "XFINITY Voice"). As shown above, XFINITY Voice is a VoIP service. *See supra* note 15.

[25] Pub. Util. Code section 710(a) (emphasis added).

Pursuing an investigation into a release of VoIP Listings runs afoul of this statutory bar because the investigation itself constitutes an assertion of authority to regulate VoIP services. The investigation specifically contemplates exposing Comcast entities to potential liability for the release,[26] and that, in turn, entails the purported "exercise of regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol services."[27] By its plain text, the Public Utilities Code forbids this.[28]

### 2. The Statute Requires an Express Statement Authorizing Any CPUC Regulation of VoIP Services, and Exceptions to the General Prohibition on VoIP Regulation Must Be Narrowly Construed.

Section 710 includes an exception to the general prohibition on VoIP regulation where the Commission's exercise of regulatory jurisdiction is "required or *expressly* delegated by federal law or *expressly* directed . . . by statute or as set forth in subdivision (c)."[29] But this provision requires a clear and unmistakable statement granting the Commission such regulatory authority over VoIP services.[30] Indeed, allowing anything *less* than a clear and explicit statement

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[26] The Commission's OII states that it intends to "consider whether the Commission should impose a fine or other remedies" following its proposed investigation. OII at 2.

[27] Pub. Util. Code section 710(a).

[28] General provisions of the Pub. Util. Code authorizing action by the CPUC, such as those allowing the Commission to obtain data and information from public utilities (*see, e.g.,* Pub. Util. Code section 314(a)), cannot overcome the specific statutory prohibition concerning regulation of VoIP services. *See Lake v. Reed*, 16 Cal. 4th 448, 464 (1997) ("a more specific statute controls over a more general one"); *see also* Cal. Code Civ. Proc. section 1859 ("when a general and particular [statutory] provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."). For similar reasons, as we demonstrate below (*see* Section III.C.1), the Commission cannot evade the specific, statutory bar on jurisdiction by pointing to its general authority over Comcast Phone.

[29] Pub. Util. Code section 710(a) (emphasis added). The Commission's OII does not even attempt to make the case that any of the express carve-outs in section 710(c) might apply – nor could they. None of the specific statutes mentioned in that subsection has any bearing on the release of VoIP directory listings or customers' privacy interests in their unlisted/non-published VoIP listings.

[30] *Id.*; *In re Benson*, 36 Cal. 4th 1096, 1106 (2005) (law requiring "express" declaration and written statement to change the character of community property requires "express written language" and "clear understanding" of intention to effect a change in the character of the property); *RJ Cardinal v. Ritchie*, 218 Cal. App. 2d 124, 135 (1st App. Div. 1963) ("It has been held that 'expressly' means 'in an express

would render the statute's repeated uses of the word "expressly" entirely superfluous – a reading contrary to fundamental principles of statutory construction.[31] Moreover, in explaining that section 710 preserves "California's current policy of regulating Internet-based services *only as specified* by the Legislature,"[32] the legislative intent behind section 710 confirms that a clear statement is required.

In addition to requiring a clear statement to overcome the broad prohibition on regulation of VoIP services, any exceptions to that prohibition must be narrowly construed so as to further the legislative policy in favor of allowing VoIP services to develop unconstrained by traditional utility regulation. As explained above, in adopting section 710, the Legislature reaffirmed the policy that regulation should not impede the development of innovative, Internet-related services that are increasingly driving investment and economic growth in California and across the nation.[33] This policy in favor of minimally intrusive regulation in the rapidly evolving area of VoIP services is, moreover, consistent with this Commission's own precedent: in fact, the

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manner; in direct or unmistakable terms; explicitly; definitely; directly.'"). *See also Merriam-Webster Online Dictionary* (defining "express" as "said or given in a clear way," including "explicitly stated").

[31] *See, e.g., City of Alhambra v. County of Los Angeles*, 55 Cal. 4th 707, 724 (2012) ("Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary"); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (noting "rule against superfluities" in statutory construction).

[32] SB 1161, section (1)(b) (setting forth the "intent of this act") (emphasis added).

[33] SB 1161, section 1(a)(1) & (4), (b); *see also* Senate Rules Committee, Office of Senate Floor Analyses, SB1161 (2011-2012 Reg. Sess.), as amended Aug. 16, 2012, at 7; *see also* Assembly Committee on Appropriations, analysis of SB 1161 (2011-2012 Reg. Sess.), as amended June 21, 2012, (Hearing Aug. 8, 2012) at 2 ("According to the author, this bill 'reaffirms California's current policy of fostering investment and innovation in the Internet and new 'app' economy and widespread availability of Internet based services that benefit consumers and stimulate growth. This bill would continue California's current policy of not regulating these services unless required or expressly delegated by federal law or expressly directed by the Legislature.").

legislative history approvingly notes that, "[l]ike the FCC, the [California] PUC has declined from applying utility-type regulation to VoIP."[34]

Given this strong legislative policy preference, any exceptions to the general prohibition in section 710 – one that reflects a clear commitment to an extremely light regulatory touch in the area of VoIP services – must be narrowly construed.[35]

### B. None of the Exceptions to the General Prohibition on VoIP Regulation Permits the Proposed Investigation.

#### 1. The Exception in Section 710(d) For Enforcement of Laws of "[G]eneral [A]applicability" Does Not Provide Jurisdiction.

Section 710(d) states that "[t]his section does not affect the enforcement of any state or federal criminal law or civil law or any local ordinances of general applicability," including (but not limited to) various specified statutes.[36] However, none of the provisions of law invoked in the OII qualifies as a "law or … local ordinance[] of *general applicability*."

##### a. Because They Solely Apply to Public Utilities, Public Utilities Sections 2891.1 and 451 Are Not Laws of General Applicability.

Neither section 2891.1 nor section 451 – on which the OII relies[37] – is a law of general applicability: both provisions *solely* and expressly apply to public utilities (as opposed to all

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[34] Senate Rules Committee, Office of Senate Floor analyses, SB 1161 (2011-2012 Reg. Sess.), as amended Aug. 16, 2012, at 8; *see also supra* note 8 (citing CPUC precedent).

[35] *See, e.g., Gold v. Superior Court,* 3 Cal. 3d 275, 285 (1970) (*en banc*) (narrowly construing exception to rule in California code of civil procedure, noting that "[t]o fulfill this legislative purpose the statutory exemption must be narrowly construed and carefully restricted"); *Independent Guard Ass'n of Nev. v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995) (in light of "Congress's clear intent to preserve the statutory purpose of informal rulemaking," exceptions to the federal Administrative Procedure Act's general rulemaking requirements "will be 'narrowly construed and only reluctantly countenanced,'" lest the exceptions become "'escape clauses'" that "an agency could utilize at its whim") (citation omitted); *Northern Cal. v. Healdsburg*, 496 F. 3d 993, 1001 (9th Cir. 2007) (narrowly construing exemptions from broad mandate of the Clean Water Act in order to "achieve the purposes" of the Act).

[36] Pub. Util. Code section 710(d).

[37] OII at 15-16.

consumers, businesses, or public authorities in the State).[38] As the Commission's OII acknowledges,[39] section 2891.1(a) by its terms prohibits only "a *telephone corporation*" from including unlisted or unpublished telephone numbers in its published directories.[40] Similarly, as the Commission notes, "Section 451 of the Public Utilities Code provides that all charges, services, instrumentalities, and rules of *a public utility* must be just and reasonable."[41] Both are narrowly drawn laws that apply to only public utilities (a narrow subset of businesses) – and thus are not laws of "general applicability."

Moreover, allowing the Commission to evade the statutory prohibition in section 710(a) simply by invoking section 451 would create an incoherent statutory scheme that the Legislature cannot have intended: By requiring the rules of a public utility to be "just and reasonable," section 451 is a classic form of "common carrier" utility regulation;[42] yet a primary purpose for enacting section 710 was to unequivocally reaffirm the State's policy (consistent with this

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[38] *See, e.g., Cohen v. Cowles Media Co*., 501 U.S. 663, 670 (1991) (describing the Minnesota doctrine of promissory estoppel as "a law of general applicability" because it "does not target or single out the press," but instead is "generally applicable to the daily transactions of *all the citizens of Minnesota*") (emphasis added); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (distinguishing between a "tax of general applicability" that applies to a broad range of service providers and a tax that "single[s] out the press"); *United States v. Mariea*, 795 F.2d 1094, 1098 (1st Cir. 1986) (distinguishing between "criminal laws of general applicability" and "a specialized, internal disciplinary code … which covers only military personnel"). *See also* Senate Rules Committee, Office of Senate Floor Analyses, SB 1161 (2011-2012 Reg. Sess.) as amended Aug. 16, 2012, at 3 (noting that existing law includes criminal or civil laws of "general applicability, including unfair or deceptive trade practices laws, that apply to the conduct of business.").

[39] OII at 15.

[40] Pub. Util. Code section 2891.1(a) (emphasis added).

[41] OII at 16 (emphasis added).

[42] *See, e.g., Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

Commission's own precedent) *against* applying such traditional utility-type regulation to innovative VoIP services.[43]

**b. The Commission is Not Authorized to Enforce Provisions of the California Constitution Other Than Article XII (Specifically Concerning Public Utilities), and Thus it Cannot Rely on the State Constitution as a Law of "General Applicability" That Affords it Jurisdiction Here.**

The OII asserts that section 2101 empowers the Commission to enforce certain provisions of the California Constitution and implies that the constitutional right to privacy is a law of general applicability that the Commission can enforce under section 710(d). Contrary to the OII's suggestion, the Commission may not evade section 710(a)'s broad prohibition on regulatory action involving VoIP services by relying on its authority under section 2101 to enforce certain provisions of the California Constitution.[44] Specifically, section 2101 provides in relevant part:

> The commission shall see that the provisions of the Constitution and statutes of [the] state *affecting public utilities*, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed ….[45]

By its plain terms, section 2101 limits the Commission's enforcement power to enforcing constitutional and statutory provisions "affecting public utilities." This stands in sharp contrast with the broad powers of, for example, the Attorney General's Office, who is generally charged

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[43] *See, e.g.*, Senate Rules Committee, Office of Senate Floor Analyses, SB 1161 (2011-2012 Reg. Sess.), as amended Aug. 16, 2012, at 7-8; SB 1161, section 1(a)(4); *see also supra* section II.A.(describing regulatory background).

[44] OII at 16 & n.74 (citing Pub. Util. Code section 2101). By citing Pub. Util. Code Section 2101 in conjunction with the constitutional right to privacy, the OII appears to suggest that the CPUC has the authority to enforce privacy rights via its statutory enforcement powers under Pub. Util. Code Section 2101.

[45] Pub. Util. Code section 2101.

with "see[ing] that the laws of the State are uniformly and adequately enforced."[46] Indeed, this Commission's own precedent has recognized that the CPUC's enforcement power – in contrast with that of the Attorney General and District Attorneys – is sharply circumscribed: "[t]he Commission is *limited to pursuing enforcement actions under the P.U. Code and our rules*," while, by contrast, the Attorney General and District Attorneys "may bring actions not only under the P.U. Code, but also under general anti-fraud laws and the criminal code."[47]

By specifically cabining the Commission's constitutional enforcement role to provisions of law that "*affect[] public utilities*," the Public Utilities Code can only reasonably be construed as referring to the provisions set forth in Article XII of the State Constitution. Article XII is specifically entitled "Public Utilities," and its provisions (among other things) specify the powers of the CPUC.[48] It is not surprising that the Legislature would have entrusted the Commission with enforcement of the "Public Utilities" Article – and *only* that Article – of the California Constitution. Indeed, that understanding is consistent with the Commission's own precedent. It appears that the only time that the Commission has enforced the state Constitution was when it brought a proceeding under *Article XII*.[49] Significantly, the constitutional right to privacy (on

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[46] Cal. Const. Art. V, section 13. For this very reason, as noted above, Comcast has not disputed the Attorney General's jurisdiction to conduct an investigation into the VoIP Listings Release.

[47] *OIR to Establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities,* D.06-03-013 (emphasis added; footnote omitted).

[48] *See, e.g.,* Cal. Const. Art. XII, section 6 ("The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.").

[49] *See People v. Western,* 42 Cal. 2d 621 (1954). Some CPUC decisions have recognized that customers of public utilities have privacy rights (including rights under the state Constitution) and have discussed such rights in framing the statutory obligations of public utilities. *See, e.g.*, *OII of Competitive Access to Customer List Information*, D.01-07-032 *, mimeo* at 22-23; *OIR into Competition for Local Exchange* Service, D.97-01-042, 1997 Cal. PUC LEXIS 42, at *39-57; *see also OII into the Practices of WitTel Telephone Corp.,* OII 95-11-004, 1995 Cal. PUC LEXIS 829, at **3-4, 8-10 (investigation to enforce rule against unlawful or unreasonable practices by CPCN holders, including potential "penalties under the Public Utilities Code," while noting CPUC Legal Division's concerns about constitutional privacy rights).

which the OII purports to rely) is contained in *Article I* of the Constitution (among the general "Declaration of Rights") and therefore is not among the provisions affecting public utilities that the Commission is authorized to enforce.[50]

It follows from this analysis that, for the same reasons that the Commission's reliance on Public Utilities sections 2891.1 or 451 is unavailing (both of which solely apply to public utilities), its reliance on the California Constitution and section 2101 fails. Under section 710(d), the Commission may enforce only laws of "general applicability"; but constitutional provisions only "affecting public utilities" – the only category of constitutional provisions that the Commission may enforce – are *not* laws of general applicability.[51]

Even if there were any doubt about this conclusion (and there is not), the section 710(d) exception must be construed narrowly, and a *clear statement* allowing the Commission to regulate VoIP services under the theory of enforcing constitutional privacy rights would be required to overcome the broad prohibition in section 710(a).[52] Any other conclusion would impermissibly allow the Commission to use the section 710(d) exception to swallow the general

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But *recognizing the existence* of privacy rights is not the same thing as *taking action to enforce* the privacy protections in Article I of the California Constitution. We have not located any CPUC decisions in which the agency has relied on Article I's privacy protections as a direct jurisdictional basis for taking enforcement action (such as imposing fines, as the Commission's OII expressly contemplates here). Indeed, as noted above, the CPUC's precedent has recognized that the agency's jurisdiction is more limited.

[50] The Commission's OII does not purport to rely on its authority to enforce any provisions of Article XII of the state Constitution as a basis for its proposed investigation here (nor would it have any basis for doing so). The Commission also does not identify any other provision of law (either statutory or constitutional) that would confer jurisdiction on the CPUC to directly enforce general provisions of the California Constitution.

[51] *See supra* note 48.

[52] *See supra* section 30.

rule.[53] Here, however, the OII does not (and cannot) point to any such clear statement. Moreover, the notion that the Legislature created an amorphous (and potentially vast) loophole in its section 710(a) prohibition by enabling the Commission to regulate VoIP services under the rubric of enforcing *any* constitutional right recognized under the state Constitution is highly implausible: The Legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouse-holes."[54]

### C. The Other Arguments Raised in the OII Provide No Basis for Avoiding Section 710(a)'s Prohibition on Regulation of VoIP Services.

#### 1. The Commission Cannot Rely on its General Regulatory Jurisdiction Over Comcast Phone to Avoid Section 710(a).

The OII alleges that Comcast Phone had a "central and active role … in the alleged violations"[55] and because Comcast Phone is a CPCN holder licensed by the Commission, the Commission has jurisdiction to investigate the VoIP Listings Release.[56] However, whether Comcast Phone did or did not have a role in the VoIP Listings Release is immaterial to the jurisdictional analysis because the alleged violations indisputably involve VoIP services.

The plain text of section 710(a) prohibits the Commission from regulating VoIP and IP-enabled *services* – without regard to what entity provides those services or whether that entity is (or is not) regulated by the CPUC. Moreover, the specific command of section 710 not to

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[53] "Were an agency afforded *carte blanche* under such a [theory], irrespective of subsequent [legislative] acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (internal quotation marks omitted).

[54] *City of Redding, Cal. v. FERC*, 693 F.3d 828, 840 (9th Cir. 2012) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

[55] *See* OII at 19.

[56] Comcast Phone holds a CPCN from the Commission. Comcast Phone provides wholesale services, including interconnection, to its affiliate Comcast IP. *See* Comcast Response to DR 3-5; Comcast Response to DR 2-1. Comcast Phone provides a limited set of retail services only to business customers. *See* Comcast Response to DR 2-5 and 2-21.

regulate VoIP *services* overrides the general authority the Commission has to regulate CPCN holders.[57] Thus, notwithstanding the Commission's broad power to regulate public utilities, such power "*does not authorize disregard by the commission of express legislative directions* to it, or restrictions upon its power found in other provisions of the [Public Utilities Code] or elsewhere in general law."[58]

The legislative history also confirms that section 710 is intended to address regulation of VoIP *services* (whether or not the provider of the services is a CPCN holder). During consideration of the bill, interconnected VoIP services were described as being offered both by "a cable company (i.e. Comcast's Digital Voice)" and *"a local exchange carrier* (i.e., AT&T's U-verse or Verizon's FiOS)."[59] The Legislature was thus well aware that several entities with CPCNs (e.g., AT&T, Verizon, and Frontier) offer both traditional landline service and IP-enabled service. Rather than focusing section 710 on the *status* of the service provider, the statute was deliberately structured to focus on the *nature of the service*.[60] Toward this end, the law adopted the following recommendation to strike the word "providers":

> 710(a). The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled service ~~providers~~ except as expressly directed to do so by statute or as set forth in subdivision (c).[61]

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[57] *See supra* note 28 (citing law that the specific controls over the general in statutory construction).

[58] *Assembly of the State of California v Pub. Util. Comm'n*, 12 Cal. 4th 87, 103 (1995).

[59] Senate Energy, Utilities and Communications Committee, analysis SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing April 17, 2012) at 3.

[60] Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2012-2013 Reg. Sess.) as amended March 26, 2012 (Hearing April 17, 2012) at 7 (the "bill only prohibits state regulation of VoIP and other IP-enabled *services.*") (emphasis added).

[61] Senate Energy, Utilities, and Communications Committee, analysis of SB 1161 (2012-2013 Reg. Sess.) as amended March 26, 2012 (Hearing April 17, 2012) at 8. While the enacted version of section 710(a) was slightly different, it also did not include the word "providers."

Thus, even *if* the Commission could establish that Comcast Phone had a "role" in the VoIP Listings Release, that fact would not alter the conclusion that the Commission lacks jurisdiction. For this reason, the Commission should resolve this motion to dismiss for lack of jurisdiction as a matter of law.

### 2. Applying Section 710 to the VoIP Listings Release Does Not Raise a Retroactivity Problem.

The OII "tentatively conclude[s]" that SB 1161 "does not apply to the pre-SB 1161 violations alleged in this OII" because the alleged violations occurred before January 1, 2013, when section 710 went into effect.[62] The OII's "tentative" conclusion is wrong and misapprehends the concept of a "retroactive" law. As discussed below, applying section 710 to the Commission's OII is *not* retroactive for three separate reasons.

First, the OII mistakenly presumes that section 710 would need to apply retroactively because the VoIP Listings Release occurred prior to the law's enactment. As the California Supreme Court explained, a law "'is not made retroactive *merely because* it draws upon *facts existing prior to its enactment*.'"[63] For example, laws that govern procedure, such as the conduct of trials, are "*prospective* in nature since they *relate to the procedure to be followed in the future*" — even if the underlying civil or criminal conduct took place prior to the law's enactment.[64] Section 710 is unquestionably a procedural law that limits the Commission's jurisdiction and conduct on a *going-forward basis* (*i.e.*, bars the agency from undertaking the OII and future enforcement action). Thus, the OII's tentative conclusion – that applying section 710 here is *retroactive* – is fundamentally mistaken. Even if the Commission had adopted the OII

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[62] OII at 18 (emphasis added).

[63] *Tapia v. Superior Court*, 53 Cal. 3d 282, 288 (1991) (emphasis added); *Strauch v. Superior Court*, 107 Cal. App. 3d 45, 49 (1980); *Elsner v. Uveges, State Comp. Ins. Fund*, 34 Cal. 4th 915, 936 (2004).

[64] *Tapia*, 53 Cal. 3d at 288 (emphasis added).

before section 710 was enacted, its enactment would still have barred the Commission from further investigating and adjudicating the VoIP Listings Release and the OII would have had to have been dismissed.[65]

Second, the decisive factor in determining whether a law is impermissibly retroactive is whether it "change[s] the legal consequences of past conduct" by "imposing new or different *liabilities.*"[66] A law is improperly "retroactive" if it defines past conduct as a crime, increases the punishment, or deprives a defendant of a defense on the merits based on the past conduct.[67] Laws that eliminate liability or reduce sentencing for certain crimes, on the other hand, are not improperly retroactive and are thus properly applied to pending cases. These guidelines for what constitutes impermissible retroactive application of law are based on "[e]lementary considerations of fairness" that individuals should "have an opportunity to know what the law is and to conform their conduct accordingly."[68] In this case, the law does not impose any new or different liabilities on any party and thus, by its nature cannot be impermissibly retroactive. For example, section 710 does not expose *Comcast* to greater liabilities. Rather, as shown above, it prospectively limits the *Commission's* jurisdiction.

Finally, applying section 710 to bar this enforcement action is not retroactive because section 710 clarified and affirmed the existing legal framework of not regulating VoIP as a traditional utility service. A "statute that merely clarifies, rather than changes, existing law is

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[65] *See Younger v. Superior Court*, 21 Cal. 3d 102 (1978) (statute divesting the courts of authority to address petitions to destroy former records of marijuana conviction and giving such authority to the Department of Justice "effectively repealed" the former law, and the court had no jurisdiction to address the case on appeal); *Bruner v. U.S.*, 343 U.S. 112, 116-117 (1952) (holding that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, *all cases fall with the law*") (emphasis added).

[66] *Tapia*, 53 Cal. 3d at 288, 291 (emphasis added).

[67] *Elsner v. Uveges*, 34 Cal. 4th at 937; *Myers v. Philip Morris*, 28 Cal. 4th 828, 839 (2002); *Strauch*, 107 Cal. App. at 48-49; *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994).

[68] *Landgraf*, 511 U.S. at 265.

properly applied to transactions pre-dating its enactment."[69] As explained in detail above, the Commission had never concluded in a final, appealable order that VoIP services are a regulated public utility service subject to the Commission's jurisdiction.[70] In fact, the Commission affirmed as recently as in its legislative analysis of SB 1161 that it has *not* exercised jurisdiction over VoIP services.[71] Moreover, the legislative analyses further emphasized that the law is intended to preserve the existing *status quo*.[72] Accordingly, there is no basis for the Commission to avoid its obligation to comply with section 710 on the theory that the law is retroactive.

What *is* an improper retroactive application of law, however, is the *Commission's apparent attempt to apply provisions of the Public Utilities Code to the VoIP Listing Releas*e notwithstanding the Commission's precedent and history of never having regulated VoIP services. If section 710 had never been enacted, the most that the Commission could do would be to commence a rulemaking proceeding to determine if VoIP should be classified as "telephone service" subject to its jurisdiction. If the Commission made such a determination (in a final, appealable rulemaking order), the Commission could then apply relevant provisions of the Public Utilities Code to such service only on *a prospective basis.* Any attempted application of the Public Utilities Code or the Constitution in an adjudicative context to actions that occurred prior that final appealable order (including the VoIP Listing Release) would upset the principles of "fair notice, reasonable reliance, and settled expectations" that dictate against retroactivity.[73]

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[69] *Western Security Bank v. Superior Court of Los Angeles County*, 15 Cal. 4th 232, 243 (1997).

[70] *See supra*, section II.A. (describing regulatory background).

[71] *See* CPUC Legislative Subcommittee Recommendation Memo at 8, dated June 6, 2012 (approved on June 7, 2012).

[72] Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012, (Hearing April 17, 2012).

[73] *Landgraf*, 511 U.S. at 270; *Tapia,* 53 Cal. 3d at 288.

## IV. ALTERNATIVELY, THE COMMISSION SHOULD DISMISS THE ACTION ON PRUDENTIAL GROUNDS GIVEN THE CALIFORNIA ATTORNEY GENERAL'S INVESTIGATION

As noted above, the Attorney General's Office is actively investigating the VoIP Listings Release and, in contrast to the CPUC, has clear authority to do so. Comcast respectfully suggests that the public interest is not served by having two California state agencies investigating the same incident – an approach that potentially could result in conflicting findings and enforcement actions. Rather, prudential considerations of administrative efficiency and fairness require dismissal of the OII.

The Attorney General's Office has particular expertise in enforcing laws of general applicability that may apply here, including consumer protection and privacy laws. In fact, last year, the Attorney General formed the Office of Privacy Protection, which is vested with the "broad" mission of "enforc[ing] laws regulating the collection, retention, disclosure, and destruction of private or sensitive information by individuals, organizations, and the government."[74] Significantly, the unit has the authority not only to enforce state privacy laws but federal ones as well – a mandate that allows the Attorney General's Office to take a comprehensive approach to privacy regulation.[75] It is the Office of Privacy Protection that is actively undertaking an investigation into the VoIP Listings Release at issue here.

Unlike the CPUC's more limited authority over public utilities, the Attorney General's Office has broad authority "to see that the laws of the State are uniformly and adequately enforced."[76] California has various broadly framed consumer protection and privacy statutes that – unlike the laws cited in the OII – apply generally to all businesses; these "laws of general

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[74] Press Release, Attorney General Kamala D. Harris Announces Privacy Enforcement and Protection Unit (2012). A copy is available at: http://oag.ca.gov/news/all/2012/2012-7.

[75] *Id.*

[76] Cal. Const., Art. V, section 13.

applicability" can be enforced by the Attorney General's Office as to VoIP services under section 710(d). Thus, unlike the CPUC's proposed investigation into the VoIP Listings Release, there is no question that the Attorney General's investigation is not barred by section 710.

Where, as here, a matter lies outside the Commission's jurisdiction (or where its jurisdiction is unclear), the Commission has not hesitated to refer the matter to another state agency that is better suited to handling it. Indeed, the Commission has explained that, "if a matter can be best addressed outside the Commission, the staff should promptly refer the matter to outside law enforcement officials."[77] The reasons for doing so are straightforward:

> [l]aw enforcement officials' enforcement of general consumer protection laws is especially important with respect to telecommunications matters outside our jurisdiction or over which our jurisdiction may not be clear. . . . The AG and DAs, unlike Commission staff, can reach actors engaging in such activities through their application of *general state consumer protection laws*. Also *where Commission jurisdiction is not clear or is otherwise disputable,* prosecution of the case by the AG or DAs may avoid lengthy litigation over jurisdictional issues and provide the most effective, timely relief to consumers.[78]

The OII is exactly this type of case. Although Comcast's position is that the proposed enforcement action clearly exceeds the Commission's jurisdiction, there can be no dispute that the Commission's jurisdiction is, at a minimum, "not clear or . . . otherwise disputable." Indeed, this Motion to Dismiss demonstrates that the Commission's jurisdiction is vigorously "disput[ed]." Dismissing the case on prudential grounds would avoid what are certain to be lengthy and ongoing jurisdictional disputes.[79] Moreover, given the Attorney General Office's expertise in privacy matters and authority to enforce laws of general applicability, Comcast

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[77] D.06-03-013, *mimeo* at 107.

[78] D.06-03-013, *mimeo* at 106-107.

[79] If the CPUC were to dismiss the case on prudential grounds, it need not make any determination on the scope of its jurisdiction in this matter.

respectfully submits that customers' privacy interests will be well-protected by deferring to the Attorney General's Office.[80]

This approach would also promote administrative efficiency and avoid the risk of inconsistent results (including potentially conflicting findings of fact and conclusions of law, and inconsistent remedies). The Commission has on a number of occasions dismissed without prejudice CPUC cases "on prudential grounds" in situations where a court or another agency is considering the same matter. For example, in D.06-04-010, *Pacific Bell Telephone Company v. MAP Mobile Communications, Inc*., the Commission dismissed a complaint alleging refusal to pay for interconnection services because the FCC was "considering many, if not all" of the same issues in a pending FCC complaint case, observing that:

> Having these two actions proceed simultaneously in two different forums is *inefficient at best and poses the risk of inconsistent results*.[81]

Accordingly, even if the Commission were to decline to dismiss the case on the ground that it lacks jurisdiction as a matter of law, it should dismiss the proposed enforcement action on prudential grounds given that the Attorney General's Office is actively investigating this matter, and it would be wasteful and inefficient for the Commission to expend scarce resources on a duplicative investigation.

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[80] *See also Alisal Water Corp.,* D.99-11-043 (dismissing, without prejudice, an application seeking to transfer a water system where title to the water system was disputed and where Commission reasoned that "[n]otwithstanding the Commission's jurisdiction to determine [the] status of water systems, it is also the case that the courts are better equipped to adjudicate matters of title and contract.").

[81] D.06-04-010, *mimeo* at 4. *See also PacWest v Sprint Spectrum, L.P., et al*., D.11-03-034 (dismissing an intercarrier compensation complaint on "prudential grounds," citing the pendency of a related appeal at the D.C. Circuit and FCC rulemaking, as well as the significant investment of Commission resources in the matter); *In re the Application of North County Communications,* D.10-06-006 (dismissing CPUC application because of pending FCC proceeding on appeal at the D.C. Circuit, and administrative efficiency); *Pacific Bell v. AT&T Communications of California, Inc*. D.97-09-105, 75 CPUC2d 678, 679 (dismissing without prejudice Pacific's complaint that AT&T and MCI were marketing their local and interexchange services in violation of federal and state law because the FCC was considering some of the same claims).

## V. CONCLUSION

For the foregoing reasons, Comcast respectfully requests that the OII be dismissed on jurisdictional grounds. Comcast further requests that the ALJ/Assigned Commissioner promptly issue a ruling on Comcast's Motion to Dismiss and stay discovery and any other action in the proceeding until the motion is ruled on. Alternatively, the Commission should dismiss this OII on prudential grounds in light of the Attorney General's investigation into this matter.

Respectfully submitted this 18th day of November 2013,

/s/

Suzanne Toller
Jane Whang
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: suzannetoller@dwt.com
janewhang@dwt.com

Attorneys for Comcast

/s/

Peter Karanjia
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3401
Tel. (202) 973-4200
Fax. (202) 973-4499
Email: peterkaranjia@dwt.com

Attorneys for Comcast