BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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| Order Instituting Rulemaking Regarding Revisions to the California Universal Telephone Service (LifeLine) Program. | Rulemaking 11-03-013 (Filed March 24, 2011) |

# COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENT FROM PARTIES

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# COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENT FROM PARTIES

## I. INTRODUCTION

Pursuant to the Administrative Law Judge's (ALJ) March 9, 2015 Ruling (1) Incorporation Staff Proposal into the Record (2) Requesting Comment from Parties and (3) Setting Comment Dates (Ruling), the ALJ's March 18, 2015 Ruling correcting attachment to March 9, 2015 Ruling and Providing Additional Time for Comments, and the Commission's Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) submits these comments on whether and how fixed-voice over Internet protocol (VoIP) service providers that do not have a Certificate of Convenience and Necessity (CPCN) should participate in the California LifeLine Program.

ORA supports making California LifeLine available to eligible fixed-VoIP service customers. As consumers continue to transition from using traditional analog wireline service to other mediums of communications such as VoIP service, low-income California consumers would benefit by the participation of fixed-VoIP providers in the LifeLine Program as it would give them more choice among LifeLine providers. It would also promote public safety as LifeLine-eligible consumers (i.e., low-income consumers) may not otherwise have access to

LifeLine services. Under the Public Utilities Code, the California Public Utilities Commission (CPUC or Commission) is charged with protecting consumers and ensuring the provision of safe, reliable utility service and infrastructure.[1] To that end, it would be beneficial for fixed-VoIP providers to participate in the LifeLine program so that LifeLine is accessible to everyone who needs it. This is consistent with the plain language of the Moore Universal Telephone Service Act (the Moore Act), which adopted the LifeLine program and requires the Commission to promote "[i]ncreasing access to public resources enhancing public health and safety" to the LifeLine program.[2]

In order for fixed-VoIP service providers to participate in the California LifeLine Program, the Commission must adopt a process for fixed-VoIP providers that would include, at a minimum, a registration process, program rules and regulation, enforcement mechanisms that gives the Commission the authority and the ability to ensure that LifeLine customers are getting what they paid for. Until the Commission adopts such a process, fixed-VoIP service providers cannot participate in the LifeLine Program.

As discussed in detail below, if the Commission wishes to allow fixed-VoIP service providers to participate in the LifeLine Program, then it must utilize its regulatory authority under Section 706(a) of the 1996 Telecommunications Act (Section 706) to require them to obtain a CPCN or a parallel process, such as the proposal recommended by the Communications Division (CD) which includes a VoIP identification registration process, Tier 3 advice letter process, administrative obligations, LifeLine program rules and requirements and other CPUC rules and requirements (CD Proposal). Section 706 places a duty on the CPUC to accelerate the deployment of advanced services, including VoIP services, to all Californians; this includes the deployment of fixed-VoIP services to low-income LifeLine customers. Public Utilities (P.U.) Code section 710(a) does not preclude the CPUC from including fixed-VoIP services in the California LifeLine program so long as the CPUC invokes its Section 706 authority. If the Commission chooses to not rely on its Section 706 authority, a statutory change would be

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[1] See, e.g., Pub. Util. Code § 451.

[2] Pub. Util. Code § 871.1(c)(3).

necessary to permit fixed-VoIP service providers to participate in the LifeLine Program with reasonable Commission oversight.

ORA supports much of the substance of the CD Proposal for enabling fixed-VoIP service providers to participate in the California LifeLine Program. CD's Proposal would establish clear and sensible rules toward ensuring customer protections, promoting administrative efficiency and transparency, advancing technology-neutral voice services, and creating a level playing field amongst providers. However, reasonable Commission oversight of the LifeLine program requires clarity and assurance that Commission enforcement authority is in place to ensure compliance to rules and requirements. CD's Proposal lacks the specificity to enforce its recommended approach. Therefore, ORA recommends that the Commission require fixed-VoIP service providers to obtain a CPCN because the Commission's enforcement authority is clear and not disputed.

In order to expedite participation in the LifeLine Program, the Commission could consider in this proceeding automatically granting CPCNs to fixed-VoIP service providers with corporate affiliates that already have a CPCN and benefit from having access to public rights of way (including utility poles) and interconnection agreements.

## II. DISCUSSION

### A. Fixed-VoIP providers are Telephone Corporations

The CPUC has jurisdiction to require fixed-VoIP providers to obtain a CPCN in order to participate in the California LifeLine program. As an initial matter, the provision of voice communications services in California by these entities for profit subjects them to the Commission's jurisdiction as "public utility" "telephone corporations." Any corporation or person "owning, controlling, operating, or managing any telephone line for compensation within this state" is a "telephone corporation" subject to the jurisdiction and control of the Commission.[3] P.U. Code section 233 defines "telephone line" to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate

[3] Pub. Util. Code § 234 (definition of "telephone corporation"); Pub. Util. Code § 216 ("definition of public utility").

communication by telephone, whether such communication is had with or without the use of transmission wires." [4] The definition of a "telephone corporation" does not draw jurisdictional distinctions based on the technology used in connection with the telecommunications service. As explained below, fixed-VoIP providers operate telephone lines in their provision of voice communications and are thus subject to the Commission's jurisdiction.

The Commission may apply the same enforcement requirements and standards to fixed-VoIP carriers. P.U. Code section 239 defines VoIP as "voice communications service that uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from, or terminates at, the user's location in Internet Protocol or a successor protocol."[5] The plain language of P.U. Code section 239 demonstrates that VoIP service utilizes "conduits, ducts, poles, wires, cables, instruments, or appliances" to facilitate communication by telephone. Accordingly, any corporation or person providing VoIP service for profit in California is a telephone corporation by operation of law.[6]

Moreover, neither P.U. Code section 239 (defines "VoIP" and "IP enabled" services) nor P.U. Code section 710 (limits the CPUC's jurisdiction over VoIP or IP-enabled services) alter or amend the relevant definitions of "public utility" (P.U. Code section 216), "telephone line" (P.U.

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[4] Pub. Util. Code § 233.

[5] Pub. Util. Code § 239.

[6] In 2004, in Investigation (I.) 04-02-007, *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice Over Internet Protocol Should be Exempt from Regulatory Requirements*, the Commission tentatively concluded that "those who provide VoIP service fixed- with the PSTN [public switched telephone network] are public utilities offering a telephone service subject to our regulatory authority." (I.04-02-007 at 4.) In reaching this tentative conclusion, the Commission analyzed the functionalities of VoIP, especially from the end-user's perspective, and interpreted VoIP service providers to fall within the definition of a public utility telephone corporation pursuant to sections 216 and 234. Subsequently, in 2011, in Rulemaking (R.) 11-01-008, *Order Instituting Rulemaking on the Commission's Own Motion to Require Fixed- Voice Over Internet Protocol Service Providers to Contribute to the Support of California's Public Purpose Programs,* the Commission reached the same tentative conclusion that "fixed-VoIP service providers fall within the broad definition of "telephone corporation." (R.11-01-008 at 27.) While these tentative conclusions were never adopted in final Commission decisions, ORA is unaware of any Commission decision that concludes otherwise.

Code section 233), or "telephone corporation" (P.U. Code section 234) that govern the jurisdictional analysis here, as discussed below.

### B. Federal Law Delegates Authority to the CPUC to Require Fixed-VoIP Service Providers to Obtain a CPCN or Other Parallel Process in Order to Participate in the LifeLine Program

The CPUC has the authority under Section 706(a) of the 1996 Telecommunications Act to require fixed-VoIP service providers to have a CPCN or other parallel process, such as the CD Proposal to provide California Lifeline service. A CPCN requirement – more than the VoIP Identification Registration and other program requirements that CD proposes – provides the proper legal foundation to ensure and enforce such providers to comply with minimum service quality and reliability standards, any public safety measures, and customer safeguards established by the CPUC.

Section 706 states:

> The [Federal Communications] Commission *and each State commission* with regulatory jurisdiction over telecommunications services *shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability*[7] *to all Americans* (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[8]

The CPUC is the state commission in California with regulatory jurisdiction over telecommunications services.[9] Thus, the "advanced telecommunications capability"[10] referenced

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[7] Section 706 defines "advanced telecommunications capability" to include Voice over Internet Protocol (VoIP) and broadband. Federal statute provides at 47 U.S.C. § 1302(d)(1) that: "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

[8] Codified at 47 U.S.C. § 1302(a) (emphasis added).

[9] *See, e.g.*, Pub. Util. Code §§ 216, 233, 234, 239, 285, 709, 2871-2897.

[10] Section 706 defines "advanced telecommunications capability" to include VoIP. Section 706(d)(1) states that: "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that

in Section 706, which includes VoIP service, is within the CPUC's subject matter jurisdiction. Section 706 gives parallel regulatory authority to states and the Federal Communications Commission (FCC).[11] This reading was recently affirmed by the District of Columbia (D.C.) Circuit Court of Appeals (D.C. Circuit) in *Verizon v. FCC*.[12] Under Section 706, the CPUC has an obligation to promote the deployment of VoIP services in California as Section 706 contains, in the D.C. Circuit's words, "a direct mandate."[13]

Some parties may claim that Section 706 at most authorizes a public utility commission to use the authority it already possesses under other provisions of law, essentially arguing that Section 706 has no purpose and effect. This view is at odds with the FCC's position on Section 706[14] and with the D.C. Circuit's determination in the recent *Verizon v. FCC* case that Section 706 is a specific grant of regulatory authority to both the FCC and state commissions.[15] As the D.C. Circuit noted, "Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could have not done the same here."[16] This view is also inconsistent with the Senate Committee Report on the Telecommunications Competition and Deregulation Act of 1995 (Senate Committee Report).[17] The Senate Committee Report states that Section 706 is "intended to ensure that one of the primary objectives of the [1996 Telecommunications Act]--to accelerate deployment of

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enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

[11] *Id.*

[12] *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014). *See also* Order on In the Matter of Preserving the Open Internet; Broadband Industry Practices (Open Internet Order), 25 F.C.C.R. 17905, 17968, ¶ 117 (2010). ALJ Bemesderfer supported this view at the PHC, noting that: "In [Verizon v. FCC], the D.C. Circuit affirms the FCC's interpretation of Section 706 as a grant of regulatory authority even though the decision itself rejects once again the FCC's attempt to formulate net neutrality rules." PHC Transcript at 11, lines 4-9.

[13] *Comcast v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010).

[14] *Open Internet Order*, 25 F.C.C.R. at 17968-17971, ¶¶ 117-122.

[15] *Verizon*, 740 F.3d at 635.

[16] *Verizon*, 740 F.3d at 638.

[17] The Telecommunications Competition and Deregulation Act of 1995 was eventually adopted by Congress in 1996, and became known as the 1996 Telecommunications Act.

advanced telecommunications capability—is achieved," and emphasized that Section 706 is "'*a necessary fail-safe*' to guarantee that Congress's objective is reached."[18] As the FCC observed, and the D.C. Circuit quoted in *Verizon v. FCC*, "[i]t would be odd indeed to characterize Section 706(a) as a 'fail-safe' that 'ensures' the [Federal Communications] Commission's ability to promote advanced services if it conferred no actual authority."[19]

The FCC noted in the *Open Internet Order* that the authority Congress granted to the FCC and each state under Section 706 is limited to the following three factors: (1) regulatory actions that fall within the state's subject matter jurisdiction over such communications; (2) actions taken under Section 706 that "'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"; and (3) "activity undertaken to encourage such deployment [that] must 'utilize[e], in a manner consistent with the public interest, convenience, and necessity,' one (or more) of various specified methods" delineated in Section 706.[20] The FCC found that these limiting factors support the conclusion that Congress intended to grant substantive authority to the FCC and each state commission in Section 706.[21] *Encouraging the deployment of VoIP to all Californians, including low-income consumers, is consistent with these three limiting factors.*

Furthermore, under the California Constitution, the Commission is required to implement and follow Section 706, which not only creates a specific grant of regulatory authority for the Commission, but is also a mandatory, versus a permissive statute.[22] Section 3.5 of the California Constitution provides:

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[18] Committee Reports, 104th Congress (1995-1996) Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 50-51 (1995) (emphasis added). See also Open Internet Order, 25 F.C.C.R. at 17969-17970, ¶ 120; Verizon, 740 F.3d at 639.

[19] *Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120. See also Verizon, 740 F.3d at 639.

[20] *Open Internet Order*, 25 F.C.C.R. at 17970, ¶ 121 (citations omitted). In Verizon, 740 F.3d at 639-640, the D.C. Circuit only discusses the first two limitations, but not the third limitation. The D.C. Circuit reaches the same conclusion as the FCC that it is "satisfied that the scope of authority granted to the [Federal Communications] Commission by section 706(a) is not so boundless . . . . "

[21] *Id.*

[22] *See* 47 U.S.C. § 1302(a) and its use of the word "shall."

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
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> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.[23]

Therefore, this Commission has a duty and obligation to implement and effectuate Section 706, unless and until an appellate court tells it otherwise.

### C. P.U. Code Section 710 Preserves the CPUC's Authority Under Section 706

P.U. Code section 710 does not preclude the Commission from requiring VoIP providers to obtain a CPCN or follow the CD Proposal in order to participate in the LifeLine program because it provides a delegation of authority for requirements and express delegations of federal law:

> 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).[24]

The CPUC is an agency embodied in the California Constitution,[25] and as such, has broad, far-reaching discretionary authority, though the Legislature can limit such authority, as it did with passage of P.U. Code section 710. In enacting P.U. Code section 710, the Legislature acknowledged the CPUC's subject matter jurisdiction over VoIP and IP-enabled services, while

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[23] CA Const. § 3.5.

[24] Section 710(a) (emphasis added).

[25] CA Const., Art. XII.

placing limits on that authority. If the CPUC had never had authority over VoIP and IP-enabled services, then the need for P.U. Code section 710 would have never arisen. In view of the D.C. Circuit Court's conclusion that Section 706 is "an affirmative grant of authority" to the FCC and the state commissions, it falls clearly within the highlighted exemption in P.U. Code section 710(a).[26]

Because Section 706 delegates specific authority to "each state commission with regulatory jurisdiction over telecommunications services," the CPUC does not need additional authority granted by the Legislature to have regulatory authority over deployment of advanced telecommunications capability, such as VoIP service.[27] Under the Supremacy Clause of the United States Constitution,[28] federal law can preempt state law:

> The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law." Congress may exercise that power by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption.[29]

However, because P.U. Code section 710 contains exceptions to accommodate federal law requirements, there does not appear to be any preemption issue here.

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[26] ORA's position on Section 706 and P.U. Code section 710 is consistent with the position the CPUC has taken in A.14-04-013, et al. the proceeding on the proposed merger of Comcast Corporation and Time Warner Cable, Inc. In the Proposed Decision on that matter, the Commission stated that the CPUC has jurisdiction to review the merger under Section 706 and concludes "that Section 706(a) of the 1996 Telecommunications Act provides the express delegation of authority allowed by § 710." (A.14-04-013, et al., Proposed Decision Granting with Conditions Application to Transfer Control (PD) at 21. See also PD at 18-20; A.14-04-013, et al., Scoping Memo and Ruling of Assigned Commissioner and ALJ of August 14, 2015 at 10-12.)

[27] 47 U.S.C. § 1302(a).

[28] U.S. Const. Art. VI., § 2. ORA notes that under Article 3.5(c) of the California Constitution, an administrative agency, such as the CPUC, does not have the authority "to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." However, because Section 710(a) provides an exception, there is no need for a Supremacy Clause inquiry.

[29] *Brown v. Mortensen*, 51 Cal. 4th 1052, 1059 (2011).

### D. CD's Proposal & the CPCN Process

#### 1. CD's Proposal

CD proposed a set of rules to enable the participation of fixed-VoIP providers in the California LifeLine Program. CD's Proposal includes a VoIP identification registration process, Tier 3 advice letter process, administrative obligations, LifeLine rules and requirements and other applicable CPUC rules and requirements, including the Service Quality Rules (General Order (G.O.) 133-C, Privacy of Telephone Corporations (G.O. 107-B), Consumer Bill of Rights Governing Telecommunications Services and Market Rules to Empower Telecommunications Consumers and to Prevent Fraud (G.O. 168), Procedures for Obtaining Information and Records in the Possession of the CPUC and its Employees and CPUC Policy Orders Thereon (G.O. 66-C) and Rules for Filing and Publishing Tariffs for Gas, Electric, Telephone, Telegraph, Water and Heat Utilities (G.O. 96-B). ORA supports most of the substance of the CD Proposal.

ORA is concerned that CD's Proposal does not cover all of the rules that fixed-VoIP providers should be subject to, e.g., Rule 1.1 of the Rules of Practice and Procedure, there are no clear enforcement mechanisms, nor does CD's Proposal include any explanation regarding how and under what authority the Commission would impose or carry out any enforcement rules or requirements. CD's Proposal also does not justify or explain why a separate process for fixed-VoIP service providers is necessary or more desirable versus a CPCN process. Creating a separate process for fixed-VoIP providers creates undue administrative burdens on the Commission and leads to an uneven playing field. If fixed-VoIP providers are allowed to participate in the LifeLine program without a CPCN, the CPUC's ability to ensure compliance and enforcement of public safety and service reliability measures could be compromised to the detriment of LifeLine customers.

Furthermore, under P.U. Code section 1013, in order to exempt a fixed-VoIP provider, which, as discussed above is a telephone corporation, from the CPCN process, the Commission must make a finding that the provider is not a monopoly or does not have market power in the

relevant market(s).[30] It is unclear whether the Commission has the authority under P.U. Code section 1013 to issue a blanket exemption for all fixed-VoIP service providers to the CPCN requirement or whether it needs to make this determination on a case by case basis. It would be far more simple and transparent to adopt a CPCN process for fixed-VoIP providers that wish to participate in the California LifeLine Program.

No matter which path the Commission chooses, either requiring a CPCN for fixed-VoIP service providers or adopting a separate process along the lines of CD's Proposal, the Commission will need to rely on its Section 706 authority (which invokes the exception in P.U. Code section 710(a)). If the Commission chooses not to rely on Section 706, fixed-VoIP providers cannot participate in the California LifeLine Program because P.U. Code section 710(a) expressly prohibits the Commission from exercising regulatory control over VoIP services (e.g., issuing a CPCN or requiring them to register and follow program rules and requirements and other CPUC regulations), unless one of the exceptions, such as the express delegation of federal law, applies or unless there is an existing exception in statute.

### 2. CPCN Process

If the Commission adopts a CPCN Process for fixed-VoIP service providers participating in the LifeLine Program, then the Commission does not need to adopt a series of new special rules for these providers. Adopting a CPCN process for fixed-VoIP service providers wishing to participate in the LifeLine Program would answer many of the other questions set forth in the Ruling. For example, the Commission already has enforcement rules for service providers with a CPCN, and these enforcement rules would apply equally to all entities with a CPCN. Fixed-VoIP providers would pay the same performance bond that competitive local carriers (CLCs) currently

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[30] P.U. Code section 1013, which provides, in relevant part: "Telephone corporations that the commission determines have monopoly power or market power in a relevant market or markets shall have a certificate of public convenience and necessity and shall not be eligible for designation as registered telephone corporations. A telephone corporation that has been found not to have monopoly power or market power in a relevant market or markets by the commission shall be eligible for registration subject to the approval of the commission. A telephone corporation operating in this state shall either have a certificate of public convenience and necessity or be registered under this section or be a telephone corporation authorized to operate in California without a certificate of public convenience and necessity."

pay ($25,000).[31] The Commission would adopt a uniform set of withdrawal of service/transfer of service/exit rules that apply to all CPCN holders, regardless of regulatory classification and/or technology that is used to offer California LifeLine service.

The bottom line is that a CPCN process is transparent, it is very familiar to the Commission, it has a pre-existing comprehensive set of rules and regulations that could be used for fixed-VoIP providers, it would promote administration efficiency, and it would help create a level playing field for voice service providers on a technology-neutral basis. Additionally, evoking the Commission's authority under Section 706 to require fixed-VoIP providers to obtain a CPCN or follow a parallel process such as the CD Proposal will not require additional authority granted by the Legislature. This will expedite the process for low-income consumers to have access to fixed-VoIP LifeLine service.

In order to accelerate participation in the LifeLine Program, the Commission could decide to automatically grant CPCNs to fixed-VoIP service providers with corporate affiliates that already have a CPCN and benefit from having access to public rights of way (including utility poles) and interconnection agreements.

## III. CONCLUSION

For the aforementioned reasons, ORA recommends that the Commission encourage fixed-VoIP service providers to participate in the California LifeLine Program. The inclusion of fixed-VoIP services in California's LifeLine Program will benefit low-income consumers and promote public safety in the State. In order for fixed-VoIP service providers to participate in the California LifeLine Program, the Commission must adopt a process for fixed-VoIP providers that would include, at a minimum, a registration process, program rules and regulation, enforcement mechanisms that gives the Commission the authority and the ability to ensure that LifeLine customers are getting what they paid for.

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[31] *See* D.13-05-034; http://www.cpuc.ca.gov/PUC/Telco/Information+for+providing+service/forms+for+applying+provider.htm

Under existing law, the Commission must utilize its authority under Section 706 in order to require fixed-VoIP service providers to obtain a CPCN or adhere to a parallel process in order to participate in the LifeLine Program. Section 706 contains the express delegation of authority allowed for by P.U. Code section 710(a). ORA strongly recommends that the Commission adopt a CPCN process as it is clear and transparent, promotes administrative efficiency, utilizes enforcement mechanisms already in place, and helps create a more level playing field amongst service providers.

Respectfully submitted,

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