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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

O1 Communications, Inc. (U6065C)

Complainant

vs.

MCI Communications Services, Inc. (U5378C) and Verizon Select Services Inc., (U5494C)

Defendants

Case 17-12-014

MCI COMMUNICATIONS SERVICES, INC. (U5378C) AND VERIZON SELECT SERVICES INC.'S (U5494C) MOTION TO DISMISS O1'S AMENDED COMPLAINT

Scott H. Angstreich
Frederick Gaston Hall
Kevin D. Horvitz
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
sangstreich@kellogghansen.com
fhall@kellogghansen.com
khorvitz@kellogghansen.com

Jesús G. Román
VERIZON
15505 Sand Canyon Avenue
Irvine, CA 92618
(949) 286-7202
jesus.g.roman@verizon.com

Curtis L. Groves
VERIZON
1300 I Street, N.W., Suite 500 East
Washington, D.C. 20005
(202) 515-2179
curtis.groves@verizon.com

Attorneys for Verizon

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Pursuant to Rule 11.2 of the California Public Utilities Commission's Rules of Practice and Procedure, defendants MCI Communications Services, Inc., ("MCI") and Verizon Select Services Inc., ("VSSI"; with MCI, collectively, "Verizon") move to dismiss the amended complaint filed against them by O1 Communications, Inc., ("O1") on April 16, 2018 ("Amended Complaint") for lack of jurisdiction and failure to state a claim under Public Utilities Code § 1702.

I. INTRODUCTION

After Verizon showed that the Commission lacked jurisdiction over each count in O1's original Complaint, O1 filed an Amended Complaint that abandoned each of those counts and, instead, pleads four brand new counts. But the core of O1's claims remains the same. O1 is asking this Commission to adjudicate a dispute between a local telephone company and two long-distance carriers over payments allegedly due under a private contract for traffic that is jurisdictionally interstate. The Commission has never adjudicated such a dispute in the past, and O1's attempt to transform Verizon's purported breach of contract into violations of various Public Utilities Code provisions fails. The Commission should dismiss the Amended Complaint for lack of jurisdiction.

First, as with the Public Utilities Code claim in its original Complaint, O1's new counts based on Code provisions all would require the Commission to resolve the parties' dispute about their private contract *before* the Commission could find in O1's favor on any of its claims. The allegations of the Amended Complaint confirm this, repeatedly alleging that the remedy for O1's claims is for Verizon to abide by (what O1 asserts are) the terms of the parties' private contract. Yet the Commission has confirmed that it lacks jurisdiction over such private contract disputes,

and clever pleading will not transform O1's claims into ones within the Commission's jurisdiction.

Second, all of the traffic at issue in the Amended Complaint is jurisdictionally interstate traffic. O1 repeatedly has represented that the *only* traffic it routes comes from or is delivered to its over-the-top VoIP providers. Under § 710 of the Public Utilities Code and binding Federal Communications Commission ("FCC") precedent, that traffic is jurisdictionally interstate and subject to exclusive federal jurisdiction. Rather than confront its repeated admissions about the nature of its traffic, O1's Amended Complaint contains only bald assertions that some of the traffic at issue is jurisdictionally intrastate. The Commission need not assume the truth of those legal conclusions in reviewing the Amended Complaint and can take administrative notice of O1's unequivocal admissions about its traffic.

Third, each of O1's four new claims fails to satisfy the pleading standard in § 1702. Verizon does not act as a public utility when it buys the inputs for the service it provides to its long-distance customers. And O1 has failed to plead adequately that Verizon violated any Code provision. Verizon cannot have violated § 558 because the parties continue to exchange traffic without discrimination or delay. By their plain terms, Verizon cannot violate §§ 451 and 453 because those provisions impose specific requirements on the entity providing telecommunications services (here, O1), and not on the entity billed for the service (here, Verizon). Further, § 709, the basis of O1's fourth claim for relief, is merely a policy statement, not a law, rule, or order under § 1702.

O1's Amended Complaint is no more viable than its original, abandoned Complaint. The Commission should dismiss this private contract dispute so that it can proceed where all of O1's claims can be heard: in federal court.

II. BACKGROUND

Verizon described the background of this dispute in detail in its original motion to dismiss.[1] In short, the Verizon defendants are long-distance carriers. O1 is a competitive local exchange carrier ("CLEC"). In 2013, O1, MCI, and other Verizon entities — but not VSSI — had a billing dispute, in part before the Commission and in part in federal court. O1, MCI, VSSI, and other Verizon entities ultimately resolved the dispute in 2015 by entering into a private settlement agreement that is governed by New York law and that was not submitted to the Commission for review or approval.

Since the adoption of the agreement, O1 has consistently overcharged Verizon — billing Verizon for end-office switching access services that O1 does not provide and for fraudulent traffic. In 2016, Verizon notified O1 that Verizon disputed all of O1's invoices and that Verizon would begin recouping its previous overpayments by offsetting payment on O1's future charges.

On December 8, 2017, O1 filed a Complaint with the Commission alleging that Verizon breached the terms of the private contract by failing to pay O1 at certain purportedly prescribed rates.[2] O1 also alleged that Verizon's purported breach of the private contract violated some combination of §§ 701, 702, and 761 of the Code and § 201 of the federal Communications Act.[3]

On February 8, 2018, Verizon moved to dismiss O1's Complaint for lack of jurisdiction. Verizon demonstrated that the Commission lacked jurisdiction over O1's Complaint because O1 was suing Verizon over a private contract involving interstate traffic that lies within exclusive federal jurisdiction, because Verizon does not act as a public utility when it buys the inputs to its

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[1] Verizon 1st Mot. To Dismiss at 3-8.

[2] Compl. ¶¶ 38-49.

[3] *Id.* ¶¶ 51-58, 60-63.

services, and because Verizon cannot violate § 201 of the federal Communications Act when it acts as a customer and, in all events, only the FCC or a federal court has jurisdiction to hear a claim under § 201.[4]

On April 5, 2018, Administrative Law Judge Ayoade held a prehearing conference with the parties. ALJ Ayoade observed that § 1702 of the Code grants the Commission authority to hear disputes only for violations of laws, rules, decisions, or orders by public utilities and questioned whether O1's Complaint satisfied § 1702.[5] ALJ Ayoade opined that the Commission "d[oes not] enforce settlement agreement[s] . . . generally, unless [the Commission has] adopted them and utilized them in some ways,"[6] and that, to find that Verizon violated any law, rule, decision, or order the Commission would "have to reach a conclusion that they have violated the contract first."[7] ALJ Ayoade stated that he would not "exercise pendant jurisdiction [over interstate traffic claims] if [he] decide[s] [he] want[s] to look at the intrastate portion of this complaint" and he advised O1 that — if it in fact could identify some intrastate traffic at issue — it should "decide whether [it] want[s] to . . . litigat[e] this case, this complaint in two forums."[8]

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[4] *See* Verizon 1st Mot. to Dismiss at 9-16; Verizon Reply in Supp. of 1st Mot. to Dismiss at 2-13. Verizon also pointed out that the settlement agreement prohibits O1 from billing for fraudulent traffic and sets forth rate caps that O1's charges cannot exceed, not specific rates that Verizon must pay irrespective of the nature of O1's services and the rates in O1's tariffs. *See* Verizon 1st Mot. to Dismiss at 5.

[5] *See* Apr. 5, 2018 Prehr'g Conference Tr. 9:28-11:28.

[6] *Id.* at 45:15-18.

[7] *Id.* at 59:7-8; *see also id.* at 59:18-22 ("And the Commission has just not been involved in trying to figure out who's right or wrong in a contract provision entered into willingly by the parties for whatever reason. That is my concern.").

[8] *Id.* at 38:21-28.

ALJ Ayoade allowed O1 the opportunity to file an amended complaint to address these problems.[9]

On April 16, 2018, O1 filed an Amended Complaint. The Amended Complaint abandoned each of the three claims for relief in the original Complaint. In their place, O1 now alleges that Verizon violated § 558 of the Code, which requires that "telephone corporation[s] . . . receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation"[10]; § 451 of the Code, which requires that "charges demanded or received by any public utility . . . be just and reasonable"[11]; § 453 of the Code, which requires that public utilities not "make or grant any preference or advantage . . . or subject any corporation or person to any prejudice or disadvantage" with respect to "rates, charges, service, facilities, or in any other respect"[12]; and § 709(f)-(g) of the Code, which "find[] and declare[] that the policies for telecommunications in California" include "promot[ing] lower prices, broader consumer choice, and avoidance of anticompetitive conduct" and "remov[ing] the barriers to open and competitive markets and promot[ing] fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice."[13]

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[9] *Id.* at 54:9-14.

[10] Cal. Pub. Util. Code § 558.

[11] *Id.* § 451.

[12] *Id.* § 453(a).

[13] *Id.* § 709(f)-(g).

On April 17, 2018, ALJ Ayoade denied Verizon's original motion to dismiss as moot, directed Verizon to file an answer by May 17, 2018, and permitted Verizon to file a new motion to dismiss if Verizon believed the Amended Complaint did not cure the jurisdictional defects.[14]

III. THE COMMISSION DOES NOT HAVE JURISDICTION OVER O1'S AMENDED COMPLAINT, WHICH EFFECTIVELY ALLEGES THAT VERIZON BREACHED THE TERMS OF A PRIVATE CONTRACT

O1's first claim for relief in its original Complaint — which O1 conceded was the "core of [its] complaint"[15] — was a claim for breach of a private contract that the Commission did not review, adopt, or approve, and that is governed under New York law.[16] As the Commission noted in *Rodriguez v. Pacific Gas & Electric Company*, "the Commission is not the appropriate body to adjudicate [ ] private agreements . . . or the expectations arising from them. While such allegations may create a cause of action *in the courts*, they suffer from a jurisdictional defect here."[17] At the prehearing conference, ALJ Ayoade endorsed this well-established jurisdictional limitation, explaining that the Commission does not get involved in "trying to figure out who's right or wrong in a contract provision entered into willingly by the parties for whatever

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[14] As instructed by ALJ Ayoade, Verizon is filing an Answer to O1's Amended Complaint contemporaneously, but Verizon does not thereby waive its right to move to dismiss the Amended Complaint for lack of jurisdiction. *See* Apr. 17, 2018 Email Ruling Directing Verizon to File an Answer to O1's Apr. 16, 2018 Am. Compl. ("In their answer, defendants may specifically raise and/or re-state any jurisdictional defects(s) to the Amended Complaint . . . . Pursuant to Rule 4.4, failure to indicate jurisdictional defects [in an Answer] does not waive these defects and shall not prevent a motion to dismiss made thereafter."). However, if the Commission were to find that it has jurisdiction over O1's Amended Complaint, Verizon intends to file its own complaint against O1 to recover amounts that O1 improperly billed and that Verizon has paid. Verizon would seek to have the Commission adjudicate the two complaints together.

[15] Apr. 5, 2018 Prehr'g Conference Tr. 17:8-15.

[16] *See* Verizon 1st Mot. to Dismiss at 11-12; Verizon Reply in Supp. of 1st Mot. to Dismiss at 9-11; *see also* Apr. 5, 2018 Prehr'g Conference Tr. 24:14-22.

[17] D.04-03-010 at 8, 2004 WL 578924, at 4 (CPUC Mar. 16, 2004) (emphasis added).

reason,"[18] and cautioning O1: "So you want us to enforce the settlement agreement. I could give you so many reasons why that is a very precarious -- difficult situation for [the Commission] to be in."[19] The proper forum for such a claim, ALJ Ayoade explained, is in "civil court."[20]

By abandoning its breach of contract claim, O1 effectively concedes that the Commission is not the appropriate forum to interpret and enforce the parties' private contract. To attempt to evade this limitation, however, O1 now alleges that the same conduct — Verizon's "refus[al] to compensate O1"[21] — violates four separate sections of the Public Utilities Code. O1 explicitly asks the Commission to do the "very precarious"[22] thing ALJ Ayoade warned against: "To remedy Verizon's violation of Section 558, O1 requests that the Commission order Verizon to compensate O1 for its services pursuant to the rates[[23]] set forth in the parties' Confidential Settlement Agreement . . . ."[24] Each Claim for Relief contains materially identical language,[25]

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[18] Apr. 5, 2018 Prehr'g Conference Tr. 59:19-21; *see also id.* at 45:15-18 ("We just don't enforce settlement agreement[s] like that, I mean, generally, unless we've adopted them and utilized them in some ways.").

[19] *Id*. at 61:8-12.

[20] *Id*. at 45:8-9.

[21] *See* Am. Compl. ¶ 85(a) ("Did Verizon violate Section 558 by refusing to compensate O1 . . . ."); *id.* ¶ 85 (c) ("Did Verizon violate Section 451 by refusing to compensate O1 . . . ."); *id.* ¶ 85(e) ("Did Verizon . . . violat[e] . . . Section 453 by refusing to compensate O1 . . . ."); *id*. ¶ 85(g) ("Did Verizon . . . violat[e] . . . Section 709 by refusing to compensate O1 . . . .").

[22] Apr. 5, 2018 Prehr'g Conference Tr. 61:8-12.

[23] As Verizon has established, the Settlement Agreement sets forth rate *caps*, not specific rates. *See* Verizon 1st Mot. to Dismiss at 5.

[24] Am. Compl. ¶ 53 (First Claim for Relief – Violation of Section 558).

[25] *Id.* ¶ 63 (Second Claim for Relief – Violation of Section 451) ("To remedy Verizon's violation of Section 451, O1 requests that the Commission order Verizon to compensate O1 at the agreed-to rates in the Confidential Settlement Agreement along with late payment charges, attorney's fees and costs."); *id.* ¶ 73 (Third Claim for Relief – Violation of Section 453) ("To

proving that O1's Amended Complaint, no different from its original Complaint, seeks to have the Commission adjudicate the parties' dispute about the meaning of their private contract.

O1's newly minted claims based on various sections of the Public Utilities Code do not confer on the Commission jurisdiction to adjudicate a private contract dispute. As ALJ Ayoade correctly observed in the context of O1's now-abandoned § 761 claim, to reach any of the claims in O1's Amended Complaint, the Commission would first "have to reach a conclusion that [Verizon] violated the contract."[26] For example, to find that Verizon illegally discriminated against O1 by not paying O1 the amounts that O1 claims are due under the contract,[27] the Commission would have to resolve the dispute about the parties' private contract — Verizon cannot have discriminated against O1 by following the terms of the contract that O1 and Verizon voluntarily signed. O1 is thus attempting to transform its run-of-the-mill breach of contract claim into a claim cognizable before the Commission by alleging that the contract breach was unjust, unreasonable, or discriminatory.

The Commission has recently confirmed that its jurisdictional requirements cannot be evaded so easily. In *Rodney & Alice Wilson Family Revocable Trust of 1999 v. Pacific Bell Telephone Company*, a complainant invoked the Commission's jurisdiction by arguing that

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remedy Verizon's violation of Section 453, O1 requests that the Commission order Verizon [to] compensate O1 the rates set forth in the Confidential Settlement Agreement along with late payment charges, attorney's fees and costs."); *id.* ¶ 82 (Fourth Claim for Relief – Violation of Section 709) ("To remedy Verizon's anticompetitive conduct, O1 requests the Commission to order Verizon to compensate O1 at the rates set forth in the parties' Confidential Settlement Agreement along with late payment charges, attorney's fees and costs.").

[26] Apr. 5, 2018 Prehr'g Conference Tr. 59:7-8.

[27] *See*, *e.g.*, Am. Compl. ¶ 52 ("Verizon is discriminating against O1 compared to those CLECs whose invoices Verizon pays for the same service and O1 is harmed by such discrimination.").

Pacific Bell's alleged violation of its property rights was also a violation of § 761.[28] The Commission dismissed the complaint because "the 'unjust' nature of the . . . alleged violations of Pub. Util. Code § 761 c[ould] not be addressed without a prior determination on the merits of the [underlying property law] dispute, over which the Commission lack[ed] jurisdiction."[29] This decision is on all fours with this case. The Commission could not assess the purportedly "unjust" or "discriminatory" nature of Verizon's refusal to pay O1 based on its disputes of O1's bills without first reaching a determination on the merits of O1's breach of contract claim, over which the Commission lacks jurisdiction.

The Commission should reject O1's attempt to disguise its breach of contract claim as a claim within the Commission's jurisdiction and should dismiss the Amended Complaint in its entirety.

IV. O1'S AMENDED COMPLAINT RELATES SOLELY TO OVER-THE-TOP VOIP CALLS, OVER WHICH THIS COMMISSION LACKS JURISDICTION

As Verizon established in its original motion to dismiss, there is no applicable exception that provides the Commission with the authority to adjudicate a dispute over the interstate traffic at issue here.[30] O1 does not dispute this; instead, it asserts that this dispute also concerns intrastate traffic. It does not. O1 has previously admitted the factual predicates that lead to the conclusion that all of its traffic is jurisdictionally interstate, and the contrary legal conclusions alleged in the Amended Complaint — with no supporting factual allegations or even

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[28] *See* D.18-01-027 at 4, 6-7, 2018 WL 555625, at *2-4 (CPUC Jan. 18, 2018).

[29] D.18-01-027 at 7, 2018 WL 555625, at *4.

[30] *See* Verizon 1st Mot. to Dismiss at 10-12.

acknowledgement of O1's prior sworn factual statements — cannot provide a basis for Commission jurisdiction.

A. O1 Has Repeatedly Admitted that It Carries Exclusively Jurisdictionally Interstate Over-the-Top VoIP Calls

O1's Amended Complaint contains the unadorned allegation that it "provides intrastate and interstate switched access services to Verizon,"[31] and that "[a] substantial portion of the traffic in dispute in this litigation is intrastate traffic."[32] These are not factual allegations, but legal conclusions about jurisdictional classifications. In reviewing a complaint, the Commission "do[es] not accept as true the ultimate facts, or conclusions" alleged.[33] Notably, O1 alleges no facts about its traffic that could support the legal conclusions alleged in the Amended Complaint.

In addition, the legal conclusions in O1's Amended Complaint cannot be reconciled with O1's repeated and recent *factual* admissions in a related federal court case[34] that *all* of O1's traffic comes from over-the-top VoIP providers. Over-the-top VoIP providers allow users to make and receive telephone calls using their broadband Internet access service, which is sold by a different provider.[35] To allow their customers to reach telephone customers that receive service over the public switched telephone network, over-the-top VoIP providers partner with a

[31] Am. Compl. ¶ 25.

[32] *Id.*

[33] *Wave Cmty. Newspapers, Inc. v. U.S. TelePacific Corp.*, D.17-09-021 at 5, 2017 WL 4548170, at *3 (CPUC Sept. 28, 2017).

[34] *O1 Commc'ns, Inc. v. AT&T Corp.*, No. 3:16-cv-01452 (N.D. Cal.) ("*O1 v. AT&T*").

[35] *See* Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22,404, ¶ 8 (2004), *petition for review denied*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

LEC that provides the interconnection between the public switched telephone network and the Internet.[36]

The FCC has held — and O1 concedes — that over-the-top VoIP traffic is jurisdictionally *inter*state traffic.[37] Verizon is not, as O1's counsel asserted at the prehearing conference, merely "pointing to . . . something from another case that involves AT&T."[38] Verizon is relying on O1's own, repeated admissions, which O1 has never confronted or even attempted to explain away: not in its Complaint, not in its opposition to Verizon's motion to dismiss, not at the prehearing conference, and not in its Amended Complaint.

First, O1's Vice President of Industry Affairs, James Mertz, submitted a sworn declaration, under penalty of perjury, in support of O1's motion for summary judgment, stating: "Since April 2012, all of O1's originating and terminating access services are provided in partnership with what is referred to in the industry as 'over the top' ('OTT') VoIP service providers (O1's customers have included Vonage, Google, and Skype)."[39]

Second, in a supplemental letter brief that O1 filed in support of its motion for summary judgment, O1 stated that "the present matter" — that is, O1's attempt to recover switched access charges from AT&T — "involve[s] all IP originated traffic."[40]

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[36] *Id.*

[37] *See id.* ¶ 31; Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17,663, ¶ 944 (2011); O1 Opp. to 1st Mot. to Dismiss at 9 (acknowledging that "Voice over Internet Protocol ('VoIP')" is "an interstate service").

[38] Apr. 5, 2018 Prehr'g Conference Tr. 53:6-9.

[39] Decl. of James Mertz in Supp. of Pl. O1 Commc'ns, Inc.'s Mot. for Summ. J. at ¶ 8, *O1 v. AT&T* (N.D. Cal. July 26, 2017), ECF No. 84-1 (Ex. A to this Motion).

[40] Letter from D. Urban, Counsel for O1, to Judge Vince Chhabria at 2, *O1 v. AT&T* (N.D. Cal. Sept. 11, 2017), ECF No. 90-1 (Ex. B to this Motion).

Third, O1 responded to AT&T's discovery requests by "stipulat[ing] that since April 1, 2012, all of O1's originating and terminating access charges to AT&T relate to over-the-top VoIP."[41]

Finally, O1 told that federal court that, *before* April 2012, O1 "not only provided VoIP services . . . but [also] provided non-internet TDM based local and long distance services."[42] O1 did not deny that "after April 2012 all of the traffic at issue was Over the Top VoIP."[43] Notably, this final statement, like the first one quoted above, is a general statement about O1's business and not anything specific to the traffic O1 exchanges with AT&T. These statements, therefore, apply with equal force to the traffic O1 exchanges with Verizon, all of which was exchanged after April 2012.

The federal court, moreover, relied on O1's repeated admissions about the source of its traffic, stating in its opinion granting partial summary judgment that "O1 acknowledges that it exclusively provided services in conjunction with over-the-top voice-over-IP providers since April 1, 2012."[44] O1 did not move for reconsideration of that aspect of the decision or otherwise dispute or deny the accuracy of that statement, which was necessary to the court's entry of partial summary judgment in favor of AT&T.

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[41] Ex. 3 to the Reply Decl. of Michael J. Hunseder, Esq., in Supp. of Def. AT&T Corp.'s Reply Mem. of Law in Supp. of Its Cross Mot. for Summ. J. at 2, *O1 v. AT&T* (N.D. Cal. Sept. 7, 2017), ECF No. 89-4 (Ex. C to this Motion).

[42] Pl. O1 Commc'ns, Inc.'s Suppl. Br. in Further Supp. of Mot. for Summ. J. Pursuant to the Ct.'s Sept. 28, 2017 Order at 4 n.6, *O1 v. AT&T* (N.D. Cal. Oct. 12, 2017), ECF No. 101 (Ex. D to this Motion).

[43] *Id.*

[44] Order Granting Summ. J. in Part at 2 n.1, *O1 v. AT&T* (N.D. Cal. Dec. 19, 2017), ECF No. 106.

O1 cannot create a disputed fact issue by including in its Amended Complaint unadorned legal conclusions that are inconsistent with its repeated and explicit sworn factual statements about the nature of its business and its traffic. Notably, O1 has been given multiple opportunities to explain away those statements and has made no attempt to square the legal conclusions in its Amended Complaint with its prior factual admissions. Therefore, there can be no dispute that all of the traffic at issue here is jurisdictionally interstate and outside this Commission's jurisdiction.

B. The Commission Lacks Jurisdiction to Regulate Over-the-Top VoIP Traffic Under § 710 of the Public Utilities Code

Section 710 of the Public Utilities Code further confirms that the Commission lacks jurisdiction over O1's Complaint. "The [C]omission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol . . . services" except in limited circumstances not present here.[45] Specifically, the Commission can adjudicate disputes regarding interconnection agreements and intercarrier compensation disputes otherwise within the Commission's jurisdiction.[46] As Verizon has demonstrated, this case does not involve an interconnection agreement within the Commission's jurisdiction, and the Commission otherwise lacks jurisdiction to resolve compensation disputes between a competitive LEC and long-distance carriers regarding interstate traffic.[47]

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[45] Cal. Pub. Util. Code § 710(a); *see also id.* § 710(b) ("No department, agency, commission, or political subdivision of the state shall enact, adopt, or enforce any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law, that regulates VoIP or other IP enabled service . . . .").

[46] *See id.* § 710(c)(3), (5).

[47] *See* Verizon 1st Mot. to Dismiss at 9-12; Verizon Reply in Supp. of 1st Mot. to Dismiss at 5-12.

Rather, to decide the merits of O1's Amended Complaint and Verizon's counterclaims, the Commission would have to address Verizon's position that, in routing over-the-top VoIP traffic, O1 provides — and can therefore charge for — at most tandem switching.[48] Deciding this issue would constitute the exercise of regulatory jurisdiction over VoIP traffic in violation of § 710. The Commission's inability to exercise regulatory jurisdiction over a fundamental merits question provides an additional reason why the Commission should dismiss the Amended Complaint.

V. O1'S AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER PUBLIC UTILITIES CODE § 1702

To determine if a complaint's "allegations are 'well pleaded,' [the Commission is] guided by the standards set forth in Pub. Util. Code § 1702,"[49] which requires a complaint to (1) "allege that a regulated utility engaged in an act or failed to perform an act," and (2) "allege a violation of any law or a violation of a rule or order of this Commission."[50] "The Commission will dismiss a complaint that fails to meet Pub. Util. Code § 1702's two-pronged standard."[51]

O1's Amended Complaint fails under each prong. First, Verizon is not a regulated utility when it buys the inputs for the telephone services Verizon sells to customers, and therefore O1

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[48] *See* Joint Prehr'g Conference Statement at 2.

[49] *Shilberg v. San Diego Gas & Elec. Co.*, D.17-11-012 at 6, 2017 WL 5714728, at *4 (CPUC Nov. 20, 2017).

[50] *Rodney & Alice Wilson Family Revocable Tr.*, D.18-01-027 at 4-5, 2018 WL 555625, at *2. Section 1702 provides in relevant part that a complainant shall set forth "any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." Cal Pub. Util. Code § 1702; *see also* Commission's R. of Practice & P. 4.1(a) (similar).

[51] *Rodney & Alice Wilson Family Revocable Tr.*, D.18-01-027 at 5, 2018 WL 555625, at *2.

does not and cannot adequately allege that Verizon has violated the Public Utilities Code. Second, O1 does not allege facts that amount to a violation of any law, rule, or order. The Commission need not reach any other determination in order to dismiss O1's Amended Complaint.

A. As a Matter of Law, Verizon Acts Solely in its Capacity as a Customer, and Not in a Dual Capacity as a Public Utility, When Buying Service from O1

There is no question that Verizon is a public utility when it provides telecommunications services. There is also no question that Verizon is not a public utility in *every* task that it performs. Under the Public Utilities Code, an entity is only a public utility when it "is perform[ing]" "the service" that makes it a public utility.[52] The dispositive question is whether Verizon acts as a public utility when it performs the act (or fails to perform the act) that O1 alleges is unjust: the "failure to pay O1's invoices" for the amounts O1 claims are due for the services Verizon purchased from O1.[53]

When Verizon purchases the inputs into the telephone services that it then sells to its customers, Verizon is not performing the service — the offering of telephone service to the public — that makes Verizon a public utility. Verizon is not acting as a public utility when it

[52] Cal. Pub. Util. Code § 216(a); *see also California Cmty. Television Ass'n v. General Tel. Co. of Cal.*, 73 CPUC 507, 1972 WL 30058, at *19 (1972) (use by a telephone and electric utility of their pole space for CATV provided attachments is not a "public utility" service because such use is not "in connection with or to facilitate" either the "transmission of electricity for light, heat, or power," or "communication by telephone"); Apr. 5, 2018 Prehr'g Conference Tr. 58:5-9 (counsel for O1 stating that "it is true that a telephone utility could open a hot dog stand. It would not be acting as a public utility in that circumstance. There's no doubt about that.").

[53] *E.g.*, Am. Compl. ¶ 50. O1's choice to assert sixteen different times in its Amended Complaint that Verizon and O1 "jointly" "provide" services, does nothing to change the fact that O1 does not allege that Verizon did anything wrong in connection with any service it provides to customers.

buys copper wire or fiber optic cable, or purchases electricity to power its telephone network, even though it uses that wire, cable, and electricity to offer telephone services to its customers. Verizon is also not acting as a public utility when it buys services from O1, which are simply another input to those telephone services.

That conclusion rests on no disputed facts and is ripe for decision now as a matter of law. Counsel for O1 has acknowledged that Verizon is "purchasing" a service from O1 and that it uses that service, in turn, "to provide telephone services."[54] Those facts are undisputed. As both the FCC and the courts held, when a company like Verizon purchases such inputs, that company acts *exclusively* as a customer of telecommunications services — no different from any other entity purchasing service from a carrier — not in a dual capacity as both a customer and a common carrier.[55] The Public Utilities Code similarly governs only what the provider must charge, and not what the customer must pay, and so Verizon is not acting even in part as a "public utility" under § 216(a) when it buys service from O1. Therefore, O1's Amended Complaint fails under the first prong of § 1702.

B. O1 Does Not Identify Any Rule, Order, or Law that Verizon Has Allegedly Violated

At the prehearing conference, ALJ Ayoade noted the absence in O1's original Complaint of "an[y] act done or an omission by a public utility that is in violation of [a] provision of law or

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[54] *See* Apr. 5, 2018 Prehr'g Conference Tr. 63:26-64:3.

[55] *See*, *e.g.*, Memorandum Opinion and Order, *All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, ¶¶ 10, 12 (2011) (holding that a long-distance carrier buying switched access service acts "in its role as a customer" and therefore a competitive LEC cannot "claim in a court or at the Commission" that the customer "violated the [Communications] Act," which governs carriers, not customers); *Qwest Commc'ns Co. v. Aventure Commc'ns Tech., LLC*, 86 F. Supp. 3d 933, 1019-23 (S.D. Iowa 2015) (ruling on the pleadings that a long-distance carrier acts solely in its role as customer when it purchases switched access services, and therefore cannot violate the Act).

order or rule of the Commission."[56] In an attempt to cure this flaw, O1 abandoned *all* of its initial claims, and brought four new ones. Yet none of O1's new claims — which O1 appears to have lifted directly from its very different complaint in *O1 Communications, Inc. v. New Cingular Wireless Pcs, LLC*[57] — adequately pleads that Verizon has violated any law, rule, decision, or order.

1. O1's first claim for relief, which alleges that Verizon violated § 558, fails to state a claim.

The only duty that § 558 imposes on telephone companies is to "receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made."[58] Yet O1 does not allege that Verizon "receive[s]," "transmit[s]," or "deliver[s]" any communications or messages with discrimination or delay. In fact, O1 alleges the opposite: that Verizon and O1 continue to exchange traffic with no interruptions.[59] Thus, the purpose of § 558 — "each carrier operating in California must transmit and route the calls of all other carriers connected to its network"[60] — as well as its plain textual requirement is satisfied.

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[56] Apr. 5, 2018 Prehr'g Conference Tr. 27:18-21.

[57] C.15-12-020 (CPUC) ("*New Cingular*"). *Compare* Confidential Verified Compl. of O1 Commc'ns, Inc. § VI.A, VI.B, VI.C, VI.D, *New Cingular* (CPUC Dec. 28, 2015) (alleging violations of §§ 558, 451, 453, and 709), *with* Am. Compl. § V (alleging violations of §§ 558, 451, 453, and 709).

[58] Cal. Pub. Util. Code § 558.

[59] *See* Am. Compl. ¶ 42.

[60] Order Denying Rehearing of Decision 13-07-002, *Order Instituting Rulemaking to establish rules governing the transfer of customers from competitive local carriers exiting the local telecommunications market*, D.14-10-050 at 3, 2014 WL 5474952, at *2 (CPUC Oct. 16, 2014); *see also* Order Instituting Investigation to Address Intrastate Rural Call Completion Issues, I.14-05-012 at 3, 2014 WL 2430104, at *2 (CPUC May 15, 2014) ("All carriers, whether

O1's complaint is actually that Verizon has not paid as much for the traffic the companies have exchanged as O1 thinks Verizon should have paid under O1's interpretation of the parties' private contract.[61] But § 558 says nothing about a customer's obligation to *pay* for traffic exchanged.

This Commission's 2017 decision in *New Cingular*[62] is not to the contrary. In *New Cingular*, O1 complained that AT&T's wireless carrier was insisting on interconnecting indirectly with O1 and separately alleged that AT&T was thereby discriminating against O1 by not allowing direct interconnection for the exchange of traffic.[63] The Commission held that these allegations stated a claim upon which relief could be granted.[64] O1 does not allege that Verizon is discriminating against O1 with respect to the manner in which the companies exchange traffic. Instead, O1 alleges that Verizon is not paying O1 what Verizon allegedly owes under the parties' private contract.

2. O1's second and third claims for relief, which allege that Verizon violated §§ 451 and 453, fail to state a claim.

Section 451 requires that "charges demanded or received by any public utility" be reasonable.[65] It authorizes the Commission "to regulate [the] rates, practices, service, and the

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wholesale, intermediate, or retail traffic haulers, must terminate traffic for one another and from an end user to another end user in every instance.")

[61] *See*, *e.g.*, Am. Compl. ¶ 42 ("despite Verizon's failure to pay"); *id.* ¶ 43 ("Verizon has refused to compensate O1 for its services"); *id.* ¶ 44 ("Verizon has failed to respond to O1's demand letter and has failed to pay O1 any amounts billed").

[62] Order Granting Rehearing of Decision (D.) 16-09-005, and Vacating the Decision, D.17-08-016, 2017 WL 3521570 (CPUC Aug. 10, 2017).

[63] *See* Confidential Verified Compl. of O1 Commc'ns, Inc. ¶¶ 63, 65-66, 77, *New Cingular* (CPUC Dec. 28, 2015).

[64] *New Cingular*, D.17-08-016 at 5-6, 2017 WL 3521570, at *3-4.

[65] Cal. Pub. Util. Code § 451.

reliability, safety and adequacy of [] facilities" of a service provider.[66] Section 453(a) prohibits public utilities from "mak[ing] or grant[ing] any preference or advantage . . . or subject[ing] any corporation or person to any prejudice or disadvantage" "as to rates, charges, service, facilities, or in any other respect."[67] It prohibits service providers from discriminating *among customers*.[68] Each of these provisions regulates what *O1*, the service provider, may charge *Verizon*, the customer, and not the other way around. "An inspection of the cases interpreting these statutes discloses that the conduct that is forbidden [by §§ 451 and 453] is in regard to discrimination in rates or service by the utility *towards various groups or classes of its customers* . . . ."[69]

Because Verizon is not demanding or receiving any charges — O1 is — Verizon cannot violate § 451 by refusing to pay O1's invoices based on the parties' dispute about the terms of their private contract. For the same reason, only O1 could be making or granting any preference with regard to the rates it is charging — Verizon, as O1's customer, cannot violate § 453(a) either. For these reasons, the Commission's decision in *New Cingular*, holding that O1 stated a valid claim under § 453(a) against AT&T's wireless carrier, is irrelevant. O1 was a customer of that wireless carrier: specifically, it was seeking to purchase interconnection services from AT&T.[70]

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[66] Order Instituting Investigation, *Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Service and Facilities of PacifiCorp*, I.06-03-002 at 1, 2006 WL 623520, at *1 (CPUC Mar. 7, 2006).

[67] Cal. Pub. Util. Code § 453(a).

[68] *See, e.g.*, *NAACP, W. Region v. All Regulated Pub. Utils.*,71 CPUC 460, 1970 WL 19908, at 3 (CPUC Oct. 6, 1970).

[69] *Id.* (emphasis added).

[70] D.17-08-016 at 4-5, 2017 WL 3521570, at *3.

3. O1's fourth claim for relief, which alleges violation of § 709, fails to state a claim.

Subsections 709(f) and 709(g) set forth state policies related to telecommunications in California.[71] They are not "provision[s] of law or . . . order or rule of the [C]omission" that can serve as a cognizable cause of action under § 1702. As the Commission has expressly held, "[b]ased on the plain language of the statute, PU Code § 709 does not . . . create a cause of action by one party against another."[72] Accordingly, O1's claim that Verizon violated section 709 must be dismissed.

O1, however, asserts that the Commission recently found that "O1 properly stated a cause of action under Section 709(f) and (g) for anticompetitive rates and practices" in *New Cingular*.[73] Not so. The Commission there addressed only O1's claim that AT&T's wireless carrier was violating § 453(a). The Commission did not address the validity of O1's claim under § 709.[74] Because the Commission found that the ALJ erred in dismissing O1's claim under § 453(a), it remanded the case, making sure to note that it did "not intend to prejudge the merits of any of the allegations in the Complaint."[75] Moreover, O1's motion for rehearing of the ALJ's dismissal of its complaint made no reference to § 709.[76] In sum, nothing in *New Cingular* overruled the

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[71] Cal. Pub. Util. Code § 709(f)-(g).

[72] *In re MCI Telecomms. Corp.,* D.97-09-113, 1997 WL 868373, at 11 (CPUC Sept. 24, 1997).

[73] Am. Compl. n.14.

[74] *See* D.17-08-016 at 5-6, 2017 WL 3521570, at *3-4 (discussing § 453(a) only).

[75] D.17-08-016 at 6, 2017 WL 3521570, at *4.

[76] *See* Application for Rehearing of Decision D.16-09-005 Granting AT&T Mobility Motion to Dismiss, *New Cingular* (CPUC Oct. 20, 2016).

Commission's precedent holding that § 709 is merely a policy statement that cannot serve as the basis for a cognizable claim under § 1702.

In all events, O1's decision to abandon all of its original claims and bring the identical four causes of action it brought in *New Cingular* in this proceeding which involves entirely different facts perfectly exemplifies the gamesmanship that will occur if the Commission does not dismiss O1's Amended Complaint. Aware that ALJ Ayoade doubted the Commission's jurisdiction over O1's breach of contract claim, O1 has re-pleaded it as a "harm[to] O1's ability to compete . . . as a result of the loss of revenue" in violation of a policy statement.[77] If such a pleading tactic can succeed, the statutory limitations on the Commission's jurisdiction would be rendered worthless. The Commission should not create such precedent here.

In sum, O1's Amended Complaint fails under both prongs of § 1702 and the Commission can dismiss the Complaint for that reason alone.

VI. CONCLUSION

For the foregoing reasons and those in Verizon's previous briefs, the Commission should dismiss O1's Amended Complaint.

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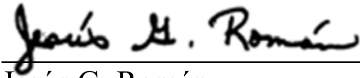
[77] Am. Compl. ¶ 79.

Respectfully submitted,



Jesús G. Román
VERIZON
15505 Sand Canyon Avenue
Irvine, CA 92618
(949) 286-7202
jesus.g.roman@verizon.com

Curtis L. Groves
VERIZON
1300 I Street, N.W., Suite 500 East
Washington, D.C. 20005
(202) 515-2179
curtis.groves@verizon.com

Scott H. Angstreich
Frederick Gaston Hall
Kevin D. Horvitz
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
sangstreich@kellogghansen.com
fhall@kellogghansen.com
khorvitz@kellogghansen.com

Attorneys for Verizon

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