



**FILED**

11-09-09

02:23 PM

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

Rulemaking on the Commission's Own  
Motion into Reliability Standards for  
Telecommunications Emergency Backup  
Power Systems and Emergency Notification  
Systems Pursuant to Assembly Bill 2393.

Rulemaking 07-04-015  
(Filed April 12, 2007)

**COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE  
TELECOMMUNICATIONS COMPANIES (CALTEL) ON PROPOSED DECISION**

November 9, 2009

Sarah DeYoung  
Executive Director, CALTEL  
50 California Street, Suite 500  
San Francisco, CA 94111  
Telephone: (925) 465-4396  
Facsimile: (877) 517-1404  
Email: [deyoung@caltel.org](mailto:deyoung@caltel.org)

Clay Deanhardt  
Law Office of Clay Deanhardt  
21-C Orinda Way, #374  
Orinda, CA 94563  
Phone: (925) 258-9079  
Email: [clay@deanhardtlaw.com](mailto:clay@deanhardtlaw.com)

Counsel for CALTEL

## RECOMMENDED CHANGES TO PROPOSED DECISION

1. Delete the text beginning with the last full paragraph on page 19 and continuing through the last sentence on page 20. Replace it with an analysis showing that the educational rules in the proposed decision are the regulation of “general commercial dealings ... marketing, advertising and other business practices.”
2. Delete Finding of Fact No. 35 and replace it with the Finding of Fact in Appendix A to these comments.
3. Delete Conclusion of Law No. 38, 40, 41, 42 & 44 and replace them with the Conclusions of Law in Appendix B to these comments.

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Pursuant to Commission Rule of Practice and Procedure 14.3, the California Association of Competitive Telecommunications Companies (“CALTEL”)<sup>1</sup> respectfully submits the following Comments on the Proposed Decision of Commissioner Simon in this rulemaking (the “PD”).

## **I. INTRODUCTION**

CALTEL agrees with PD’s focus on residential customer education and supports the specific consumer educational requirements it sets out. CALTEL also does not object to the idea that VoIP providers should meet those requirements. But the PD significantly overreaches by holding that “fixed” VoIP services are subject to state regulation; a finding that is beyond the scope of this proceeding, not necessary to support the purported goal of the PD, and neither factually or legally supportable on this record.

Assuming the goal of the PD is, as it should be, to create an enforceable order requiring companies to inform their residential customers about emergency power issues, then there is a more direct and narrowly focused way to accomplish that goal. The PD should simply recognize that the educational requirements proposed by the PD are regulations governing “general commercial dealings ... marketing, advertising and other business practices” that fall within the FCC’s stated exceptions to its VoIP service preemption under the *Vonage Preemption Order*.<sup>2</sup> Such a finding would give the Commission all of the authority it needs to enforce its order while leaving for another,

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<sup>1</sup> CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. CALTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. The majority of CALTEL members are small businesses who help to fuel the California economy through technological innovation, new services, affordable prices and customer choice.

<sup>2</sup> Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (Rel. November 12, 2004) 19 FCC Rcd. 22404 (the “*Vonage Preemption Order*”), ¶1.

more appropriate proceeding the question of whether any VoIP service is subject to state regulation.

As written, however, the PD reaches a broad, unnecessary and unsustainable legal conclusion that has no basis in the record of this proceeding. Accordingly, CALTEL respectfully recommends that the PD be changed as set out in the Recommended Changes and that new Findings of Fact and Conclusions of Law be adopted as set out in Appendices A & B.

**II. THE PROPOSED DECISION IS ILLEGAL BECAUSE IT PURPORTS TO CHANGE D.06-06-010 WITHOUT PROVIDING PARTIES WITH THE LEGALLY REQUIRED NOTICE.**

In D.06-06-010, the Commission determined that it was premature to assess the Commission's role in regulating VoIP. While that decision certainly may be revisited, as suggested by the PD, that revisiting must occur in the context of a properly noticed proceeding *for that purpose*. The Commission cannot use this proceeding to change D.06-06-010, as the PD purports to do.

Public Utilities Code §1708 provides the only legal way by which the Commission may change a previous order. It provides:

The commission may at any time, **upon notice to the parties, and with opportunity to be heard** as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision. (Emphasis added).

The PD purports to rescind, alter and amend D.06-06-010 by (1) expressly finding that the Commission has regulatory authority over certain kinds of VoIP, and (2) exerting that authority. No parties, however, were provided with any notice that the Commission would reconsider D.06-06-010 in this proceeding. To the contrary, this proceeding was

scoped to consider issues regarding emergency backup power. The *Assigned Commissioner's Scoping Memo and Ruling* dated April 28, 2009 (the "Scoping Memo") is only three pages long and doesn't even use the term VoIP, let alone provide notice or an opportunity for VoIP providers to weigh in on the scope of authority asserted over them by the PD.

Despite providing no such notice, the PD devotes roughly 22% of its analysis (5 pages out of 23) to justifying PD Conclusion of Law No. 41: "When the service provided is 'fixed' VoIP, it can be separated into interstate and intrastate communications, and is subject to state regulation."

This unsupported and unnecessary conclusion goes well beyond the scope of this proceeding. It rescinds and amends D.06-06-010 without providing any affected parties with notice that the Commission was even considering such a radical step.

Whether or not D.06-06-010 left open the possibility that the Commission would revisit VoIP service regulation, P.U. Code § 1708 provides that the Commission certainly cannot do so without giving potentially affected parties proper notice of what the Commission is considering and an opportunity to be heard on that point. To move from the conclusion that it is premature to assess the Commission's proper regulatory role over VoIP (D.06-06-010, p. 3) to exerting full regulatory authority over a VoIP service, in a proceeding designed to address emergency backup power, is simply an abuse of discretion a clear violation of due process.

If the Commission wants to reconsider whether to exert regulatory authority over VoIP services of any type, it should open a new proceeding to consider whether such action is appropriate after due notice giving affected parties an opportunity to be heard.

But reaching the conclusion that fixed VoIP services are subject to state regulation is not a proper finding for this proceeding.

This proceeding instead should focus on whether the PD's proposed education rules can be applied to VoIP service providers. They can be, without the Commission having to find that it has full regulatory authority over any VoIP service. As discussed in Section III, there are clear and narrower grounds the PD could have relied on, and now should rely on, to extend the emergency power education rules to VoIP providers.

**III. THE PROPER BASIS FOR THE PROPOSED DECISION TO ASSERT JURISDICTION IN THIS PROCEEDING IS TO RELY ON COMMISSION POWERS THAT THE FCC EXPRESSLY LEFT FOR IT.**

The educational requirements proposed by the PD are in the nature of rules that affect “general commercial dealings ... marketing, advertising and other business practices.” An order imposing them therefore would fall within the express exceptions to the FCC's VoIP service preemption under the *Vonage Preemption Order*. Revising the jurisdictional analysis to focus on those exceptions would provide a sound legal basis for the PD to achieve its stated goal – the education of residential consumers about this very important topic.

As the Commission is aware, the FCC expressly preempted state regulation of VoIP services in the *Vonage Preemption Order*. In so doing, the FCC wanted to make it clear that “this Commission [the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities.”

Significantly, the FCC carved out an exception to its stated preemptions:

We express no opinion here on the applicability to Vonage of Minnesota's general laws governing entities conducting business within

the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices. We expect, however, that as we move forward in establishing policy and rules for DigitalVoice and other IP-enabled services, states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints. *Vonage Preemption Order*, ¶ 1.

For the reasons mentioned above, those exceptions are applicable here and should form the basis for the PD's extension of the emergency power education requirements to VoIP services.

**IV. THE JURISDICTIONAL ANALYSIS IN THE PROPOSED DECISION HAS NO SUPPORT IN THE RECORD AND IS INCOMPLETE.**

Whether or not the FCC has expressly preempted regulation of all VoIP services, including fixed VoIP, there is no legal or factual basis in the PD for the Commission to conclude that federal law does not preempt state law in this area generally, or that the Commission *can* regulate fixed VoIP services.

The PD concludes that the Commission can regulate so-called "fixed" VoIP services because, according to the PD, providers of such services can differentiate between interstate and intrastate traffic. PD, p. 20 and Finding of Fact No. 35. This analysis fails because there is no evidence in the record of the proceeding to support it or the finding of fact. The finding also misreads the FCC's *Universal Service Order*,<sup>3</sup> and the PD's analysis of the legal issues surrounding preemption is incomplete.

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<sup>3</sup> Report and Order and Notice of Proposed Rulemaking, *In re Universal Service Contribution Methodology*, WC Docket No. 06-122 (Rel. June 27, 2006) 21 FCC Rcd 7518.

**1. There is no Evidence in the Record for a Finding that “Fixed” VoIP Providers can Differentiate between Interstate and Intrastate Traffic.**

On page 20 and in Finding of Fact No. 35, the PD claims that providers of fixed VoIP services can differentiate between interstate and intrastate traffic. There are no record cites supporting these findings, demonstrating that there is no evidence in the record to support them. Neither is this a “fact” that has ever been found by the FCC or any court.

In its first full paragraph on page 20, the PD says, “Generally, the capability of tracking intrastate and interstate calls depends on whether the VoIP is ‘fixed’ as opposed to ‘nomadic.’ ... Thus, when the service provided is ‘fixed’ VoIP, it can be separated into interstate and intrastate communications, and is subject to state regulation.” Neither of these statements is supported in the PD with any cite to record evidence, because there is no record evidence to support them.

The PD may consider it self-evident that “when the service provided is ‘fixed’ VoIP, it can be separated into interstate and intrastate communications,” but that is not the case. To the contrary, as the FCC said in paragraph 25 of the *Vonage Preemption Order*, it is not clear at all whether traffic from VoIP services can be differentiated sufficiently to allow for state regulation of such services *even if the service provider knows the location of the originating call* (e.g. even if the call is made on “fixed” VoIP service):

In fact, the geographic location of the end user at any particular time is only one clue to a jurisdictional finding under the end-to-end analysis. The geographic location of the ‘termination’ of the communication is the other clue; yet this is similarly difficult or impossible to pinpoint. This ‘impossibility’ results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the

same communication session and to perform different types of communications simultaneously, none of which the provider has a means to separately track or record. For example, a DigitalVoice user checking voicemail or reconfiguring service options would be communicating with a Vonage server. A user forwarding a voicemail via e-mail to a colleague using an Internet-based e-mail service would be ‘communicating’ with a different Internet server or user. An incoming call to a user invoking forwarding features could ‘terminate’ anywhere the DigitalVoice user has programmed. A communication from a DigitalVoice user to a similar IP-enabled provider’s user would ‘terminate’ to a geographic location unknown either to Vonage or to the other provider. These functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it. Indeed, it is the total lack of dependence on any geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications. (Footnotes omitted).

In other words, even if the service is “fixed” to a particular location, the FCC is not convinced that there can be a finding of state jurisdiction based on an end-to-end analysis.

Moreover, whether or not the PD considers this essential fact to be self-evident, the Commission cannot act on it without having record evidence that actually supports the conclusion drawn. Public Utilities Code section 1757(a)(4) requires that Commission decisions be based on “substantial evidence” for a court to affirm them. In this proceeding, however, there is no evidence at all.

Because there is no record evidence supporting the PD conclusion that fixed VoIP services can be separated into interstate and intrastate communications, that conclusion and the legal conclusions that spring from it are arbitrary, capricious and unsustainable. *See Motor Vehicle Manufacturer’s Association v. State Farm*, 463 U.S. 29, 43 (1983) (for agency action not to be arbitrary and capricious, the “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”); *see also, California Assn. of*

*Nursing Homes etc. v. Williams* 4 C.A.3d 800, 811 (1970) (Generally, administrative agencies may not base decisions upon evidence outside the record and not made available for rebuttal by the affected parties.)

**2. The FCC did not find, in its *Universal Service Order*, that fixed VoIP services are subject to state regulation.**

The PD’s conclusion that fixed VoIP is subject to state regulation<sup>4</sup> is based on its reading ¶ 56 of the FCC’s 2006 *Universal Service Order*. The FCC, however, did not find in that decision or any other that “fixed” VoIP providers can separate interstate and intrastate traffic. Neither has the FCC ever found that “fixed” VoIP services are subject to state regulation.<sup>5</sup>

In the *Universal Service Order*, the FCC created a safe harbor for VoIP providers to contribute to the federal USF on the basis that 64.9% of their revenues are from interstate traffic. The FCC also found that interconnected VoIP providers may report their actual interstate revenues for USF purposes *if* they are capable of doing so. Specifically, at ¶ 56, the FCC said:

While, as stated above, interconnected VoIP providers may report their actual interstate telecommunications revenues, **we recognize that some interconnected VoIP providers do not currently have the ability to identify whether customer calls are interstate** and therefore subject to the section 254(d) contribution requirement. Indeed, a fundamental premise of our decision to preempt Minnesota’s regulations in the Vonage Order was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries. Therefore, an interconnected VoIP provider may rely on traffic studies or the safe harbor described above in calculating its federal universal service contributions. Alternatively, **to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer**

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<sup>4</sup> See PD Conclusion of Law No. 41, which mirrors the final sentence of the first full paragraph of PD page 20.

<sup>5</sup> To the contrary, as the discussion below in Section IV.3 demonstrates, the FCC preempted state action with respect to “fixed” VoIP that shares the same characteristics as DigitalVoice in the *Vonage Preemption Order* and strongly suggested that it would preempt state action with respect to services, if any exist, that do not share those characteristics.

**calls**, it may calculate its universal service contributions based on its actual percentage of interstate calls. Under this alternative, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider. (Emphasis added, footnotes omitted).

The PD combines the last two sentences of ¶ 56 with the unsupported finding that fixed VoIP service providers can identify interstate and intrastate traffic to conclude that fixed VoIP providers are subject to state regulation. *See* Finding of Fact No. 35, Conclusion of Law No. 41.

In doing so, however, the PD ignored the significant *contingent* language at the beginning of ¶ 56. The FCC made no finding that VoIP providers *are capable* of identifying different types of traffic, merely that *if* they are capable of doing so, they would no longer be subject to the preemptive effects of the *Vonage Preemption Order*.

The PD makes an enormous leap to get from the FCC’s “if they can track traffic” to the PD’s “they all do it” and, as discussed above, there is no evidence in the record to support that leap. The FCC has never made such a general finding, and neither has any court. The PD therefore cannot rely on ¶ 56 of the *Universal Service Order* as a basis for asserting general jurisdiction over fixed VoIP providers.

### **3. The PD’s Jurisdictional Analysis is Incomplete.**

The PD’s analysis of the jurisdictional issues surrounding VoIP, in addition to having no factual basis, is legally insufficient and incomplete.

The *Vonage Preemption Order* preempts regulations applied to “services having the same capabilities” as Vonage’s DigitalVoice service. *Vonage Preemption Order*, ¶¶ 1, 46; *see also Id.*, fn. 93. The PD implies that “fixed” VoIP does not meet that criteria,

but there is no evidence, no analysis and no formal conclusion of fact or law on this point. The PD, in fact, never even defines “fixed” VoIP or has any discussion over whether “fixed” VoIP services provided by one company are the same as or different from (and in what ways) services provided by another.

Contrary to the PD’s broad-brush assumption that undefined “fixed” VoIP services are subject to state regulation, the FCC strongly suggested the opposite. In *Vonage Preemption Order* paragraph 25, quoted in full above, the FCC said, “Indeed, it is the total lack of dependence on any geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications.” Elaborating on that point in footnote 93, it said, “We note that these integrated capabilities and features are not unique to DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, *including those offered or planned by facilities-based providers.*” (Emphasis added).

Without, therefore, conducting a thorough analysis of the different kind of VoIP services that might constitute “fixed” VoIP services, the PD has no basis for finding that any specific service, or category of services, falls outside of the scope of the *Vonage Preemption Order*.

Moreover, even if, as the PD posits, the FCC has not expressly preempted state regulation of “fixed” VoIP services, this does not mean that such regulation is not subject to preemption, or that the Commission automatically has jurisdiction over such services.

In short, the PD’s analysis of whether it can assert regulatory authority over “fixed” VoIP providers is incomplete and unsustainable. And it is of no avail for the PD

to rely on the enforcement of a state law as the basis for asserting jurisdiction. If there is federal preemption of state action, that preemption extends to statutes as well as regulations. This principle should be clear from the fact that the *Vonage Preemption Order* was a response to the Minnesota Commission’s implementation of Minnesota law. *Vonage Preemption Order*, ¶¶ 10-11.

**V. THE COMMISSION SHOULD CHANGE THE PROPOSED DECISION TO REFLECT THE SCOPE OF THIS PROCEEDING AND ACHIEVE THE NARROW GOALS.**

There is no legal or policy need in this proceeding for the Commission to take the extraordinary step of reversing its position in D.06-06-010 by finding that it has full regulatory authority over any VoIP service. As explained above, moreover, there is no legal basis for the Commission to make that leap. For the reasons set forth above, therefore, CALTEL respectfully requests that the Commission change the PD to eliminate the discussions and findings purporting to extend Commission authority to fixed VoIP services generally, and replace them with findings that support the adoption of the education requirements based on the Commission’s general ability to regulate “general commercial dealings ... marketing, advertising and other business practices.”

As required by Rule 14.3, CALTEL has set out the changes that need to be made to the PD to accomplish this goal in the Recommended Changes and Appendices A and B to these comments.

November 9, 2009

/S/ Clay Deanhardt

Sarah DeYoung Executive Director, CALTEL 50 California Street, Suite 500 San Francisco, CA 94111 Telephone:(925) 465-4396 Facsimile:(877) 517-1404 Email: deyoung@caltel.org	Clay Deanhardt 21-C Orinda Way Orinda, CA 94563 Phone: 925-258-9079 Email: clay@deanhardtlaw.com  Counsel for CALTEL
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APPENDIX A  
PROPOSED FINDINGS OF FACT

No. \_\_\_\_: The customer education requirements ordered in this decision are requirements for general commercial dealings, marketing, advertising and other business practices.

APPENDIX B  
PROPOSED CONCLUSIONS OF LAW

No. \_\_:       The Commission is not preempted from regulating the general commercial dealings, marketing, advertising and other business practices of companies providing VoIP services.

## CERTIFICATE OF SERVICE

I certify that I have by electronic mail this day served a true copy of the original document entitled:

COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE  
TELECOMMUNICATIONS COMPANIES (CALTEL) ON PROPOSED DECISION

on all parties of record in this proceeding or their attorneys of record. Electronic service is made pursuant to Rule 1.10 of the Commission's Rules of Practice.

Signed and dated: November 9, 2009, at Orinda, California.

/s/Clay Deanhardt

WILLIAM D. WALLACE ESQ.  
VERIZON WIRELESS  
1300 I STREET, N.W., SUITE 400 WEST  
WASHINGTON, DC 20005  
FOR: CHARTER FIBERLINK CA-CCO, LLC

KEVIN SAVILLE  
ASSOCIATE GENERAL COUNSEL  
CITIZENS/FRONTIER COMMUNICATIONS  
2378 WILSHIRE BLVD.  
MOUND, MN 55364  
FOR: CHARTER FIBERLINK CA-CCO, LLC

REX KNOWLES  
REGIONAL VICE PRESIDENT  
XO COMMUNICATIONS SERVICES, INC.  
111 EAST BROADWAY, SUITE 1000  
SALT LAKE CITY, UT 84111

MARC LADIN  
VP GLOBAL MARKETING  
3N  
505 N. BRAND BLVD., SUITE 700  
GLENDALE, CA 91203

ELAINE M. DUNCAN  
ATTORNEY AT LAW  
VERIZON CALIFORNIA INC.  
711 VAN NESS AVENUE, SUITE 300  
SAN FRANCISCO, CA 94102  
SAN FRANCISCO, CA 94102-3214

CHRISTINE MAILLOUX  
ATTORNEY AT LAW  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO, CA 94104

K.C. HALM  
DAVIS WRIGHT TREMAINE LLP  
1919 PENNSYLVANIA AVE., NW, SUITE 200  
WASHINGTON, DC 20006

CARRIE L. COX  
VICE PRESIDENT/SENIOR COUNSEL  
CHARTER COMMUNICATIONS, INC.  
12405 POWERSCOURT DRIVE  
ST LOUIS, MO 63131

CINTA PUTRA  
CEO  
3N  
505 N BRAND BLVD., STE. 700  
GLENDALE, CA 91203

JESUS G. ROMAN  
MCIMETRO ACCESS TRANSMISSION SERVICES  
112 LAKEVIEW CANYON ROAD, CA501LB  
THOUSAND OAKS, CA 91362

NATALIE WALES  
CALIF PUBLIC UTILITIES COMMISSION  
LEGAL DIVISION  
ROOM 5141  
505 VAN NESS AVENUE

REGINA COSTA  
RESEARCH DIRECTOR  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO, CA 94104

DAVID J. MILLER  
SENIOR ATTORNEY  
AT&T SERVICES LEGAL DEPT  
525 MARKET STREET, ROOM 2018  
SAN FRANCISCO, CA 94105

MARYLIZ DEJONG  
DIRECTOR--REGULATORY  
AT&T CALIFORNIA  
525 MARKET STREET, SUITE 1928  
SAN FRANCISCO, CA 94105

STEPHEN H. KUKTA  
SPRINT NEXTEL  
201 MISSION STREET, STE. 1500  
SAN FRANCISCO, CA 94105-1831

MARILYN ASH  
U.S. TELEPACIFIC CORP.  
620/630 3RD ST.  
SAN FRANCISCO, CA 94107  
SAN FRANCISCO, CA 94111  
FOR: CTIA-THE WIRELESS ASSOCIATION

MARK P. SCHREIBER  
ATTORNEY AT LAW  
COOPER, WHITE & COOPER, LLP  
201 CALIFORNIA STREET, 17TH FLOOR  
SAN FRANCISCO, CA 94111  
FOR: SUREWEST TELEPHONE

SARAH DEYOUNG  
EXECUTIVE DIRECTOR  
CALTEL  
50 CALIFORNIA STREET, SUITE 1500  
SAN FRANCISCO, CA 94111  
FOR: CALTEL

THOMAS J. MACBRIDE, JR.  
ATTORNEY AT LAW  
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP  
505 SANSOME STREET, 9TH FLOOR  
SAN FRANCISCO, CA 94111  
FOR: CALIFORNIA ASSOCIATION OF  
COMPETITIVE TELECOMMUNICATIONS COMPANIES

EARL NICHOLAS SELBY  
LAW OFFICES OF EARL NICHOLAS SELBY  
530 LYTTON AVENUE, 2ND FLOOR  
PALO ALTO, CA 94301-1705  
FOR: COX CALIFORNIA TELCO, LLC

JEROME CANDELARIA  
ASSISTANT GENERAL COUNSEL  
CALIFORNIA CABLE TV ASSOCIATION  
360 22ND STREET, NO. 750  
OAKLAND, CA 94612

KRISTIN L. JACOBSON, ESQ.  
SPRINT NEXTEL  
201 MISSION STREET, SUITE 1500  
SAN FRANCISCO, CA 94105

THOMAS J. SELHORST  
SENIOR PARALEGAL  
AT&T CALIFORNIA  
525 MARKET STREET, RM. 2023  
SAN FRANCISCO, CA 94105

MARGARET L. TOBIAS  
TOBIAS LAW OFFICE  
460 PENNSYLVANIA AVE  
SAN FRANCISCO, CA 94107

JEANNE B. ARMSTRONG  
ATTORNEY AT LAW  
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP  
505 SANSOME STREET, SUITE 900

PATRICK M. ROSVALL  
ATTORNEY AT LAW  
COOPER, WHITE & COOPER, LLP  
201 CALIFORNIA STREET, 17TH FLOOR  
SAN FRANCISCO, CA 94111

SARAH E. LEEPER  
ATTORNEY AT LAW  
MANATT, PHELPS & PHILLIPS, LLP  
ONE EMBARCADERO CENTER, 30TH FLOOR  
SAN FRANCISCO, CA 94111

SUZANNE TOLLER  
ATTORNEY AT LAW  
DAVIS WRIGHT TREMAINE LLP  
505 MONTGOMERY STREET, SUITE 800  
SAN FRANCISCO, CA 94111-6533  
FOR: XO COMMUNICATIONS

DOUGLAS GARRETT  
COX CALIFORNIA TELCOM, LLC  
2200 POWELL STREET, STE 1035  
EMERYVILLE, CA 94608

LESLA LEHTONEN  
VP LEGAL AND REGULATORY AFFAIRS  
CALIFORNIA CABLE & TELECOM ASSOCIATION  
360 22ND STREET, SUITE 750  
OAKLAND, CA 94612

KATHERINE WEED  
DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, FOURTH FLOOR  
BERKELEY, CA 94704-1204  
FOR: DISABILITY RIGHTS ADVOCATES  
FOR: DISABILITY RIGHTS ADVOCATES

RICHARD OSBORNE  
OFFICE OF EMERGENCY SERVICES  
3650 SCHRIEVER AVE  
MATHER, CA 95655  
MATHER, CA 95655  
FOR: OFFICE OF EMERGENCY SERVICES

CHARLES E. BORN  
MANAGER, GOV'T & EXTERNAL AFFAIRS  
FRONTIER COMMUNICATIONS  
PO BOX 340  
ELK GROVE, CA 95759

JOY WILLIS  
OPERATIONS MANAGER  
SHASCOM 9-1-1  
3101 SOUTH ST.  
REDDING, CA 96001

MELISSA W. KASNITZ  
ATTORNEY AT LAW  
DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, FOURTH FLOOR  
BERKELEY, CA 94704-1204

SUE PLANTZ  
ACTING CHIEF TECHNOLOGY OFFICER  
OFFICE OF EMERGENCY SERVICES  
3650 SCHRIEVER AVENUE

JOE CHICOINE  
MANAGER, STATE GOVERNMENT AFFAIRS  
FRONTIER COMMUNICATIONS  
PO BOX 340  
ELK GROVE, CA 95759

KATHY GALEY  
SYSTEMS ADMINISTRATOR  
SHASCOM 9-1-1  
3101 SOUTH ST  
REDDING, CA 96001

## **Information Only**

ARUN K. HANDA  
PRINCIPAL/DIRECTOR  
TELCORDIA TECHNOLOGIES  
331 NEWMAN SPRING ROAD, ROOM NVC 2Z-343  
RED BANK, NJ 07701

SPILIOS E. MAKRIS, PH.D  
TELCORDIA TECHNOLOGIES  
1 TELCORDIA DRIVE, RM RRC 1C-210  
PISCATAWAY, NJ 08854

JAMES SKOW  
GENERAL COUNSEL  
EMERGENCY COMMUNICATIONS NETWORK, INC.  
9 SUNSHINE BLVD.  
ORMOND BEACH, FL 32174

MICHAEL HYNEK  
ACCESS SOLUTIONS, L.P.  
17519 MUIRFIELD DRIVE  
DALLAS, TX 75287

NATHAN GALZIER  
ALLTEL COMMUNICATIONS, INC.  
4805 E. THISTLE LANDING DRIVE  
PHOENIX, AZ 85044

NICK LORDI  
SAIC  
NVC-2A483  
331 NEWMAN SPRINGS ROAD  
RED BANK, NJ 07701

MICHELLE SALISBURY  
CA-CLEC LLC  
2000 CORPORATE DRIVE  
CANONSBURG, PA 15317

TERRY RAY  
EXTENET SYSTEMS (CALIFORNIA) LLC  
3030 WARRENVILLE RD., STE. 340  
LISLE, IL 60532-3633

KATHERINE MUDGE  
COVAD COMMUNICATIONS COMPANY  
7000 N. MOPAC EXPRESSWAY, FLOOR 2  
AUSTIN, TX 78731

ERIC ULLER  
SANTA MONICA POLICE DEPARTMENT  
333 OLYMPIC DRIVE  
SANTA MONICA, CA 90401

LISA BARR  
DISPATCH ADMINISTRATOR  
WEST CITIES POLICE  
911 SEAL BEACH BLVD.  
SEAL BEACH, CA 90740

PHILIP H. KAPLAN  
CHAIR  
TELECOMMUNICATIONS ACCESS FOR THE DEAF  
19262 PEBBLE BEACH PLACE  
NORTHRIDGE, CA 91326-1444  
FOR: TADDAC - TELECOMMUNICATIONS ACCESS  
FOR THE DEAF AND DISABLED  
ADMINISTRATIVE COMMITTEE

JACQUE LOPEZ  
VERIZON CALIFORNIA INC.  
CA501LB  
112 LAKEVIEW CANYON ROAD  
THOUSAND OAKS, CA 91362-3811

NATASHA RABE  
THE NTI GROUP  
15301 VENTURA BLVD., BLDG. B, STE 300  
SHERMAN OAKS, CA 91403

ESTHER NORTHRUP  
COX COMMUNICATIONS  
350 10TH AVENUE, SUITE 600  
SAN DIEGO, CA 92101  
SAN DIEGO, CA 92123

VIVIANNE HEDGPETH  
BUSINESS SERVICES MANAGER  
IRVINE POLICE DEPARTMENT  
1 CIVIC CENTER PLAZA  
IRVINE, CA 92606

THOMAS MAHR  
VICE PRESIDENT AND GENERAL COUNSEL  
VERIZON WIRELESS  
15505 SAN CANYON AVE E305  
IRVINE, CA 92618

LINDA BURTON  
REGULATORY MANAGER  
SIERRA TELEPHONE COMPANY, INC.  
PO BOX 219  
OAKHURST, CA 93644-0219

WILLIAM NUSBAUM  
ATTORNEY AT LAW  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO, CA 94104

PETER A. CASCIATO  
ATTORNEY AT LAW

JAMES KEENE  
EVP/CO-FOUNDER  
NATIONAL NOTIFICATION NETWORK  
505 NORTH BRAND BLVD., STE.700  
GLENDALE, CA 91203

ANDREW L. RASURA  
GOVERNMENT AND REGULATORY MANAGER  
TCAST COMMUNICATIONS, INC.  
24251 TOWN CENTER DR., 2ND FLOOR  
VALENCIA, CA 91355

LORRAINE A. KOCEN  
VERIZON CALIFORNIA INC.  
112 S. LAKEVIEW CANYON ROAD, CA501LS  
THOUSAND OAKS, CA 91362-3811

ROBIN D. RICHARDS  
THE NTI GROUP  
15301 VENTURA BLVD., BLDG. B, STE. 300  
SHERMAN OAKS, CA 91403

REBECCA W. GILES  
REGULATORY CASE ADMINISTRATOR  
SDG&E AND SOCALGAS  
8330 CENTURY PARK COURT, CP-32D

MICHAEL BAGLEY  
VERIZON WIRELESS  
15505 SAND CANYON AVENUE  
IRVINE, CA 92612

NATASHA HOOD  
TYCO ELECTRONICS POWER SYSTEMS  
1088 CAMPANILE  
NEWPORT BEACH, CA 92660

RUDOLPH M. REYES  
REGULATORY COUNSEL  
VERIZON CALIFORNIA INC.  
711 VAN NESS AVENUE, SUITE 300  
SAN FRANCISCO, CA 94102

PATRICK J. GEOFFREY  
PACIFIC GAS & ELECTRIC COMPANY  
MAIL CODE H12A  
123 MISSION STREET, ROOM 1266  
SAN FRANCISCO, CA 94105

JOSH DAVIDSON  
ATTORNEY AT LAW

PETER A. CASCIATO P.C.  
355 BRYANT STREET, SUITE 410  
SAN FRANCISCO, CA 94107  
FOR: TIME WARNER TELECOM OF CALIFORNIA,  
LP

KATIE NELSON  
DAVIS WRIGHT TREMAINE, LLP  
505 MONTGOMERY STREET, SUITE 800  
SAN FRANCISCO, CA 94111-6533

STEVEN LE  
DIRECTOR  
ADVANCED APPLICATIONS, SAIC  
1275 COLUMBUS AVENUE  
SAN FRANCISCO, CA 94133

EFRAIM PETEL  
HORMANN AMERICA, INC.  
837 ARNOLD DRIVE, SUITE 600  
MARTINEZ, CA 94553

ANITA TAFF-RICE  
ATTORNEY AT LAW  
EXTENET SYSTEMS, LLC  
1547 PALOS VERDES MALL, NO. 298  
WALNUT CREEK, CA 94597

BRIAN "TINO" GRANADOS  
150 FRANK H. OGAWA PLAZA, 7TH FLOOR  
OAKLAND, CA 94612  
OAKLAND, CA 94612

ROBERT GNAIZDA  
POLICY DIRECTOR/GENERAL COUNSEL  
THE GREENLINING INSTITUTE  
1918 UNIVERSITY AVENUE, SECOND FLOOR  
BERKELEY, CA 94704  
FOR: THE GREENLINING INSTITUTE

JOHN P. WEISS  
CHIEF OF POLICE  
SCOTTS VALLEY POLICE DEPARTMENT  
1 CIVIC CENTER DRIVE  
SCOTTS VALLEY, CA 95066

ROBERT L. DELSMAN  
ATTORNEY AT LAW  
NEXTG NETWORKS OF CALIFORNIA, INC.  
2216 O TOOLE AVENUE  
SAN JOSE, CA 95131

RICHARD L. GOLDBERG  
STAFF COUNSEL III (SPECIALIST)  
DEPARTMENT OF GENERAL SERVICES  
707 3RD STREET, 7TH FLOOR, STE. 7-330  
WEST SACRAMENTO, CA 95605

DAVIS WRIGHT TREMAINE LLP  
505 MONTGOMERY ST, STE 800  
SAN FRANCISCO, CA 94111-6533

MIKE BORSETTI  
2200 GREEN ST.  
SAN FRANCISCO, CA 94123-4710

JOHN A. GUTIERREZ  
DIRECTOR, GOVERNMENT AFFAIRS  
COMCAST CABLE COMMUNICATIONS, INC.  
3055 COMCAST PLACE  
LIVERMORE, CA 94551

MICHELE G. PARKER  
AT&T CALIFORNIA  
2600 CAMINO RAMON RM 2W700G  
SAN RAMON, CA 94583-5000

BOB GLAZE  
150 FRANK H. OGAWA PLAZA 8TH FLOOR  
OAKLAND, CA 94612

LEON M. BLOOMFIELD  
WILSON AND BLOOMFIELD LLP  
1901 HARRISON STREET, SUITE 1620

STEPHANIE CHEN  
LEGAL ASSOCIATE  
THE GREENLINING INSTITUTE  
1918 UNIVERSITY AVENUE, 2ND FLOOR  
BERKELEY, CA 94704  
FOR: THE GREENLINING INSTITUTE

JOHN WILSON  
SCOTTS VALLEY POLICE DEPARTMENT  
1 CIVIC CENTER DRIVE  
SCOTTS VALLEY, CA 95066

YVONNE SMYTHE  
CALAVERAS TELEPHONE COMPANY  
PO BOX 37  
COPPEROPOLIS, CA 95228

GREG R. GIERCZAK  
SUREWEST TELEPHONE COMPANY  
PO BOX 969  
ROSEVILLE, CA 95678  
FOR: SUREWEST TELEPHONE

WENDY A. CROSTHWAITE  
ROSEVILLE POLICE DEPARTMENT  
1051 JUNCTION BLVD.  
ROSEVILLE, CA 95678

RENATO PERUZZI  
DEPT. OF TECHNOLOGY SERVICES  
PO BOX 1810  
RANCHO CORDOVA, CA 95741-1810

DAPHNE RHOE  
DGS-TELECOMMUNICATIONS DIVISION  
CALIFORNIA 9-1-1 EMERGENCY COMMUNICATION  
601 SEQUOIA PACIFIC BLVD.  
SACRAMENTO, CA 95814  
FOR: DEPARTMENT OF GENERAL SERVICES

LARRY J ROWE  
OPERATIONS SECTION  
DEPARTMENT OF GENERAL SVCS, TELECOMM.  
601 SEQUOIA PACIFIC BLVD  
SACRAEMNTO, CA 95814

MIKE ROBSON  
EDELSTEIN AND GILBERT  
1127 11TH STREET, SUITE 1030  
SACRAMENTO, CA 95814  
MICHELLE RUBALCAVA  
SCHOTT & LITES ADVOCATES  
1510 14TH STREET  
SACRAMENTO, CA 95818  
SACRAMENTO, CA 95833

JIM LITES  
SCHOTT & LITES ADVOCATES  
1510 14TH STREET  
SACRAMENTO, CA 95818  
SUSAN LIPPER  
SR. MGR  
OMNIPOINT COMMUNICATIONS, INC.  
1755 CREEKSIDE OAKS DRIVE, SUITE 190

STEVE PEACH  
DIRECTOR  
SHASCOM 9-1-1  
3101 SOUTH STREET  
REDDING, CA 96001

SHEILA HARRIS  
MANAGER, GOVERNMENT AFFAIRS  
INTEGRA TELECOM HOLDINGS, INC.  
1201 NE LLOYD BLVD., STE.500  
PORTLAND, OR 97232

## State Service

ALIK LEE  
CALIF PUBLIC UTILITIES COMMISSION  
COMMUNICATIONS POLICY BRANCH  
ROOM 4209  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214  
FOR: DRA

BREWSTER FONG  
CALIF PUBLIC UTILITIES COMMISSION  
ENERGY PRICING AND CUSTOMER PROGRAMS BRA  
ROOM 4209  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

CHRISTOPHER CHOW  
CALIF PUBLIC UTILITIES COMMISSION  
EXECUTIVE DIVISION  
ROOM 5301  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

CHRISTOPHER MYERS  
CALIF PUBLIC UTILITIES COMMISSION  
COMMUNICATIONS POLICY BRANCH  
ROOM 4209  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

JANE WHANG  
CALIF PUBLIC UTILITIES COMMISSION  
EXECUTIVE DIVISION  
ROOM 5029  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

JEFFREY P. O'DONNELL  
CALIF PUBLIC UTILITIES COMMISSION  
DIVISION OF ADMINISTRATIVE LAW JUDGES  
ROOM 5111  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

LAURA E. GASSER  
CALIF PUBLIC UTILITIES COMMISSION  
LEGAL DIVISION  
ROOM 4107  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

MARY JO BORAK  
CALIF PUBLIC UTILITIES COMMISSION  
COMMUNICATIONS POLICY BRANCH  
ROOM 4209  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

MICHAEL GREER  
CALIF PUBLIC UTILITIES COMMISSION  
COMMUNICATIONS POLICY BRANCH  
ROOM 4211  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

PHYLLIS R. WHITE  
CALIF PUBLIC UTILITIES COMMISSION  
DRA - ADMINISTRATIVE BRANCH  
ROOM 4208  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

SAZEDUR RAHMAN  
CALIF PUBLIC UTILITIES COMMISSION  
POLICY ANALYSIS BRANCH  
AREA 3-E  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

SIMIN LITKOUHI  
CALIF PUBLIC UTILITIES COMMISSION  
POLICY ANALYSIS BRANCH  
AREA 3-D  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

VICTOR F. BANUELOS  
CALIF PUBLIC UTILITIES COMMISSION  
UTILITY & PAYPHONE ENFORCEMENT  
AREA 2-F  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

EDWARD RANDOLPH  
ASM LEVINE'S OFFICE  
ASSEMBLY COMMITTEE/UTILITIES AND COMMERC  
STATE CAPITOL ROOM 5135  
SACRAMENTO, CA 95814

PAUL S. PHILLIPS  
CALIF PUBLIC UTILITIES COMMISSION  
EXECUTIVE DIVISION  
ROOM 5306  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

ROSALINA WHITE  
CALIF PUBLIC UTILITIES COMMISSION  
PUBLIC ADVISOR OFFICE  
AREA 2-B  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

SCOTT MOSBAUGH  
CALIF PUBLIC UTILITIES COMMISSION  
EXECUTIVE DIVISION  
ROOM 5207  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

TYRONE CHIN  
CALIF PUBLIC UTILITIES COMMISSION  
CONSUMER PROGRAMS BRANCH  
AREA 3-E  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214

KRISTINE FRENCH  
ENERGY POLICY ADVISORY COMMITTEE STAFF  
707 3RD STREET, 1ST FLOOR  
WEST SACRAMENTO, CA 95605

PAMELA LOOMIS  
CALIF PUBLIC UTILITIES COMMISSION  
EXECUTIVE DIVISION  
770 L STREET, SUITE 1050  
SACRAMENTO, CA 95814

**SERVED VIA U.S. MAIL AT THE ADDRESS ABOVE (OR AS NOTED BELOW)**

COMMISSIONER TIMOTHY SIMON  
CALIFORNIA PUBLIC UTILITIES COMMISSION  
505 VAN NESS AVENUE, ROOM 5213  
SAN FRANCISCO, CA 94102

ALJ JEFFREY P. O'DONNELL  
JOY WILLIS  
KATHY GALLEY  
NATASHA HOOD  
SHEILA HARRIS