

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



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Order Instituting Rulemaking on the Commission's Own Motion to Require Interconnected Voice Over Internet Protocol Service Providers to Contribute to the Support of California's Public Purpose Programs.

Rulemaking 11-01-008

(Filed January 13, 2011)

**REPLY COMMENTS OF THE GREENLINING INSTITUTE
ON THE ORDER INSTITUING RULEMAKING**

STEPHANIE C. CHEN
ENRIQUE GALLARDO
The Greenlining Institute
1918 University Avenue, Second Floor
Berkeley, CA 94704
Telephone: 510 926 4017
Facsimile: 510 926 4010
E-mail: enriqueg@greenlining.org

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Introduction

Pursuant to the proposed schedule found in the Order Instituting Rulemaking ("OIR") in R.11-01-008, the Greenlining Institute ("Greenlining") provides these Reply Comments. As we stated in Opening Comments, Greenlining fully supports the Commission's move to formally include interconnected Voice over Internet Protocol ("VoIP") service to the category of providers who fund California's universal service programs. In a separate document, Greenlining will respond to the Motion of the Consumer Protection and Safety Division for Modification of the Scope of Rulemaking to Include Consumer Protection ("CPSD Motion," filed March 8, 2011). However, we will state here that Greenlining supports the CPSD Motion and urges the Commission to include consumer protection in this proceeding.

I. The Commission Should Find that Interconnected VoIP Service Providers Are California "Telephone Corporations."

The California Public Utilities Commission should find that interconnected VoIP service providers are "telephone corporations" as defined by Cal. Public Util. Commission § 234. A number of parties argue that the Commission currently lacks the authority to determine that VoIP providers are "telephone corporations" or can only do so after further considerations,

explanations or evidentiary hearings.¹ Despite the arguments of these parties, there are no obstacles to the Commission applying this definition to interconnected VoIP service providers. As will be demonstrated below, application of this definition to VoIP providers would be the most exigent and effective manner of affecting the formal inclusion of VoIP service as contributors to California’s universal service programs.

A. All VoIP Providers May Be Included as “Telephone Corporations.”

AT&T argues that application of the “telephone corporation” definition to “over-the-top” VoIP providers will require evidentiary hearings because these providers – who rely on a customer’s own broadband connection and the customer-owned adapter to provide their service – may not “own, control, operate or manage” any telephone lines.² Although such over-the-top providers may not actually own any telephone lines, the Commission may find here that they clearly control, operate or manage telephone lines when they transmit telephone calls. The CPSD Motion describes the process where VoIP providers control different functions of “telephone lines” in order to complete telephone calls.³ At the very least, over-the-top VoIP providers may be found to control the customer-owned embedded multimedia terminal adapters (“eMTAs”) in order to complete telephone calls.⁴ The VoIP customers cannot complete calls without the intervention and control of their over-the-top VoIP service providers. Thus, the Commission may define over-the-top VoIP providers as telephone corporations.

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¹ See Response of Pacific Bell Telephone Company d/b/a AT&T California (“AT&T Comments”), p. 9; Opening Comments of Verizon and Verizon Wireless (“Verizon Comments”), pp. 8-9.

² See AT&T Comments, pp. 9-10, citing Cal. Public Util. Code § 234(a).

³ See CPSD Motion, pp. 4-6.

⁴ See *id.*, p. 5.

II. The Passage of SB 1040 Does Not Limit Any Commission Action Here.

Verizon argues that the passage of SB 1040 demonstrates that the legislature believes that VoIP cannot be included in the definition of “telephone corporation.”⁵ However, Verizon misstates the legislature’s actions. Specifically, SB 1040 added the 911 surcharge to VoIP service by adding provisions and amending the definition of various terms found in the Revenue and Taxation Code related specifically to the 911 surcharge; it did not affect in any way the Pub. Util. Code.⁶ For example, “service supplier” was amended to add “any person supplying VoIP service” to the existing provision, “any person supplying intrastate telephone communication services.”⁷ The term “intrastate telephone communication services,” which is not found anywhere within the Pub. Util. Code, was not changed by SB 1040. Contrary to Verizon’s assertion, the definition of “intrastate telephone communication services”⁸ *does not* mirror the “communication by telephone” language of Public Util. Code § 233; rather it a specific term of art found only in the Revenue and Taxation Code section dealing with the 911 surcharge.⁹ In passing SB 1040, the legislature did not in any way make any pronouncements on the status of VoIP within the Pub. Util. Code or in relation to universal service. The legislature’s actions pertained only to changes with the 911 surcharge.

Even if we were to assume, despite the evidence to the contrary, that the legislature wished to comment on the “definition” of “communication by telephone” found within the Pub. Util. Code by passing SB 1040, this would not prevent the Commission from finding that VoIP

⁵ See Verizon Comments, pp. 7-8.

⁶ See Cal. SB 1040 (Kehoe) (2008) (Legislative Counsel’s Digest); *see also* Revenue and Taxation Code §§ 41007(a), 41009, 41011.

⁷ See Cal. SB 1040 (Kehoe) (2008) (Legislative Counsel’s Digest); *see also* Revenue and Taxation Code § 41007(a).

⁸ Verizon mis-identifies the term “intrastate telephone communication services” as “intrastate ‘telephone communication services,’” placing “intrastate” outside of the term and failing to mention that this term is specifically defined by the Revenue and Taxation Code § 41010. *See* Verizon OIR Comments, p. 7.

⁹ *See* Revenue and Taxation Code § 41010: “‘Intrastate telephone communication services’ means all local or toll telephone services where the point or points of origin and the point or points of destination of the service are all located in this state.” This definition is not found anywhere in the Cal. Pub. Util. Code.

service providers may be included as “telephone corporations.” This is because the definition of “telephone line” is broader than “communication by telephone” as it includes all material used “in connection with or to facilitate communication by telephone.”¹⁰ The definition of “telephone corporation” is yet broader in scope than “telephone line,” as it includes “every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.”¹¹ Thus, the OIR was correct in finding that “the broad definition of ‘telephone corporation’ includes interconnected VoIP service providers.”¹² The passage of SB 1040 does not in any way prevent the Commission from taking the proposed action.

III. A Commission Finding that VoIP Providers Are Telephone Corporations Is Preferable to Legislative Action.

A number of parties state that the Commission should not take action to formally make interconnected VoIP providers universal service contributors and should yield to legislative action instead. However, the Commission action proposed by the OIR is the most exigent and effective means of achieving the desired result. The California Cable and Telecommunications Association (CCTA) states that after the passage of Proposition 26, Commission action affecting the “expansion of the funds to include interconnected VoIP providers is subject to a two-thirds approval by both houses of the Legislature.”¹³ However, Proposition 26, which amended the California Constitution, only requires the legislative super-majority for “[a]ny change in *state statute* which results in any taxpayer paying a higher tax...”¹⁴ Thus, Proposition 26 would not apply to the proposed Commission action, which would not constitute any change in state statute.

¹⁰ See Cal. Pub. Util. Code § 233.

¹¹ See Cal. Pub. Util. Code § 234(a).

¹² See OIR, p. 25 (citations omitted).

¹³ See Opening Comments of CCTA on the OIR (“CCTA Comments”), p. 8.

¹⁴ See Proposition 26, Sec. 2, amending the Section 3(a) of Article XIII A of the California Constitution (emphasis added).

In fact, the proposed Commission action is much preferable to legislation designed to achieve the same result. If CCTA's view that including VoIP providers as contributors to the universal service surcharge would trigger the requirements of Proposition 26 is accurate,¹⁵ then legislation to apply universal service surcharges to VoIP service would be problematic, as it would need two-thirds approval by both houses of the Legislature. There is no reason to depend on legislative action to achieve the OIR's ends. Passage of any legislation may be problematic, but achieving a super-majority is especially difficult, as the annual California budget impasses demonstrate. In any case, legislation is not needed. The proposed Commission action is more efficient and effective.

IV. Commission Finding of VoIP Providers as "Telephone Corporations" Is Not Problematic.

A number of parties argue that designation of interconnected VoIP providers as "telephone corporations" will be undesirable and will bring about undesirable results. CCTA argues that if the Commission designates interconnected VoIP provider as "telephone corporations," then it must apply the full panoply of regulation found for "telephone corporations" in the Cal. Pub. Util. Code.¹⁶ However, this is not the case – the Commission may forbear from any regulation where it is preempted by Federal Communications Commission ("FCC") authority.

However, CCTA argues that if the Commission adopts the proposed telephone corporation classification, "the exact contours of that [FCC] preemption would not be clear, fueling controversy and uncertainty."¹⁷ The contours of FCC preemption and allowable state regulation over VoIP providers have been uncertain and controversial ever since the FCC

¹⁵ Greenlining does not support CCTA's argument.

¹⁶ See CCTA Comments, p. 5.

¹⁷ *Id.*, p. 6.

released the *Vonage Preemption Order*.¹⁸ Commission classification of interconnected VoIP providers as telephone corporations will not increase any uncertainty. In fact, the Commission may create greater certainty for the VoIP industry by announcing the scope of its authority. The OIR includes just such an announcement of its modest objectives in this rulemaking: “to make the funding for and contribution base of California’s universal service programs technology neutral.”¹⁹ As Greenlining will state in its response to the CPSD Motion, the Commission should also announce that it will expand this rulemaking to include consumer protection issues. This rulemaking is well designed to remove the uncertainties of state regulation over VoIP regulation following the FCC’s recent Declaratory Ruling on Universal Service Contribution Methodology.²⁰ Thus removal of this uncertainty is a motive for Commission action, not a reason for the Commission to desist.

V. The Commission Should Apply Registration Requirements Necessary to Achieve Its Purposes.

AT&T argues that telephone corporation classification would require that VoIP providers complete a registration process such that they “would be subject to extensive ‘traditional ‘telephone company’ regulation[]’ – a result expressly preempted by the *Vonage Preemption Order*.”²¹ However, the registration process proposed by the OIR clearly does not constitute “extensive traditional telephone company regulation” preempted by the FCC, as it is similar to the registration required of wireless providers.²² Further, the Commission may seek more information than that proposed in the OIR, in order to affect the purpose of universal service

¹⁸ See 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, FCC 04-267, (2004) (“*Vonage Preemption Order*”)

¹⁹ See OIR, p. 23.

²⁰ See Declaratory Ruling, *In the Matter of Universal Service Contribution Methodology*, WC Docket No.06-122 (rel. November 5, 2010).

²¹ AT&T Comments, pp. 11-12.

²² See OIR, p. 30.

contributions *and* consumer protections. Greenlining supports the more robust registration process suggested by The Utility Reform Network.²³

The *Vonage Preemption Order* preempted state economic regulation of VoIP providers and conditions of entry into the market.²⁴ However, the Commission may require the necessary registration processes needed to affect its purpose to include VoIP providers as universal service contributors. The CPSD Motion makes clear that the FCC has allowed the states to have authority over consumer protections.²⁵ Thus, the Commission should develop a registration process, such as proposed by TURN, which will allow it to effect meaningful regulation over consumer protections.

Conclusion

It is clear that the Commission may move forward with its proposal to include interconnected VoIP providers as telephone corporations and formal contributors to universal service. However, it is also clear that the Commission also has authority over consumer protection of VoIP providers. Greenlining urges the Commission to consider adding consumer protections to the scope of this proceeding.

Respectfully submitted,

Dated: March 22, 2011

/s/ Stephanie C. Chen
Stephanie C. Chen
Senior Legal Counsel
The Greenlining Institute

/s/ Enrique Gallardo
Enrique Gallardo
Legal Counsel
The Greenlining Institute

²³ See Opening Comments of The Utility Reform Network on the OIR, pp. 7-9.

²⁴ See *Vonage Preemption Order*, ¶¶21, 37.

²⁵ See CPSD Motion, pp. 16-19.