



**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  
(Issued January 13, 2011)

**REPLY COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE  
TELECOMMUNICATIONS COMPANIES ON THE ORDER INSTITUTING RULEMAKING  
REGARDING REQUIRING VOICE OVER INTERNET PROTOCOL SERVICE PROVIDERS  
TO CONTRIBUTE TO CALIFORNIA'S PUBLIC PURPOSE PROGRAMS**

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Pursuant to the schedule established in the Order Instituting Rulemaking (OIR), the California Association of Competitive Telecommunications Companies (“CALTEL”)<sup>1</sup> respectfully submits the following Reply Comments on behalf of its members.

## I. INTRODUCTION

The opening comments of the majority of parties to this proceeding support requiring VoIP providers to collect and remit surcharges for California public purpose programs in the interest of competitive and technological neutrality.<sup>2</sup> There was a sharp division amongst the parties, however, about the OIR’s determination that the best way to achieve that result is to reinterpret the meaning of “telephone corporation” under Public Utilities Code §234 to include interconnected VoIP service providers.<sup>3</sup> The opening comments of TURN, and the motion filed by CPSD requesting a modification of the scope of the proceeding, provide strong evidence that this statutory reinterpretation is the single factor that is most likely to derail the Commission’s ability to achieve the “modest” and “limited” objectives outlined in the OIR.<sup>4</sup>

A number of other parties joined CALTEL in urging the Commission to instead seek specific authority from the legislature to assess universal service charges on VoIP

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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, broadband, 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. See [www.caltel.org](http://www.caltel.org) for a list of CALTEL member companies.

<sup>2</sup> See AT&T comments at pp. 3-4, Small LECs comments at p. 3, TURN comments at p. 1, Division of Ratepayer Advocates (DRA) comments at pp. 3-4, Consumer Protection and Safety Division (CPSD) comments at p. 1, Disability Rights Advocates (DisabRA) comments at pp. 1-2, and Greenlining Institute’s comments at p. 2. CALTEL notes that it seems disingenuous for Verizon to object to the goals of this docket, given that Verizon will likely continue to receive subsidization from these funds while it has publicly stated that it is moving, as the Commission noted, closer and closer to an all VoIP network.

<sup>3</sup> OIR at p. 27.

<sup>4</sup> OIR at pp. 2, 23.

services within the scope that the Federal Communications Commission (FCC) found appropriate. For example, both Verizon and CCTA explained how reinterpreting §234 would not be consistent with other recent actions of the Legislature, and AT&T correctly observed that the simply reinterpreting the definition of “telephone corporation” might not be sufficient to capture “over-the-top” VoIP providers.

In these comments, CALTEL will also discuss why it is unlawful for the Commission to adopt DRA’s recommendation that “fixed” VoIP providers be barred from using two of the three FCC-established contribution methods. CALTEL also explains why VoIP service providers, many of whom are already voluntarily collecting and remitting surcharges, should not be required to make costly billing changes in order to modify the way that they identify surcharges on customer bills. Finally, CALTEL agrees with AT&T’s recommendation that VoIP service providers be allowed no less than 120 days to comply with any new requirements adopted by the Commission in this proceeding.

**II. REINTERPRETING THE DEFINITION OF “TELEPHONE COMPANY” TO INCLUDE VOIP PROVIDERS WILL DERAIL THE COMMISSION’S LIMITED GOALS IN THIS PROCEEDING**

As CALTEL stated in its opening comments, the best way to achieve the Commission’s limited objectives in this proceeding is to refrain from reinterpreting statutes that were not drafted with VoIP in mind. Verizon and CCTA explain in some significant detail how such a reinterpretation of the definition of “telephone corporation” in PU Code §234 is clearly inconsistent with other recent actions of the Legislature.<sup>5</sup> Furthermore, AT&T correctly points out that, even reinterpreted, it is not clear that the

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<sup>5</sup> See Verizon comments at pp. 5-8, California Cable & Telecommunications Association (CCTA) Comments at pp. 5-9.

definition of “telephone corporation” could be construed to include “over-the-top” VoIP providers that do not own or control the broadband connections that their services rely upon.<sup>6</sup> The CALTEL member companies who offer VoIP services are all facilities-based interconnected VoIP service providers, and would strongly oppose adoption of regulations that include some, but not all, interconnected VoIP providers.

Another important reason for not reinterpreting §234 to include VoIP providers – perhaps the reason most critical to the success or failure of this rulemaking – is that the mere suggestion immediately led some parties to call for a significant expansion of the scope of the proceeding to include a review of all aspects of state jurisdiction over VoIP; a result that the OIR was clearly trying to avoid.<sup>7</sup>

Unfortunately, the alternative offered by SureWest is also not tenable. SureWest is incorrect that the Commission can proceed solely on the basis of the FCC’s determination that states are not preempted – the Commission must have appropriate authorization to act from the California Legislature as well.<sup>8</sup> For these reasons, CALTEL urges the Commission to affirm the current scope of the proceeding, to abandon reliance on reinterpretation of the definition of “telephone corporation,” and, as suggested by

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<sup>6</sup> See AT&T comments at pp. 9-10.

<sup>7</sup> See TURN comments at pp. 2-6, CPSD comments at pp. 1-2 (including references to CPSD’s Motion for Modification of the Scope of Rulemaking to Include Consumer Protection), DisabRA comments at p. 4. CALTEL notes that the FCC’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking on Universal Service Fund and Intercarrier Compensation (USF/ICC) Reforms has requested comment on whether Interconnected VoIP should be classified as a telecommunications or information service (NPRM and Further NPRM *in the Matter of Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109 at ¶73). Comments are due on this Section of the NPRM on April 18, 2011 and the Chairman of the FCC has committed to issuing an order in the proceeding by the end of the year.

<sup>8</sup> See SureWest Telephone (SureWest) comments at pp. 3-4. SureWest incorrectly analogizes that because the *Legislature* extended contributions to the state E911 fund to interconnected VoIP service providers without reinterpreting the definition of “telephone corporation” in PU Code §234, the *Commission* has the same authority to do so in this proceeding.

several other parties,<sup>9</sup> to initiate a collaborative process to obtain the specific legislative authority needed to extend California’s universal service public purpose charges to VoIP services.

**III. DRA’S “RECOMMENDATION” THAT FIXED VOIP SERVICE PROVIDERS ARE BARRED FROM USING TWO OF THE THREE CONTRIBUTION METHODS APPROVED BY THE FCC IS UNLAWFUL AND SHOULD BE REJECTED**

The OIR explains that the FCC, in the *VoIP Universal Service Order*, “gave interconnected VoIP providers three options” for calculating the interstate and international portion of their revenues for the purpose of making contributions to the federal Universal Service Fund (USF).<sup>10</sup> The OIR further notes that the FCC’s November 5, 2010 Declaratory Ruling determined that states were not preempted from assessing surcharges from interconnected VoIP providers subject to two qualifications:

1. The relevant state’s contribution rules must be consistent with the FCC’s universal service contribution rules;
2. The state may not apply its contribution rules to intrastate interconnected VoIP revenues attributable to services provided in another state.<sup>11</sup>

Despite this clear requirement that California cannot deviate from the FCC’s contribution rules, DRA recommends that the Commission bar “fixed” VoIP service providers from utilizing two of the three approved methodologies.<sup>12</sup>

DRA appears to mistakenly conclude that the “fixed” vs. “nomadic” status of a VoIP provider is self-evident. CALTEL explained why this assumption is incorrect in its comments on the first Proposed Decision in R.07-04-015:

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<sup>9</sup> See AT&T comments at p. 13, CCTA comments at pp. 7-9, Verizon comments at p. 9.

<sup>10</sup> OIR at p. 20.

<sup>11</sup> OIR at p. 26.

<sup>12</sup> See DRA comments at pp. 5-6.

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.<sup>13</sup>

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<sup>13</sup> See CALTEL comments on Commissioner Simon’s Proposed Decision in R.07-04-015, dated November 9, 2009, at pp. 6-7. Ultimately, the Commission’s declined to assert broad jurisdiction over all things VoIP in R. 07-04-015. See D.08-09-014, p. 22.

This analysis is in large part the reason why the FCC permits all interconnected VoIP service providers to select from one of three approved contribution methods (i.e. the interim safe harbor percentage, traffic studies or actual interstate revenues):

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 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).<sup>14</sup>

DRA relies on a reference to an Appendix to that Order (Appendix C, which lays out the instructions for completing FCC Form 499A in compliance with ¶56) to assert that “fixed” VoIP providers can only use actual intrastate revenues, and “nomadic” VoIP providers can only use the safe harbor percentage or traffic studies, to separate interstate and intrastate revenues.<sup>15</sup> This assertion demonstrates that DRA has incorrectly leapt to the same unsupported assumption as the earlier Proposed Decision, i.e. that all “fixed” VoIP service providers have developed the capability of separating 100% of their traffic into interstate and intrastate buckets. As CALTEL explains above and in its previous

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<sup>14</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 at ¶ 56.

<sup>15</sup> DRA comments at p. 6, footnote 11.

comments, such a conclusion would need to be proven with evidence from a fact-intensive audit of every interconnected VoIP provider's systems, processes and traffic records.<sup>16</sup> DRA's "recommendation" unlawfully deviates from the FCC's analysis, determinations and contribution rules and should therefore be rejected.

**IV. VOIP SERVICE PROVIDERS WHO ALREADY VOLUNTARILY COLLECT AND REMIT SURCHARGES FOR CALIFORNIA PUBLIC PURPOSE PROGRAMS SHOULD NOT BE REQUIRED TO MAKE COSTLY BILLING CHANGES IN ORDER TO MODIFY THE WAY THAT THEY IDENTIFY SURCHARGES ON CUSTOMER BILLS**

The OIR noted that "some VoIP providers are currently contributing on a voluntary basis, including Time Warner and Comcast."<sup>17</sup> In its opening comments, CALTEL stated that the majority of its members that provide VoIP services already apply the designated surcharges for the state's public purpose programs to their VoIP revenue and remit those amounts to the state voluntarily. CCTA similarly stated that "most of CCTA's members currently collect and remit state public purpose program surcharges on interconnected VoIP service revenues."<sup>18</sup> Therefore, Disability Rights Advocates' conclusion that potential concerns about costly changes to billing processes in order to identify surcharges on customer bills would not apply because the OIR would "require (VoIP) providers to collect and remit the surcharges for the first time" is clearly incorrect.<sup>19</sup>

VoIP service providers who have already been voluntarily collecting and remitting surcharges should not be penalized by being subject to prescriptive and potentially costly billing changes in order to modify the way that state surcharges appear

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<sup>16</sup> See CALTEL comments on Commissioner Simon's Proposed Decision in R.07-04-015, dated November 9, 2009, at p. 10.

<sup>17</sup> OIR at p. 15.

<sup>18</sup> See CCTA comments at pp. 2-3.

<sup>19</sup> See DisabRA comments at p. 3.

on their customer bills. CALTEL agrees with AT&T that the state should follow the FCC's lead in allowing providers "operational flexibility" and in not requiring explicit identification of surcharges on customer bills.<sup>20</sup>

**V. INTERCONNECTED VOIP SERVICE PROVIDERS SHOULD BE ALLOWED NO LESS THAN 120 DAYS TO COMPLY WITH ANY NEW REQUIREMENTS**

Finally, CALTEL agrees with AT&T's recommendation that VoIP service providers be allowed no less than 120 days to comply with any new requirements adopted by the Commission in this proceeding.<sup>21</sup>

**VI. CONCLUSION**

For the reasons stated above, CALTEL urges the Commission to:

1. Affirm the current scope of the proceeding;
2. Abandon the OIR's reliance on the reinterpretation of the definition of "telephone corporation" found in PU Code §234, and instead initiate a collaborative process to obtain the specific legislative authority needed to extend California's universal service public purpose charges to VoIP services;
3. Reject DRA's unlawful recommendation that "fixed" VoIP providers be barred from using two of the three FCC-established contribution methods;
4. Follow the FCC's lead in allowing providers "operational flexibility" and not penalizing VoIP service providers who are already voluntarily collecting and remitting surcharges for state public purpose programs to make costly billing changes in order to modify identification of those surcharges on customer bills;

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<sup>20</sup> See AT&T comments at p. 14.

<sup>21</sup> See AT&T comments at p. 8.

5. Set an implementation window of no less than 120 days for interconnected VoIP service providers to comply with any new requirements adopted by the Commission in this proceeding.

March 22, 2011

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