

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)

**MOTION
OF THE CONSUMER PROTECTION AND SAFETY DIVISION
FOR MODIFICATION OF THE SCOPE OF RULEMAKING
TO INCLUDE CONSUMER PROTECTION**

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I. INTRODUCTION

Pursuant to Rule 11.1(a) of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), the Consumer Protection and Safety Division (CPSD) submits this Motion for Modification of Commission Rulemaking (R.) 11-01-008¹. The current scope of the OIR is limited to whether to add providers of Voice over the Internet Protocol (VoIP) service to the category of telephone service providers that must contribute to the State's public purpose programs. CPSD urges the Commission to consider in this proceeding whether to extend consumer protection requirements to VoIP providers.

The OIR recognizes that there is no longer any justification to arbitrarily make a distinction between "fixed" VoIP providers and telephone companies with respect to contributions to public purpose programs. The same can be said for consumer protection. As stated in R.11-01-008: "All voice services, along with

¹ Referred to herein as the "OIR".

other network services, are now transitioning to this increasingly common transmission protocol as a converged network is adapted to carry voice, data, and video bits seamlessly from the point of view of the consumer.” (R.11-01-008, p. 4.) Indeed, the Commission states, “For purposes of this proceeding, we find that this broad definition of ‘telephone corporation’ includes interconnected VoIP service providers.” (OIR, p. 27.)

The major carriers recognize that VoIP providers are in direct competition with the incumbent local exchange carriers (ILECs) for control of the residential telephone market². There is no logical reason to apply consumer protections to ILECs but not to VoIP providers. As shown below, VoIP is marketed and offered as a direct substitute for traditional wireline telephone service. In fact, the Commission receives many of the same sorts of slamming, cramming, and billing complaints against VoIP providers as it receives against traditional wireline and wireless companies. VoIP customers (unlike wireline and wireless customers) have no recourse because the Commission to date has declined to apply consumer protection requirements to VoIP providers.

It is clear that VoIP providers offer an IP-enabled telephone service which is basically indistinguishable from “plain old telephone service” (POTS), at least from the customer’s point of view. As the POTS network and the Internet become more integrated (they are carried in substantial part on the same set of wires), the argument that somehow VoIP providers do not provide telephone service or use the telephone network has become less credible.

If VoIP providers are recognized as “telephone corporations”, provisions in the Public Utilities Code that relate to consumer protections would become applicable. For example, pursuant to Section 2889.5 telephone corporations must

² In R.06-06-028, several major carriers (AT&T, Verizon, Cox, Frontier), in opposition to a Petition to Modify filed by the Division of Ratepayer Advocates, argued that the voice telecommunications market is “vigorously competitive” due to competition between landline and VoIP providers.

independently verify a consumers' intent to switch telephone carriers, and under Section 2890 they may not include unauthorized charges on a telephone bill. As shown below, California VoIP consumers are susceptible to these practices. CPSD therefore urges the Commission, in addition to recognizing that VoIP providers should contribute support to universal service programs, also to make California statutory consumer protection requirements applicable to VoIP providers.

II. MOTION TO APPLY STATUTORY CONSUMER PROTECTIONS TO VOIP SERVICE PROVIDERS

Pursuant to Rule 11.1(a), a motion is a request for the Commission or the Administrative Law Judge to take a specific action related to an open proceeding before the Commission. A motion may be made at any time by any party during the pendency of the proceeding. (Rule 11.1(b).) By filing comments on March 7, 2011, CPSD is an active party to the proceeding and this request is directly related to the subject matter of this proceeding.

CPSD brings this motion requesting the Commission to add the following issues to the scope of this proceeding.

1. If VoIP providers fall under the definition of "telephone corporation" set forth in Public Utilities Code Section 234, is the CPUC required to apply the state's statutory consumer protections (e.g., Sections 2889.5 and 2890) to all telephone corporations, including VoIP providers?
2. Is the State preempted by any FCC order or federal regulation that conflicts with the application of consumer protection requirements to VoIP providers?

The rationale for adding consumer protection requirements on VoIP providers converges naturally with the underlying rationale for the stated premise for this proceeding: namely, that in order to maintain competitive neutrality VoIP providers should contribute to the State's public purpose programs. (OIR, p. 2.)

The principle of competitive neutrality similarly requires that consumer protection laws should not unfairly advantage one service provider over another.

III. INTERNET TELEPHONE SERVICE PROVIDERS ARE “TELEPHONE CORPORATIONS” PURSUANT TO STATE LAW

CPSD recommends that the Commission in this proceeding make a definitive finding that VoIP providers fall under the state-law definition of “telephone corporations”. The Commission’s OIR “tentatively” finds that VoIP providers are under the jurisdiction of the Commission. Moreover, the Commission “find(s) that this broad definition of ‘telephone corporation’ includes interconnected VoIP service providers.” (OIR, p. 27.)

As stated in the OIR, the Commission’s objective “is to ensure that the California universal service programs are supported in a competitively and technologically neutral manner...” (OIR, p. 2.) The goal for consumer protection should be the same – to ensure that California’s consumer protections are applied in a competitively and technologically neutral manner. If VoIP providers are providing a competitive telephone service, there is no longer any justification to afford them preferential treatment.

The Commission may consider whether some fact-finding is in order in this proceeding – however, CPSD believes the characteristics of VoIP service are not in dispute. CPSD offers the following technical and industry standard description for typical provision of “fixed” VoIP service, which the Commission may wish to adopt.

VoIP service allows customers to make voice telephone calls to any other person or entity with an assigned telephone number.³ Customers who switch to VoIP service can port their existing numbers when they transfer their service, or

³ This summary of VoIP characteristics was set forth in the Maine Public Utilities Commission’s Advisory Staff Examiner’s Report, issued on May 18, 2010. The Maine PUC staff compiled the list from Time Warner Cable and Comcast’s “Proposed Facts”. CPSD believes these characteristics are common to all “fixed” VoIP service.

they can obtain a new number. The VoIP provider assigns the new number from the NXX codes that are assigned to the geographic region where the customer is located. The largest VoIP providers, Time Warner Cable (TWC) and Comcast, currently allow the use of their VoIP services only at specific fixed locations. This type of location arrangement has been termed as non-nomadic or “fixed” by the FCC.⁴

Customers of VoIP service must have a broadband connection to use the service. VoIP customers are able to also utilize their own analog telephone devices to make real-time calls over the Public Switched Telephone Network (PSTN). The customer’s analog telephones are used in conjunction with their IP-enabled telephone equipment (embedded multimedia terminal adapters – eMTAs) provided by the VoIP carrier. The eMTAs format the electrical signal from the customer’s analog telephone handset into packets, so that they can be routed onto the IP network. The eMTAs also format the digital packets back into electrical signals after the packets have been routed over the IP network. The IP packets travel from or to the customer’s location via coaxial cable to a node located within the VoIP carrier’s service area. Each node is connected to the VoIP carrier’s “headend” equipment (similar to an ILEC’s central office) by fiber-optic cable.

At the headend, cable modem termination system (CMTS) equipment provides the interface between the cable modem systems and servers at the headend and the path between the customer’s premises and the cable headend. A soft switch controls the routing of all VoIP packets on the network by performing certain functions that may include the routing of the packets, performing the database query that correlates telephone numbers with IP addresses, and other functions.

⁴ *In the Matter of Vonage Holdings Corporation’s Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* (2004) 19 FCC Recd 22404.

The CMTS equipment, which is controlled by the soft switch, distinguishes and separates the VoIP traffic from other internet traffic, based on information in the header of each packet. VoIP packets are routed either to a Media Gateway Device (if they are destined for the PSTN – e.g., an ILEC or wireless customer), or back to a VoIP customer (if the terminating customer is served by the same VoIP carrier). Calls from a VoIP customer to another VoIP customer would not be carried over the PSTN, but calls to a non-VoIP customer travel over the PSTN. The Media Gateway Device converts the call into Time Division Multiplexing (TDM) format before relaying it over the PSTN, which permits non-packetized (non-digital) electric signals by carriers on the PSTN. The TDM signal is then transferred to a terminating telecommunications carrier (i.e., an ILEC or CLEC).

From the customer’s perspective, the VoIP providers use of eMTA devices to provide service is indistinguishable from “plain old telephone service” (POTS). The IP-enabled telephone equipment generates a dial tone that the customer hears when he or she picks up the handset to place a call, although a dial-tone is not a technical necessity. The largest providers of VoIP service, Comcast and TWC, offer services such as operator service, directory assistance, and E-911, that are identical to those provided by wireline carriers.

A. VoIP Service Providers Clearly Fall Under the State-Law Definition of Telephone Corporations

Under state law, telephone corporations are defined by whether they offer “communication by telephone, whether such communication is had with or without the use of transmission wires.” (Public Utilities Code Sections 233 and 234.⁵) VoIP providers, as described above, clearly use transmission wires (and “telephone lines”) as contemplated in the statute. Although IP-enabled telephone equipment offers digitized packet-switching service, for all intents and purposes the device is a telephone. Described above, the device, i.e., a telephone, allows

⁵ Hereinafter, all statutory references are to the Public Utilities Code unless otherwise indicated.

two people separated by distances to talk to each other⁶. The law makes no distinction between digital and analog voice signals.

Consequently, there is no question that, whether they utilize the PSTN or the internet (with or without transmission wires), VoIP providers are employing equipment that facilitates communication by telephone. (Section 233.) Entities that own, control, operate, or manage any equipment that facilitates communication by telephone are by statutory definition telephone corporations. (Section 234.)

B. VoIP Is Marketed by its Providers as a Telephone Service

It is clear from Comcast and Time Warner Cable's websites that they are marketing their VoIP service as a telephone service. For example, Comcast advertises that if customers sign up for "XFINITY Voice" they can get "unlimited local and long distance calling in the US", "voicemail", "Caller ID and Call Waiting"⁷. Comcast urges customers to "talk as long as you want with unlimited local and long-distance phone service."

Time Warner Cable offers a "Digital Home Phone" service that allows you to keep your current phone number and existing phone⁸. TWC offers calling plans, voicemail, directory assistance, and caller ID. For both Comcast and TWC phone service a broadband connection is a prerequisite. These marketing campaigns tie directly to the consumers' familiarity with and desire for telephone communication at home.

⁶ The word "telephone" is not defined anywhere in the code.

⁷ www.comcast.com

⁸ <http://www.timewarnercable.com/SoCal/learn/phone/>

C. VoIP Providers Can (and Do) Commit Slamming and Cramming Violations

VoIP service providers can and do engage in slamming and cramming, as demonstrated by complaints received by the Commission.

CPSD staff has reviewed the Commission's Consumer Affairs Branch (CAB) complaint reports related to internet telephone service, searching for examples of complaints by consumers against Time Warner Cable Information Services (Time Warner Cable or TWC) and Comcast Phone of California, LLC (Comcast), the two largest providers of internet phone service. CPSD identified hundreds of complaints against both Time Warner Cable and Comcast in the past three years. (See attached Declaration of Rudy Sastra.)

CAB is not currently performing systematic tracking of complaints against VoIP service providers. CPSD strongly urges the Commission to require that CAB begin to do so.

Currently, CAB customer service representatives do not capture all relevant information for complaints that relate to cable television, internet phone service, or the internet, on the theory that the Commission does not have jurisdiction because the Commission has chosen to date not to exercise such jurisdiction⁹. If the CAB representative determines that the complaint involves a non-jurisdictional service, the consumer is informed to contact another agency. On occasion a consumer's complaint (whether in writing or by telephone) will be handled by the CAB representative, who will take down the complaint information in the database. (Declaration of Rudy Sastra.) But it is not done in a systematic way.

Many complaints reviewed by CPSD have insufficient detail in the database entries to make any determination regarding the nature of the complaint.

⁹ Section 2890 prohibits the inclusion of unauthorized charges on a telephone bill by any entity, regardless of whether the party responsible for generating the charge is a regulated utility. However, if TWC and Comcast generate their own telephone bills, Sections 2890(c) and (d)(1-2) mandate certain consumer protections by the billing telephone company.

However, in some cases staff was able to determine that the complaint against Comcast or Time Warner Cable involved: billing disputes, poor quality of service, installation problems, outages, disconnections, slamming, promotional price discrepancies, equipment failures, refund delays, and number portability issues. (Declaration of Rudy Sastra.)

The consumer complaints show that one way slamming by a VoIP service provider is possible relates to number portability. Pursuant to FCC mandate, number portability enables a customer to “port” service from an existing carrier to a new carrier, while keeping the number assigned to the customer by the existing carrier. The process requires the VoIP provider, i.e., the “new” carrier, to notify the existing carrier that the customer wants to keep his or her telephone number. To accomplish this, the existing carrier discontinues service to the customer’s number, and the number is then switched to the new VoIP provider. (Declaration of Rudy Sastra.)

An unauthorized switch from the consumer’s existing telephone carrier to a VoIP provider is for all intents and purposes exactly the same as a slam from a traditional phone company to another traditional phone company, because the consumer’s existing phone service is disconnected and switched to the VoIP provider.

CPSD submits the following excerpts of VoIP slamming complaints to demonstrate how this can occur (Declaration of Rudy Sastra):

CAB COMPLAINT ID#110995

Letter from CAB Complainant:

“In the mean time Time Warner offered a special that we showed interest in. A Time Warner representative came out to our house for an inspection and a sales pitch, but after further talking with their technician we found we would have to re-wire the house In order to accept fiber optics, this hold thing was more trouble than it was

worth, so we said “NO” and told the Time Warner representative to cancel this request. He assured us he would take care of this. The next thing we knew we had no phone service and we had been slammed, (Slammed: A term that we are not familiar with). Our phone number had been canceled and transferred to Time Warner. How absolutely cruel. We tried to get this rectified and all we got was the run around, nothing for over two weeks ... Verizon has been working diligently to help set up a line so we can at least temporarily have some service with another number. However, we need our old number back and Time Warner now refuses to transfer our number back to Verizon...It has been almost a month now and we need it released by Time Warner.”

CAB Complaint Disposition:

6/21/10 (dad) Spoke to Brenda from Verizon’s exec. Ofc., she confirmed that on 6/15/10, Mrs. Alvarez’s original number has been returned back to them and they are no longer with Time Warner. Spoke to Mrs. Alvarez and she confirmed that her phone line is no longer with Time Warner. She wanted the CPUC to document her terrible experience with Time Warner’s representatives and the inconvenience that this matter has caused her. Mrs. Alvarez doesn’t want other people to experience what she had gone through to get her original number back. Mrs. Alvarez agrees that we can close this case.

CAB COMPLAINT ID #82127

Web Complaint from CAB Complainant:

“Complaint / Concern: On Dec 15 my telephone serviced was terminated by at&t. This was due to an order from □omcast to port my home number of ***-***-**** from at&t. I am a □omcast customer for television and internet and an at&t customer for home telephone. For Comcast the account is under Bert Salyga **** ** *** *****. For at&t the account is under Sean McCarthy *** ***-**** ***. Bert Salyga and Sean McCarthy are a couple living at the same address. We did not place this order to port our number and today I have no telephone service at my home. There was also an order on Nov 16 from □omcast to port our number and also at that time my telephone service was disconnect.

Utility Comment: Comcast looked in the order (D24086694) and noticed inconsistencies. Upon their investigation it was clear that the customer called Comcast to port service from at&t did not own number *** ***_****. They had no right to this number and the order should not have been processed. This also happened on Nov 15. At&t stated that when they receive an request to port a number they must comply even if it was not legitimate. They terminated my service on Dec 15 and on Dec 16 I have no dial tone or phone service. Please see more on my Nov 16 phone termination from file 77195.

Request of CPUC: This is the second time in 2 months that my phone service was disconnected without my approval or knowledge. It seems that anyone can call and ask for a number to be ported from one service provider to another and there is no check to see if that person actually owns the phone number. I must now wait 3 days for at&t to activate a temporary phone number for me (***_***_****) and then wait 5 to 10 business days for my number of ***_***_**** to be transferred back to me. I would like CPUC to put in place measures to that this cannot happen to me a 3rd time. There should be a verification system in place to ensure a person requested the porting of a phone number actually owns that phone number. No one should continually have their phone service disconnected because someone else wants to steal their phone number.”

CAB COMPLAINT ID#43602

Summary of consumer complaint phone call entered by CAB:

Consumer says that a Time Warner rep phoned and spoke with her husband regarding switching her home phone service from Verizon. She alleges that her husband never agreed to switch the service. She says nothing was signed. She says Time Warner took her phone number she had for over twenty years and gave her a new number a couple of weeks ago. She is very upset. No one- neither the consumer’s elderly mother, nor her doctors nor other family members nor friends can contact her husband and her because they do not know the home telephone number. Referred consumer to Gary Wengrofsky in the Time Warner Law Department.

CAB Complaint Disposition:

No response from Time Warner.

CAB COMPLAINT ID #106073

Summary of consumer complaint phone call entered by CAB:

“Customer states his local service was initially with AT&T and then he ported his phone number (***)**-**** to Vonage in December 2009. Since then his service was working fine. However, on May 3, 2010 his service was no longer working. He called Vonage who stated that Comcast ported his phone number to their service without his request. Customer states he did not provide authority or request Comcast to port his number to their service. Apparently Comcast ported his number but it’s now assigned to another customer. It appears that Comcast obtained the number in error. Called Comcast, spk w/Elanie at (***)**-**** - executive assistance who stated someone from Comcast will have someone call the customer to address the issue.

Advised customer if issue is not resolved by Comcast, the customer should file a complaint with CPUC.”

CAB COMPLAINT ID#63227

Web Complaint from CAB Complainant:

“Complaint / Concern: On 9/15/09 Time Warner Cable appeared at my home and left a note saying that no one was home to have installation service. I did not request service change, did not authorize service change, nor did I verify any change to my home phone. As a result, my phone service has been shut off, I have an alarm system, and AT&T is treating this event as a return customer, which I am not, because of the PUC restrictions or guidelines. I need your assistance. I want my phone turned on immediately. I pay my bill promptly [sic] upon notification and have had service with AT&T (formerly Pacific Bell) since 1993.

Utility Comment: Time Warner immediately disregarded the work order, and AT&T said that it might be a few days to restore my service, which is unacceptable to me.

Request of CPUC: I want Time Warner to be sanctioned for not following internal or external procedures with regard to procedures in new service requests.

Utility Name: Time Warner Cable.”

CAB COMPLAINT ID#67861

Summary of consumer complaint phone call entered by CAB:

Consumer says he called to get only an estimate of the cost of new telephone service with Time Warner. However, one week later consumer found his line had been switched from ATT and assumed by Time Warner. Please investigate and respond to both the consumer and the CPUC in writing.

CAB COMPLAINT ID#55645

Web Complaint from CAB Complainant:

“Complaint / Concern: Time Warner slammed/ported my home number of nearly 50 years, ***-***-****, and I caught them and told them not to and to fix it and now they say they lost the number and it will take days to (maybe) find it and them (maybe) they will port it back to MCI.

Utility Comment: That it may take days and it is all in the hands of Time Warner Cable.

Request of CPUC: Make them give my number back and restore my old account in full.

Utility Name: MCI”

CAB Complaint Disposition:

Joyce Donovan from Time Warner called to inform that the issue with them is resolved. Per Ms. Donovan, consumer was called by Time Warner to explain that the disputed tel. number will go back to the complainant. Advised Joyce that utility needs to send the response to the CPUC CIMS to close the IC.

(Account numbers and phone numbers redacted to protect privacy.)

IV. NO FEDERAL PREEMPTION

In order for a federal agency to preempt state regulation, it must do so clearly and explicitly. (*California Coastal Comm'n v. Granite Rock Co.* (1987) 480 U.S. 572, 583.) “The requirement of a clear indication of the agency’s intent to preempt is especially important in the context of the [1996 Telecommunications Act (Act)], which ‘divided authority among the FCC and the state commissions in an unusual regime of cooperative federalism.’” (*Global Naps, Inc. v. Verizon New England* (“*Global NAPs III*”), *supra*, 444 F.3d at p. 72 (quoting *Global NAPs, Inc. v. Mass. Dept. of Telecomms. & Energy* (“*Global NAPs II*”) (1st Cir. 2005) 427 F.3d 34, 46.) The FCC has not indicated any intent to preempt the states from applying consumer protection rules to VoIP providers.

A. Vonage Does Not Preempt the States from Applying Consumer Protections

VoIP carriers have argued, based on the FCC’s *Vonage* holding, that the FCC has completely occupied the field of internet regulation, and thus any State action is preempted. On November 12, 2004, the FCC released the *Vonage Order*.¹⁰ In that order, the FCC preempted the Minnesota Public Utilities Commission from applying its traditional telephone company regulations to Vonage’s DigitalVoice service. (Vonage provides “nomadic” VoIP.) As the FCC explained, DigitalVoice resembles the telephone service provided by the circuit-switched network, but with some fundamental differences. (*Vonage Order*, at ¶

¹⁰ *In the Matter of Vonage Holdings Corporation’s Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* (2004) 19 FCC Recd 22404.

4.) Among those differences are that Vonage's service is fully portable – customers may use the service anywhere in the world where they can find a broadband connection to the Internet. (*Vonage Order*, at ¶ 5.) Although Vonage's service uses North American Numbering Plan (NANP) numbers as a means of identifying the user's Internet address, in contrast to traditional circuit-switched telephony which associates a number with a geographical location, the NANP number a VoIP subscriber uses may not be tied to the subscriber's geographical location for either assignment or use. (*Vonage Order*, at ¶ 9.) Based on these facts, the FCC concluded that no practical means exist to separate Vonage's DigitalVoice into interstate and intrastate components for purposes of enabling dual federal and state jurisdiction. (*Vonage Order*, at ¶ 23.) Thus, the FCC held that allowing Minnesota's regulation of DigitalVoice would thwart federal law and policy. (*Ibid.*)

In 2009, Nebraska and Kansas jointly sought a declaratory ruling from the FCC that states are not preempted from applying state universal service fund contribution rules to “nomadic” VoIP providers. On October 28, 2010, the FCC issued a Declaratory Ruling resolving the Nebraska and Kansas joint Petition by holding that the states are not preempted. *In the Matter of Universal Service Contribution Methodology, WC Docket No.06-122, Declaratory Ruling, (Released November 5, 2010)*. The FCC distinguished the *Vonage Preemption Order* from the joint Petition, stating that preemption will continue with regards to “rate regulation, tariffing, or other requirements that operate as ‘conditions to entry’” as held in *Vonage*. (*Id.*, p. 11.) However, the FCC made it clear that so long as there was no direct frustration of federal policies, state regulation is not preempted.

As discussed more fully below, there cannot be any frustration of federal policies with regards to consumer protection because the FCC has delegated enforcement of consumer protection to the States. The FCC Declaratory Ruling makes it clear that the *Vonage Preemption Order* preempts only state regulations pertaining to “conditions of entry”; because consumer protection requirements are

unrelated to conditions of entry, there can be no preemption.¹¹ The FCC Declaratory Ruling also makes clear that the broad goal of promoting universal service is promoted by allowing the states to apply those rules to VoIP providers. Here, the FCC's broad goal in promoting consumer protection would be promoted if California were to apply its consumer protection requirements to VoIP providers, so long as it does so in a competitively neutral manner.

Moreover, FCC Chairman Powell recognized that despite the FCC's holding in *Vonage*, states have an ongoing governmental interest in protecting VoIP consumers from slamming. In a statement appended to the *Vonage Order*, Chairman Powell stated:

There will remain very important questions about emergency services, **consumer protections** from waste, fraud and abuse and recovering the fair costs of the network. It is not true that states are or should be complete bystanders with regard to these issues. Indeed, there is a long tradition of federal/state partnership in addressing such issues, even with regard to interstate services. For example, in long distance services, the **FCC and state commissions have structured a true partnership to combat slamming and cramming**....

While today's item preempts an order of the Minnesota Commission applying its traditional "telephone company" regulations to Vonage's DigitalVoice service, it is important that I emphasize that **the Commission expresses no opinion here on the applicability to Vonage of state's general laws** governing entities conducting business within the state, such as laws concerning taxation; fraud; general

¹¹ CPSD notes that the model suggested in the Kansas and Nebraska Declaratory Ruling is similar to the statutory model for wireless service, codified in § 332 of the Federal Communications Act, which prohibits state regulation of wireless rates or entry, but reserves to the state authority to regulate terms and conditions of service, including consumer protections. *See* 47 U.S.C. § 332(c)(3)(a).

commercial dealings; marketing and advertising. (19 FCC Recd 22404, 22437.) (Emphasis added.)

Chairman Powell's statement reflects that state commissions have a continuing role in combating slamming by all VoIP providers, not just nomadic or fixed.

Since *Vonage*, the FCC and the courts have clarified that *Vonage* preemption only applies where it is not possible to distinguish between interstate and intrastate calls. (See *Universal Service Contribution Methodology Proceeding*, Report and Order of Proposed Rulemaking (2006) 21 FCC Rcd 7518 at ¶ 56 [interconnected VoIP providers with the capability to track the jurisdictional confines of customer calls do not qualify for the preemptive effects of the *Vonage Order* and would be subject to state regulation]; *Minnesota PUC v. FCC* (Eighth Cir. 2007) 483 F.3d 570, 582-583 [the *Vonage Order* does not specifically address fixed VoIP service providers, and the FCC has since indicated VoIP providers who can track the geographical end point of their calls do not qualify for preemptive effect of *Vonage*]; and *Comcast IP Phone v. Missouri Public Service Commission* (W.D. Mo. 2007) 2007 U.S. Dist. LEXIS 3628 [the FCC has not preempted the entire field of VoIP services, and the Missouri PSC is not preempted from classifying, or potentially regulating, Comcast's Digital Voice service].)

As the FCC continues to withhold a definitive answer, a few states have already gone forward and declared that VoIP providers are telephone companies.

B. The FCC Delegated Its Power To Resolve Complaints To The States; Thus, California Is Free To Resolve Consumer Complaints On Its Own

Not only has the FCC not preempted the states from applying consumer protections to VoIP providers, but California is free to implement consumer protection enforcement against VoIP providers because the FCC has delegated its power to resolve these complaints to the States. Section 258 of the Communications Act of 1934 (Act), as amended by the Telecommunications Act

of 1996 (1996 Act), provides that no telecommunications carrier shall execute a change in a subscriber's selection of a provider of telephone exchange or toll services except in accordance with verification procedures established by the FCC. Section 258 further states: "Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services." (47 U.S.C. § 258(a).)

In Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers (CC Docket No. 94-129), Second Report and Order (1998) 14 FCC Rcd 1508, the FCC adopted rules to implement section 258 of the 1996 Act. In that order, known as the *Section 258 Order*, the FCC stated that section 258 explicitly grants the FCC authority to create verification procedures for both interstate and intrastate services, and that the rules adopted in the *Section 258 Order* apply to both types of services. (*Section 258 Order*, at ¶ 86.)

However, the FCC declined to generally preempt state regulation of carrier changes. "We conclude that, although a state must accept the same verification procedures prescribed by the Commission, a state may accept additional verification based on its local experience." (*Section 258 Order*, at ¶ 87.) The FCC further noted that states must write and interpret their statutes and regulations in a manner that is consistent with the FCC's rules and orders. (*Section 258 Order*, at ¶ 89.) Finally, the FCC stated, with regard to the issue of preemption of state verification rules, it would not make a preemption determination in the absence of an adequate record clearly describing the state law or action and precisely how the state law or action conflicts with federal law. (*Section 258 Order*, at ¶ 89.)

In Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers (CC Docket No. 94-129), First Order on Reconsideration, (2000) 14 FCC Rcd 8158, the FCC revised

its rules to provide that slamming disputes between consumers and carriers should be brought before appropriate state commissions, rather than to authorized carriers, as previously adopted. (*Section 258 Order on Reconsideration*, at ¶ 1.) The FCC concluded that “it is in the public interest to have state commission, rather than a third party designated by carriers, perform the *primary* administrative functions of our slamming liability rules.” (*Section 258 Order on Reconsideration*, at ¶ 24.) The FCC further stated that this did not preclude a consumer from filing a complaint with the FCC. However, the FCC would refer informal complaints to the appropriate state commission. (*Section 258 Order on Reconsideration*, at ¶ 28.) To ensure seamless administration of complaints among the FCC and the states, each state commission that chose to take on the primary responsibility for resolving consumer slamming complaints is required to notify the FCC of the procedures it would use to adjudicate slamming complaints. (*Section 258 Order on Reconsideration*, at ¶ 29.) This Commission has opted to act as adjudicator of slamming complaints, giving it the authority to enforce slamming rules with respect to both interstate and intrastate carriers. (See D.06-03-013, at p. 156 [CoL 16].)

Although the FCC has extended a number of “telecommunications” programs to interconnected VoIP carriers, it has not pre-empted states’ slamming rules for VoIP providers. (See *IP-Enabled Services Proceeding*, Report and Order (2005) 20 FCC Rcd 10245, Concurrence of Chairmen Kevin J. Martin [noting that the FCC was continuing to evaluate obligations including number portability, which was recently extended to interconnected VoIP carriers, and consumer protections issues, such as slamming].) The result is that California is not preempted from applying the slamming and cramming rules on its own.

C. Maine Declares Digital Voice Service to be Jurisdictional “Telephone Service”

On October 27, 2010, the State of Maine Public Utilities Commission (MPUC) issued an Order declaring that VoIP services such as the kind provided

by Time Warner Cable and Comcast are “telecommunications services” and not “information services” pursuant to federal and state law definitions, and that the MPUC’s authority to regulate has not been preempted¹². The issue in that proceeding is whether VoIP providers must obtain a Certificate of Public Convenience and Necessity to offer telephone services in Maine, and whether they are subject to the regulation of the MPUC.

The MPUC looked carefully at the technical aspects of VoIP services to determine if they are in fact telephone services. The MPUC sought and received comments from Time Warner Cable, Comcast, the Voice On the Net Coalition (VON Coalition), and many other industry participants. The MPUC definitely concluded that digital VoIP offerings are “telephone services”. The MPUC also thoroughly examined Federal law and FCC orders to determine if Maine’s action was preempted, and found that it is not.

V. CONCLUSION

CPSD respectfully recommends that the Commission broaden the scope of this proceeding to including an inquiry into whether the consumer protections afforded to the people of this State by statute against, among other things, slamming and cramming, should also be applied to interconnected VoIP service providers. If the public purpose programs of this State are at risk because VoIP providers are currently exempt, the State’s consumer protection laws are equally at risk as customers increasingly switch to VoIP. To maintain competitive neutrality, and to ensure that consumers are protected no matter how they obtain telephone service, the Commission should extend consumer protections to VoIP providers.

¹² *Re Whether Providers of Time Warner “Digital Phone” Service and Comcast “Digital Voice” Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service, Order* (2010) Maine Public Utilities Commission, Docket No.2008-421.

Respectfully submitted,

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March 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**MOTION OF THE CONSUMER PROTECTION AND SAFETY DIVISION FOR MODIFICATION OF THE SCOPE OF RULEMAKING TO INCLUDE CONSUMER PROTECTION**” in **R.11-01-008** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **March 8, 2011** at San Francisco, California.

/s/ REBECCA ROJO

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