

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to Consider
Regulating Telecommunications Services
Used by Incarcerated People.

Rulemaking 20-10-002

**JOINT BRIEF OF PUBLIC ADVOCATES OFFICE,
THE UTILITY REFORM NETWORK, PRISON POLICY INITIATIVE,
AND CENTER FOR ACCESSABLE TECHNOLOGY**

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SUMMARY OF RECOMMENDATIONS

Pursuant to Rule 13.12 of the Rules of Practice and Procedure of the California Public Utilities Commission, The Public Advocates Office at the California Public Utilities Commission, The Utility Reform Network, the Prison Policy Initiative, and Consumers for Accessible Technology provide the following summary of recommendations.

- The California Public Utilities Commission has the state authority to protect individuals who are incarcerated from excessive video calling service rates.
- Despite the continued claims by the Incarcerated People Communication Service Providers in this proceeding, the Federal Communications Commission has not classified video calling services as a Title I information service.
- Even assuming video calling services were classified as a Title I information service, the recent updates in the law make clear that this classification has no preemptive effect as the Federal Communications Commission has ceded its regulatory authority.
- Section 706 of the 1996 Telecommunications Act empowers the California Public Utilities Commission to use thing like price caps to encourage the deployment of advanced telecommunication capabilities, like video calling services.
- The California Public Utilities Commission should exercise its jurisdiction over video calling services offered by Incarcerated People Communication Service Providers in this proceeding to place price cap and other regulations.
- The California Public Utilities Commission should gather more information about the remaining services identified in Question 1 of the Scoping Memo later in Phase II.

I. INTRODUCTION

The Public Advocates Office at the California Public Utilities Commission (Cal Advocates), The Utility Reform Network (TURN), the Prison Policy Initiative (PPI), and Consumers for Accessible Technology (CforAT) (collectively, Joint Intervenor) file this joint legal brief¹ in response to the November 29, 2021 *Assigned Commissioner's Phase II Scoping Memo and Ruling Extending Statutory Deadline* (Phase II Scoping Memo).

The Phase II Scoping Memo asks parties to answer two questions regarding the California Public Utilities Commission's (CPUC or Commission) jurisdiction to regulate certain telecommunication services used by people who are incarcerated:

- 1) Does the Commission have authority to regulate rates, fees and/or service quality of video and related services provided to incarcerated persons in California, including remote video calling services, in-person video calling services, text (SMS) services, private messaging services, tablet services, photo sharing/music, video entertainment and/or internet access services?
- 2) If yes, should the Commission adopt interim or permanent rate caps and/or ancillary fee regulations for video and related services?²

The Joint Intervenor support the CPUC's consideration of these questions before moving forward in this proceeding. Establishing interim rates for voice calling services in Phase I provided much needed relief to people who are incarcerated and their families.³ The public participation hearings (PPH) and comments in this proceeding demonstrate that video calling services (VCS)⁴ are, like voice calling, an essential communicative tool for people who are incarcerated and their families.⁵ Establishing rates for one while ignoring the other would fall short of achieving the CPUC's goal of

¹ As permitted by Rule 1.8(d) of the Commission's Rules of Practice and Procedure, counsel for Cal Advocates has been authorized to sign this brief on behalf of each of the Joint Intervenor.

² Phase II Scoping Memo, Appendix 1.

³ Decision (D.) 21-08-037 in Rulemaking (R.) 20-10-002, *Decision Adopting Interim Rate Relief for Incarcerated Person's Calling Services*, August 19, 2021.

⁴ This brief will address both remote video calling services and in-person video calling services.

⁵ Phase II Scoping Memo, pp. 7-8.

protecting these captive customers.⁶ The primary hurdle in establishing VCS rate caps has been the continued resistance from Incarcerated People Communication Service (IPCS) providers Global Tel*Link (GTL) and Securus Technologies, LLC (Securus) (collectively, Providers) to providing the information needed to establish a robust record on VCS. The CPUC should exercise its jurisdiction to regulate VCS so that this proceeding can achieve its intended goal of mitigating the burden on incarcerated people of the exorbitant rates charged by IPCS providers.⁷

Question 1 above identifies several technologies offered in California incarceration facilities. At this time, the Joint Intervenors recommend that the CPUC exercise its jurisdiction over VCS. The Joint Intervenors will be able to make more informed recommendations regarding the other services identified in Question 1 after evidence gathered during Phase II. As the Phase II Scoping Memo notes, due to the numerous complex issues in this proceeding the question of jurisdiction for these other services may be better suited for later in Phase II or Phase III.⁸

Sections II through V of this brief respond to Question 1. Section VI responds to Question 2.

II. VCS IS A TELECOMMUNICATIONS SERVICE UNDER FEDERAL LAW

VCS combines a live picture (video) of the call participants with an audio signal. The video call may augment or replace in-person visitation and allows communication between callers in incarceration facilities and call recipients who are either in a different part of the facility (so-called “onsite video visitation”) or remote locations such as an attorney’s office or the home of friends and family members. As discussed in greater

⁶ D.21-08-037, pp. 31-32.

⁷ “The overall purpose of this proceeding is to determine if the [CPUC] should exercise its authority to regulate the rates, terms, and conditions of intrastate inmate communication services, including (but not limited to) voice, Voice Over Internet Protocol, [VCS], and text services provided to incarcerated and detained people in California to ensure they are just, reasonable, and affordable.” Phase II Scoping Memo, p. 24.

⁸ Phase II Scoping Memo, pp. 7-8.

detail below, the Federal Communications Commission (FCC) and States have a long history of regulating VCS as a communication service.

Like all states, California plays a key role on the “dual regulatory system” of U.S. telecommunications law.² The Providers, however, attempt to thwart CPUC regulation of IPCS VCS by insisting that VCS is a Title I “information service” under federal law¹⁰ (a designation that traces its origins back to the FCC’s landmark decision in the *Second Computer Inquiry* (“*Computer II*”)¹¹). A close examination of federal and state precedent reveals a significant problem with the Providers’ argument: the FCC has never actually classified any IPCS product as an information service. Under a reasoned analysis, the Providers’ contention necessarily fails because voice and video IPCS are properly classified as telecommunications services (a status that necessarily precludes designation as an information service). In this section, Joint Intervenors explain why the Providers’ information-service argument must be rejected.

A. The FCC and States have a long history of regulating VCS as a Telecommunication Service.

Given the dual regulatory system that governs U.S. telecommunications law, a review of relevant federal law is a necessary component of any legal analysis of the CPUC’s powers. The federal Communications Act (Federal Act) was passed in 1934 and

² See *California v. FCC*, 905 F.2d 1217, 1242 (9th Cir. 1990) (quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 370 (1986)).

¹⁰ *Opening Comments of Global Tel*Link Corporation (U 5680 C) To Order Instituting Rulemaking 20-10-002*, R.20-10-002, November 9, 2020 (“Given ... the classification of video conferencing service as an advanced service and an information service under the Communications Act of 1934,..., there is no lawful basis for promulgation of VVS rate caps.”); *Comments of Securus Technologies, LLC (U 6888 C)*, R.20-10-002, April 30, 2021 (“the [CPUC] has recognized the limitations on its authority with respect to non-voice services, such as information services.”); *Opening Comments of Global Tel*Link Corporation (U 5680 C) To Administrative Law Judge’s Ruling Providing Staff Interim Rate Relief Proposal for Comment*, R.20-10-002, April 30, 2021 (“Technologies such as video visitation and broadband-enabled tables are services that are jurisdictionally interstate as information services and thus outside the scope of the [CPUC] regulatory powers.”); *Reply Comments of Securus Technologies, LLC (U 6888 C) Administrative Law Judge’s Ruling Providing Staff Interim Relief Proposal For Comment*, R.20-10-002, May 12, 2021 (“The [CPUC’s] lack of authority over [VCS] was affirmed...noting that video visitation services...have been classified by the FCC as interstate information services.”).

¹¹ *Amendment of § 64.702 of the Commission’s Rules & Regulations (Second Computer Inquiry)*, Dkt. No. 20828, 77 F.C.C. 2d 384 (released May 2, 1980).

expressly preserves a role for state regulators.¹² The Federal Act was deliberately framed to encompass new technologies that arose after enactment of the statute.¹³ The California Public Utilities Code uses a similarly expansive scope and has been interpreted broadly to allow CPUC oversight of new telecommunications services that are “akin to telephony.”¹⁴

VCS has long been treated as a regulated communications service under the Federal Act. The FCC first encountered video calling in 1964, when American Telephone & Telegraph (AT&T) debuted its “Picturephone” service, hailed as the first videophone and an indication of technological innovation to come.¹⁵ The FCC’s debates over Picturephone ranged from the philosophical to the mundane, but no one seriously disputed the FCC’s ability to embrace the challenge of regulating new technologies that clearly fell under its purview.

In 1967, FCC Commissioner Nicholas Johnson acknowledged the controversial Picturephone program as an innovation that could close the “dollar-intimacy gap”¹⁶ even as he vocally criticized AT&T for funding Picturephone’s development through revenue

¹² 47 U.S.C. § 152(b) (“[N]othing in [the Federal Act] shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practice, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”).

¹³ Stuart N. Brotman, *Communications Law & Practice* § 1.02 (rev. 2021) (“In 1933, President Franklin D. Roosevelt called for the convening of a committee to study government regulation of electronic communications. President Roosevelt had a limited purpose: to bring telephony and broadcasting under the same jurisdiction. The committee went further, recommending that Congress establish a single agency to regulate all foreign and interstate communications, including radio, telegraph and telephone, with provisions for any new technologies that might be related.” (Footnotes omitted.)).

¹⁴ *Commercial Commc’ns v. PUC*, 50 Cal.2d 512, 518-519 (1958); *see also* Response of GTL in Opposition to Public Advocates Office Motion to Compel, at 8 (Aug. 23, 2021) (“The FCC’s statutory authority to regulate interstate telecommunications services, including IPCS providers, mirrors in many respects the Commission’s regulatory authority over intrastate telecommunications services.”).

¹⁵ *Structure & Practices of the Video Relay Service Program*, CG Dkts. 10-51 & 03-123, Report & Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, Stmt. of Chairman Ajit Pai, 32 FCC Rcd. 2436, 2513 (released Mar. 23, 2017).

¹⁶ *AT&T Co. and the Associated Bell Sys. Companies Charges for Interstate and Foreign Commc’ns Service*, Dkts. 16258 & 15011, Interim Decision & Order, 9 F.C.C. 2d 30, 98 (Jul. 5, 1967) (Johnson, Comm’r, concurring) (describing a continuum of intimacy of personal communications, ranging from face-to-face communications (intimate, but expensive to the extent that it requires cross-country travel) to postal mail (less intimate, but inexpensive regardless of distance)).

from general ratepayers. The debate over proper regulatory accounting lived on after Picturephone was deemed a commercial failure and Johnson left the FCC. In 1978, while debating a revised uniform system of accounts (USOA), the FCC classified Picturephone as a “visual telephone” service, not as part of the Bell System’s growing computer operations.¹⁷ Due to the rapidly changing nature of the telecommunications industry, the FCC never finalized the 1978 revisions to the USOA,¹⁸ but the streamlined USOA in use today defines “telecommunications” as including “transmission . . . or reception of . . . *images* or sounds or intelligence of any nature by wire”¹⁹ (a definition that encompasses IPCS VCS).

In the 1980s, a new iteration of Picturephone surfaced, renamed Picturephone Meeting Service (PMS) and described as “allow[ing] the holding of conferences and meetings where the conferees were located in different geographical areas”²⁰ (this could also describe IPCS VCS, although IPCS calls are typically limited to two connections). The FCC approved a limited-duration tariff for PMS after finding that AT&T’s rates were just and reasonable under 47 U.S.C. § 201(b) (a statute that regulates prices for *communication* services).²¹

In 1982, the FCC granted AT&T’s request for authority to construct new PMS facilities. By this time, however, there was new law to contend with: in the years since the previous Picturephone deliberations, the FCC had issued its final decision in

¹⁷ *Revision of the USOA & Financial Reporting Requirements for Telephone Companies*, CC Dkt. 78-196, Notice of Proposed Rulemaking, 70 F.C.C. 2d 719, 763-764, 774-776 (released Jul. 21, 1978).

¹⁸ *Revision of the USOA & Financial Reporting Requirements for Telephone Companies*, CC Dkt. 78-196, Second Supplemental Notice of Proposed Rulemaking and Order, 88 F.C.C. 2d 83 (released Oct. 20, 1981).

¹⁹ 47 C.F.R. § 32.9000 (emphasis added).

²⁰ *AT&T Picturephone(r) Meeting Serv.*, FCC 80-779, 84 F.C.C. 2d 322, 323 (released Jan. 5, 1981).

²¹ *AT&T Picturephone(r) Meeting Serv.*, 84 F.C.C. 2d at 326-327.



**Here's a telephone change
that lets you say,
"Nice to see you!"**

It's *Picturephone** service, which transmits your picture as well as your voice. The *Picturephone* set has a built-in microphone, loudspeaker, and camera, with a button so you can turn the camera off if you don't wish to be seen. Already it is operating on a limited basis between *Picturephone* centers in New York, Chicago, and Washington, D.C. This fascinating communications service is being

further developed, and may someday find use in homes and offices.

Many changes—large and small—are happening to your phone service. Some are being made now; others, like *Picturephone* service, may come along in the future. All these changes are made for the same reason: to meet your phone needs in this fast-moving world.



Pacific Telephone
Part of the Nationwide Bell System

*Service mark of the Bell System

Figure 1. Although AT&T's Picturephone service was a commercial failure and was not broadly offered in California, the California PUC and the FCC both exercised jurisdiction over this early form of video calling.

Source: *Madera Daily Tribune*, Sep. 28, 1965, at 3.

Computer II, creating the mutually exclusive categories of “basic services” (subject to regulation as common carriage under Title II of the Federal Act) and “enhanced services” (not considered common carriage).²² *Computer II* itself described basic service as potentially including the transmission of video as well as voice.²³ When AT&T requested authority to invest money in new PMS facilities (and recover such costs from

²² *Computer II* ¶ 92, 77 F.C.C. 2d at 418-419 (describing the basic/enhanced service dichotomy).

²³ *Computer II* ¶ 93, 77 F.C.C. 2d at 419 (“A basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information. In offering this capacity, a communications path is provided for the analog or digital transmission of voice, data, *video*, etc. information.” (Emphasis added.)).

ratepayers), one of its competitors objected, arguing that PMS was an enhanced service under *Computer II* (in which case it would have to be moved to a “fully separate subsidiary” that was legally and operationally separate from AT&T’s common carrier services).²⁴ The FCC overruled the objection, holding instead that PMS was a basic service.²⁵ Thus, as far back as 1982, the FCC classified VCS as a basic service under the *Computer II* framework. Since that time, the FCC has continued to adhere to this policy—precedent that is fatal to the Providers’ argument here.²⁶

California handled Picturephone in much the same way as the FCC did—which is to say, without controversy. Although the early Picturephone was advertised in California, the service does not appear to have been offered in the state, but the later PMS brand was. As a result of *Computer II*, AT&T and Bell operating companies were required to move customer-premises equipment (CPE) operations to functionally separate subsidiaries.²⁷ As part of this required reorganization, in 1982, Pacific Telephone & Telegraph sought the CPUC’s approval to transfer certain PMS property to an entity called American Bell, Inc. The CPUC granted the request in a brief order that implicitly acknowledges jurisdiction over such service.²⁸ In states where Picturephone was available to consumers, utility commissions treated the offering as a regulated communications service.²⁹

The historic regulatory treatment of Picturephone vitiates the Providers’ claim that VCS cannot be regulated because of its novelty. Just because a certain technology

²⁴ *Application of AT&T and Certain Bell System Associated Companies for Authorization Pursuant to § 214*, File No. W-P-C-3825, Mem. Opinion, Order, Certificate & Authorizations ¶ 8, 89 F.C.C. 2d 1017, 1021 (released Apr. 16, 1982).

²⁵ *Application of AT&T* ¶ 23, 89 F.C.C. 2d at 1026.

²⁶ See Footnote 10.

²⁷ *Computer II* ¶ 139, 77 F.C.C. 2d at 438. Specifically, the FCC declined to classify CPE as performing basic or enhanced service, and instead ordered that *all* CPE, no matter what type of function it served, be offered through unregulated entities. See *Computer II*, ¶¶ 190-200, 77 F.C.C. 2d at 457-461.

²⁸ *In re Pacific Tel. & Tel. Co.*, Final Opinion, D.820813, 11 C.P.U.C. 2d 565 (May 18, 1983).

²⁹ *In re NY Tel. Co.*, Opinion No. 73-39, 2 P.U.R.4th 1 (N.Y. Pub. Serv. Comm’n Nov. 16, 1973) (excluding Picturephone equipment from rate base prior to approval of a Picturephone tariff); *In re Ill. Bell Tel. Co.*, Order, Case No. 78-0034 (Ill. Commerce Comm’n Nov. 21, 1978) (similar ruling).

contains new features does not remove it from regulatory jurisdiction. Rather, the inquiry must focus on the nature of the service being offered. The FCC's treatment of Picturephone shows clearly that the mere joinder of video and audio into a combined system of two-way communication does not change the fundamental fact that communication is communication whether it involves audio, video, or both.

B. IPCS VCS is a “Telecommunications Service” under the Federal Telecommunications Act of 1996

Congress extensively amended the Federal Act in the sweeping Telecommunications Act of 1996 (1996 Act).³⁰ Among other things, the 1996 Act adopts statutory definitions of the basic and enhanced service categories created by *Computer II*. The old basic service category is now referred to as telecommunications service, defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”³¹ Enhanced service is now known as information service, defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, [including] electronic publishing, but . . . not includ[ing] any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”³² Two recent federal-law developments are of note for purposes of this discussion: the FCC’s 1996 declaratory ruling on inmate payphones, and the Twenty-First Century Communications and Video Accessibility Act (CVAA).³³

Although decided prior to enactment of the 1996 Act, the FCC’s February 1996 declaratory ruling is notable because it remains the most recent affirmative ruling on the

³⁰ Pub. L. 104-104, 110 Stat. 56 (1996).

³¹ 1996 Act § 3(a)(2)(48) (codified as 47 U.S.C. § 153(43)). “Telecommunications service,” in turn is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 1996 Act. § 3(a)(2)(51) (codified as 47 U.S.C. § 153(46)).

³² 1996 Act § 3(a)(2)(41) (codified as 47 U.S.C. § 153(20)).

³³ Pub. L. 111-260, 124 Stat. 2751 (2010).

classification of IPCS under federal law. In 1993 a coalition of IPCS carriers asked the FCC to classify voice IPCS calling as an enhanced service (i.e., the *Computer II* version of information service), citing the extensive computer processing needed to provision, route, and monitor IPCS calls.³⁴ On the eve of the 1996 Act’s passage, the FCC rejected the request, finding that security and call-management features do not make IPCS voice telephony an enhanced service.³⁵ While this ruling is limited to voice calling, it instructs that the specialized management features commonly used in connection with IPCS do not change the generally applicable analysis. This result is consistent with the 1996 Act’s definition of information services, which excludes data processing used for “management, control, or operation of a telecommunications system.”³⁶

The second federal development of note concerns a statute passed after the 1996 Act. In 2010, Congress passed the CVAA, which creates a new statutory definition of “advanced communications services.”³⁷ Advanced communications services include “interoperable video conferencing service.”³⁸ The CVAA was enacted for the purposes of expanding communications access to disabled callers, but the statutory definition is nonetheless relevant for purposes of this discussion because Congress chose to define interoperable video conferencing service as an advanced *communications* service, not a type of information service.³⁹ In working to implement the CVAA, the FCC has provided preliminary insight into the meaning of “interoperable video conferencing service.” Although the FCC has yet to establish a regulatory definition of interoperable

³⁴ *In the Matter of the Petition of the Inmate Calling Services Providers Task Force*, Dkt. RM-8181, Petition for Declaratory Ruling, at 18-22 (Feb. 2, 1993).

³⁵ *Petition for Declaratory Ruling by Inmate Comm’cns Services Providers*, Dkt. RM-8181, Declaratory Ruling ¶¶ 28-32, 11 FCC Rcd. 7362, 7374-7376 (released Feb. 20, 1996).

³⁶ 47 U.S.C. § 153(20).

³⁷ 47 U.S.C. § 101 (codified as 47 U.S.C. § 153(1)).

³⁸ 47 U.S.C. § 153(1)(D).

³⁹ *See Ratzlaf v. U.S.*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”). To be clear, the terms “advanced communications services” and “telecommunications services” are not coterminous. The point, rather, is that advanced communications services are—as the name indicates—used for *communications*, not to store, transport, or manipulate data (the definition of an information service).

video conferencing service,⁴⁰ it has rejected an industry argument that “personal computers tablets, and smartphones should not be considered equipment used for interoperable video conferencing service, because these devices are not primarily designed for two-way video conferencing.”⁴¹ In overruling this argument, the FCC notes that “[c]onsumers get their advanced communications services primarily through multipurpose devices, including smartphones, tablets, laptops and desktops,” and that applying section 716 of the Federal Act⁴² only to devices that are exclusively used for advanced communication services would nullify the intent of the CVAA. This holding is relevant here because some IPCS carriers now provide calling capabilities on handheld devices such as computer tablets. The FCC’s interpretation of the CVAA shows that jurisdiction is determined by the type of service provided, not the kind of equipment used.⁴³

Accordingly, both the relevant statutory language and FCC precedent affirm that service classification (and, by extension, regulatory jurisdiction) hinges on the nature of the service that the consumer uses, not by the end-user hardware or the technology used to manage the telecommunications system. IPCS customers purchase a very simple service: they pay for the ability to simultaneously exchange sounds and images with one designated counterparty—this is the quintessence of a communication service.

⁴⁰ *Implementation of Sections 716 & 717 of the Comm’ns Act of 1934, as Enacted by the CVAA, etc.*, Dkts. GC 10-213, WT 96-198, CF 10-145, Report & Order and Further Notice of Proposed Rulemaking [hereinafter “CVAA R&O”] ¶ 47, 26 FCC Rcd. 14557, 14577 (Oct. 7, 2011).

⁴¹ CVAA R&O. ¶ 49, 26 FCC Rcd. at 14577.

⁴² 47 U.S.C. § 617 (concerning manufacturers’ and service providers’ obligations to provide access to telecommunications users with disabilities). (Section 716 imposes various obligations on both manufacturers of equipment used for advanced communications services, and providers of the service itself (*see* CVAA § 104 (codified as 47 U.S.C. § 617)).

⁴³ *See also* 47 C.F.R. § 64.6000(j) (defining ICS as “a service that allows Inmates to make calls to individuals outside the Correctional Facility . . . regardless of the technology used to deliver the service”).

C. The FCC has never classified any type of IPCS technology as a Title I “Information Service.”

While some IPCS carriers have expressed opposition to CPUC regulation of VCS on policy grounds, GTL and Securus have gone a step further by arguing (here and before the FCC) that VCS and other advanced IPCS services are classified as information services. There is no support for this bold statement. A thoughtful examination of the Providers’ arguments reveals how precarious the companies’ reasoning is.

The Providers claim that the FCC has classified VCS as an information service, but this allegation is based on a faulty reading of authority.⁴⁴ The Providers rely on one citation in support of this statement: paragraph 107 of the FCC’s 2010 Broadband Notice of Inquiry (NOI).⁴⁵ There are three independent reasons why the Providers’ citations to paragraph 107 are fatally flawed. First, the document cited is not an order or a rule, but rather a notice of inquiry. An FCC proceeding on a notice of inquiry “do[es] not result in the adoption of rules.”⁴⁶ If the entire proceeding does not result in the adoption of a rule, then the opening notice (which poses *questions* and is released by the FCC without public input) certainly cannot be considered any type of binding precedent. Second, the text of paragraph 107 does not support the Providers’ assertion. Paragraph 107 simply notes certain services that the FCC decided not to address in the 2010 broadband proceeding—including “information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or any other offering aside from broadband Internet service.”⁴⁷ This laundry list (which is the regulatory equivalent of dictum) is accompanied by a footnote that cites various FCC orders that have classified the respective services as information services—yet none of the authorities cited in the footnote mention IPCS VCS specifically or video

⁴⁴ See footnote 10.

⁴⁵ *Framework for Broadband Internet Service*, GN Dkt. 10-127, Notice of Inquiry, 25 FCC Rcd. 7866 [hereinafter “Broadband NOI”] (Jun. 17, 2010).

⁴⁶ 47 C.F.R. § 1.430.

⁴⁷ Broadband NOI ¶ 107, text accompanying n.280, 25 FCC Rcd. at 7909-7910.

conferencing generally. Finally, “video conferencing” is not defined in the Broadband NOI (and, notably, the NOI was issued prior to the passage of the CVAA, which introduced the term “interoperable video conferencing” into the Federal Act), so the offhand reference in paragraph 107 could refer to some type of service that is materially distinguishable from IPCS VCS—for example, a one-way broadcast service such as Zoom webinar.

GTL also uses the CVAA to raise even less meritorious claims about the status of IPCS VCS. The CVAA, as noted previously, has nothing to do with VCS jurisdiction. Rather, the CVAA is concerned exclusively with disability access in telecommunications. The statute does define “interoperable video conferencing” as a type of “advanced communications service,” a definition that GTL attempts to use for purposes of confusion and obfuscation. In resisting Cal Advocates’ attempts to obtain discovery regarding IPCS VCS, GTL quotes numerous (and largely irrelevant) provisions from the CVAA and the FCC’s related rulemaking.⁴⁸ GTL concludes its CVAA argument by stating “any form of video communication . . . constitutes a defined form of video conferencing, which the FCC has deemed to be an information service.”⁴⁹ This statement is both inaccurate and misleading. It is inaccurate because the FCC has *not* “deemed” all video conferencing to be an information service—GTL’s only direct citation in support of this statement is paragraph 107 of the 2010 Broadband NOI, which (as already discussed) does not say what GTL claims it says.⁵⁰ GTL’s argument is misleading because nothing in the text of the CVAA supports GTL’s theory. The CVAA imposes certain disability-access requirements on service providers and equipment manufacturers, but nothing in

⁴⁸ Response of GTL in Opposition to Public Advocates Office Motion to Compel, at 3 (Aug. 23, 2021).

⁴⁹ Response of GTL in Opposition to Public Advocates Office Motion to Compel, at 3 (Aug. 23, 2021).

⁵⁰ See *above*, notes 45-47 and accompanying text. The only other authority cited in support of GTL’s claim is a “see also” cite to the D.C. Circuit’s decision in *GTL v. FCC*, 866 F.3d 397 (D.C. Cir. 2017). This is a red herring both because the D.C. Circuit’s ruling is narrower than GTL would have the Commission believe, and because the court did not say a single word about *states’* ability to regulate video IPCS. See *In the Matter of Rates for Interstate Inmate Calling Services*, FCC WC Dkt. 12-375, Reply Comments of PPI on Fifth Further Notice of Proposed Rulemaking, at 22-24 (Dec. 17, 2021) (responding to GTL and Securus’s mischaracterizations of the *GTL* holding), available at <https://www.fcc.gov/ecfs/filing/12171576121872>.

the Federal Act classifies video conferencing as an information service or preempts state jurisdiction.

GTL clearly hopes that the FCC will classify VCS as an information service. But that has not happened. Unless and until the FCC takes such action, the CPUC is free to regulate IPCS VCS. Moreover, as discussed in the following section, even if VCS *were* classified as an information service, that classification does not necessarily deprive the CPUC of jurisdiction over intrastate video calls.

III. EVEN IF VCS WERE CATEGORIZED AS A TITLE I “INFORMATION SERVICE,” THE FCC HAS NO AUTHORITY TO PREEMPT STATES FROM REGULATING VCS

A. The classification Title I “Information Service” does not give the FCC blanket preemption authority over the CPUC.

The Providers have repeatedly argued that the CPUC lacks the jurisdiction to regulate VCS because FCC has classified VCS as a Title I “Information Service” under the 1996 Act.⁵¹ As explained in Section II above, VCS is properly treated as a Title II telecommunications service under the 1996 Act. Even if the Providers’ argument were correct and VCS were classified as a Title I service, the CPUC is not preempted from regulating VCS. The Providers’ arguments assume that the mere classification of a service as a Title I “information service” includes a blanket preemption from any state regulation, without any further explanation. In fact, the opposite is true. Title I of the 1996 Act gives the FCC *less* regulatory authority over the classified service and *less* ability to preempt state action. To demonstrate that a state entity is preempted from regulating a service classified as an information service under Title I of the 1996 Act, it is necessary to analyze preemption under the specific facts of the regulation, something the Providers have thus far failed to do.

As a starting point, the mere classification of a particular offering as an information service does not end the jurisdictional inquiry. An information service may

⁵¹ See footnote 9.

be intrastate (based on the physical endpoints of the parties),⁵² in which case the FCC lacks jurisdiction entirely.⁵³ Thus, if both parties to an IPCS VCS call are in California, an information-service designation would constitute no impediment to regulation.

The FCC's ability to preempt state law also depends on the FCC's original regulatory jurisdiction over the service.⁵⁴ The FCC's regulatory jurisdiction is classified as either expressly stated or ancillary to its primary jurisdiction.⁵⁵ For the FCC to preempt the CPUC from regulating VCS for the incarcerated, the FCC must first have either express or ancillary authority to regulate those services.

The FCC's strongest regulatory authority⁵⁶ is the explicitly preemptive language in the 1996 Act. Courts have ruled that the FCC has the express authority to regulate "common carrier services" (Title II of the Federal Act)⁵⁷, "radio transmissions" (Title III)⁵⁸, and "cable services" (Title IV).⁵⁹ Because of this express authority, the FCC preempts state regulation of these three types of technologies.⁶⁰ But Title I "information services" are not included in the FCC's express regulatory authority. So, assuming VCS

⁵² *Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, GN Dkt. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking ¶ 59, 17 FCC Rcd. 4798, 4832 (released March 15, 2002).

⁵³ See 47 U.S.C. § 151 (granting FCC jurisdiction over "interstate and foreign commerce in communication by wire" (emphasis added)).

⁵⁴ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (The FCC "may preempt state law only when and if it is acting within the scope of its congressionally delegated authority"); *Mozilla* at 123 ([I]n any area where the [FCC] Lacks the authority to regulate, it equally lacks the power to preempt state law."); *Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510, (D.C. Cir. 1990) ("The FCC cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services or its Title I jurisdiction over matters 'incidental to communications by wire.'").

⁵⁵ *Mozilla*, p. 124.

⁵⁶ *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010), 645 (*Comcast*) (Describing the regulatory power as "express and expansive.").

⁵⁷ 47 U.S.C. § 153; *Comcast Corp.*, p. 645 ("Congress has given the [FCC] express and expansive authority to regulate common carrier services, including landline telephony.").

⁵⁸ 47 U.S.C. § 301; *Comcast Corp.*, p. 645.

⁵⁹ 47 U.S.C. § 521; *Comcast Corp.*, p. 645.

⁶⁰ *Mozilla v. Federal Communications Commission*, 940 F.3d 1, 123 (D.C. Cir. 2019) (*Mozilla v FCC*), ([I]n any area where the [FCC] Lacks the authority to regulate, it equally lacks the power to preempt state law.").

are a Title I “information service” as the Providers claim, their federal preemption argument is weaker.

The FCC’s secondary regulatory authority to regulate, its ancillary authority, is derived from 47 U.S.C. § 154(i).⁶¹ Section 154 allows the FCC to regulate technologies “reasonably ancillary to the effective performance of its statutorily mandated responsibilities.”⁶² But “Title I is not an independent source of regulatory authority,”⁶³ rather it extends out from its express jurisdiction. For the FCC to exercise its ancillary jurisdiction it must show that “(1) the subject of regulation must fall under the [FCC’s] ‘general grant of jurisdiction’ under Title I of the Communications Act and (2) the regulations are reasonably ancillary to its effective performance of its statutorily mandated responsibilities.”⁶⁴ Again, these requirements do not include a Title I “information service” like VCS. And, again, the Providers have thus far failed to articulate how preemption applies under the facts of this proceeding.

The D.C. Circuit in *Mozilla* re-affirmed as much.⁶⁵ In a case that considered whether the FCC’s 2018 *Restoring Internet Freedom Order* (2018 RIF Order) barred states from regulating broadband internet, the Court ruled that the FCC could not preempt states from acting in an area that the FCC does not have express authority to regulate.⁶⁶ *Mozilla* considered the FCC’s decision to reclassify broadband internet as a Title I “Information Service,” a reversal of the FCC’s prior classification of broadband internet as a Title II “common carrier” service.⁶⁷ In doing so, the *Mozilla* Court reasoned that the

⁶¹ 47 U.S.C. § 154(i) (“The [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”).

⁶² *American Library Ass’n v. FCC*, 406 F.3d 689, 693 (D.C. Cir. 2005) (*American Library*).

⁶³ *People of State of Cal. v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990).

⁶⁴ *American Library*, pp. 691-692.

⁶⁵ *Mozilla v. FCC*, 940 F.3d 1, 121-145.

⁶⁶ *Mozilla v. FCC*, 940 F.3d 1, 121-145.

⁶⁷ *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rd. 311 (2018).

FCC lost its ability to expressly preempt states from setting similar regulations.⁶⁸ *Mozilla* concluded that labeling something a Title I “Information Service” *weakens* the FCC’s ability to preempt states from regulating those services.

B. There is no Federal statute that conflicts with the CPUC’s VCS rate cap.

Mozilla held that Title I of the 1996 Act does not expressly preempt regulation of Title I services, but left the door open for conflict preemption.⁶⁹ Conflict preemption has been described to occur when “under the circumstances of a particular case stands as an obstacle to the... objectives of Congress.”⁷⁰ Conflict preemption includes two subcategories: impossibility preemption or obstacle preemption. Impossibility preemption occurs when it is impossible to comply with both the federal and state set of rules.⁷¹ Obstacle preemption is when a state law is an “obstacle” of the “purposes and objectives” of Congress.⁷² The analysis for both is fact specific, dependent on the details of the federal and state laws at issue.⁷³ Neither type exists under the facts of this proceeding.

The *Mozilla* court ruled that conflict preemption could hypothetically bar a state from regulating Title I services, but the court’s review was limited to the preemption directive, without consideration of any state laws.⁷⁴ Similarly, here, in the case of the CPUC’s regulation of VCS for the incarcerated, it is unclear what law of Congress would be thwarted by CPUC regulation.⁷⁵ Given the absence of federal law regulating VCS for

⁶⁸ *Mozilla v. FCC*, 940 F.3d 1, 125 (“Under binding circuit precedent, those “statutorily mandated responsibilities” must themselves be dictated by Title II, III, or VI of the act —none of which apply here since the [FCC] took broadband out of Title II.”).

⁶⁹ *Mozilla v. FCC*, 940 F.3d 1, 136. Response of GTL in Opposition to Public Advocates Office Motion to Compel, August 23, 2021.

⁷⁰ *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000).

⁷¹ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963).

⁷² *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁷³ *Mozilla v. FCC*, 940 F.3d 1, 136-137.

⁷⁴ *Mozilla v. FCC*, 940 F.3d 1, 135-145.

⁷⁵ It should also be noted that there is currently not a state law to compare, either.

the incarcerated, it is unlikely that CPUC regulation would make it impossible for providers to comply with federal law.

The FCC's most recent order regulating IPCS (2021 IPCS Order) does not preempt the CPUC as it was silent on regulating VCS, opting to regulate only interstate voice calls.⁷⁶ The 2021 IPCS Order itself has a preemption statement but it serves to expressly *allow* states to set stricter rates and regulations than what the FCC chose to do.⁷⁷ The FCC also invited states to regulate intrastate inmate calling rates when the D.C. Circuit Court of Appeals ruled that only states could set rate caps on intrastate calling services.⁷⁸ The CPUC, in acting to protect people who are incarcerated from excessive rates would seem to be acting at the direction of the FCC, not in conflict with it.

Similarly, CPUC regulation would not be an “obstacle” to any intent by Congress given the absence of laws regulating VCS for the incarcerated. As explained above, even if VCS for the incarcerated were classified as a Title I “Information Service,” the FCC lacks authority to regulate those services. As the *Mozilla* court notes, Congress designed a broadband regulatory system that expressly anticipates a dual federal-state role.⁷⁹ This is further articulated below in Section IV of this brief, which discusses Section 706 of the 1996 Act.

The Providers have argued that CPUC regulation of ICPS would be preempted by the FCC's updated 2020 RIF Order.⁸⁰ They note that after the court in *Mozilla* struck down portions of the 2018 RIF Order, the FCC enacted the 2020 RIF Order to address the D.C. Circuit's concerns. The renewed 2020 RIF Order reaffirmed broadband as a Title I

⁷⁶ *Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking*, WC Docket No. 12-375, May 24, 2021. (2021 Order).

⁷⁷ “To the extent that state law allows or requires providers to impose rates or fees lower than those in our rules, that state law or requirement is specifically not preempted by our actions here... To the extent that a call has interstate as well as intrastate components, the federal requirements will operate as ceilings limiting potential state action.” Paragraph 217, p. 99.

⁷⁸ Letter from Ajit Pai to Brandon Presley (July 20, 2020), available at: [DOC-365619A1.pdf \(fcc.gov\)](#)

⁷⁹ *Mozilla v. FCC*, 940 F.3d 1, 134-135. (“Not only is the [FCC] lacking in its own statutory authority to preempt, but its effort to kick the States out of the Intrastate broadband regulation also overlooks the Communication Act's vision of dual federal-state authority and cooperation in this area specifically.”).

⁸⁰ Response of GTL in Opposition to Public Advocates Office Motion to Compel, p. 11.

“Information Service,” as *Mozilla* allowed, and dropped the preemption directive that *Mozilla* rejected.⁸¹ The Providers argue that the FCC’s policy in 2020 RIF Order is one of deregulation, to expressly not treat broadband as a “common carrier.”⁸² Thus, they maintain that any ratemaking or regulation passed by a state would conflict with the FCC’s policy objective of deregulation. The Providers’ position is without merit. Courts have ruled that the 2020 RIF Order is not an “instance of affirmative deregulation, but rather a decision by the FCC that it lacked authority to regulate in the first place.”⁸³ The 2020 RIF Order is a statement by the FCC of its intent to not regulate broadband but with no preemptive authority behind it. By placing broadband into Title I as an “Information Service” the FCC placed it outside of its express authority to regulate. Since the FCC has no express authority to regulate broadband, it cannot preempt state law.⁸⁴

IV. SECTION 706 OF THE 1996 ACT EMPOWERS THE COMMISSION TO ENCOURAGE BROADBAND DEPLOYMENT TO ENABLE VIDEO TELECOMMUNICATIONS

Although broadband itself is generally classified as an information service,⁸⁵ it can be used as an “advanced telecommunications capability” pursuant to Section 706, to facilitate among other things, “video telecommunications using any technology.”⁸⁶ This

⁸¹ *Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking*, WC Docket No. 12-375, May 24, 2021.

⁸² Response of GTL in Opposition to Public Advocates Office Motion to Compel, pp. 11-12.

⁸³ *ACA Connects v. Frey*, No.1:20-cv-00055 (D. Me. July 7, 2020); *American Cable Association, et. al. v. Becerra*, February 23, 2021, Hearing Transcript, available at https://www.pacermonitor.com/public/case/25819595/American_Cable_Association_et_al_v_Becerra_appeal_pending. (“The upshot is that the [FCC 2018 order] is not an instance of affirmative deregulation but, rather, a decision by the FCC that it lacked authority to regulate in the first place... a federal statute that attempts to regulate a subject outside of Congress’s constitutional authority has no preemptive effect.”).

⁸⁴ *Mozilla v. FCC*, 940 F.3d 1, 123 ([I]n any area where the [FCC] Lacks the authority to regulate, it equally lacks the power to preempt state law.”).

⁸⁵ *Verizon v. FCC*, 740 F.3d 623, 631 (D.C. Cir. 2014).

⁸⁶ Pub. L. 104–104, title VII, §706, Feb. 8, 1996, 110 Stat. 153 (codified at 47 U.S.C. § 1302(d)(1))(defining “advanced telecommunications capability” as “without regard to any transmission media or technology, as high-speed, switched, *broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology*”)(emphasis added).

appears to describe certain IPCS offerings,⁸⁷ which use advanced telecommunications capability (otherwise known as high-speed broadband service) as a delivery mechanism.⁸⁸ Thus, while some IPCS VCS may rely on high-speed broadband service, the users actually purchase the ability to transmit their voice (and possibly image) to a loved one, while receiving their loved one's voice (and image) in response. This ability to transmit the voice (and possibly image) back and forth, is itself a telecommunications service as defined in 47 U.S.C. § 153(43), and broadband service is the means by which the transmittal occurs. The Commission in its role in Section 706 as described below, can ensure that high-speed broadband service is available for purposes of IPCS VCS, and IP-enabled services. This section presents the services covered under Section 706 and then argues that the CPUC pursuant to Section 706, is authorized to encourage broadband deployment to enable video telecommunications, such as IPCS VCS, among others.

A. Section 706 advanced telecommunications capability is interpreted as high-speed broadband service, and this enable IPCS video calling service, among others.

Section 706 defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability” “without regard to any transmission media or technology” to “enable[] users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”⁸⁹ Therefore, from a plain reading of the section, the term “advanced telecommunications capability” is high-speed broadband service, and this encompasses any technology used to provide this service. To illustrate this even further, in fulfilling its own Section 706 mandate, the FCC

⁸⁷ The Joint Intervenors propose that IP-enabled services other than voice and video calling be addressed after the CPUC develops a more complete record, such as the other services raised in the Scoping Memo, amongst them, private messaging service or tablet services. See Scoping Memo at Appendix 1. The role of Section 706 may come into sharper focus once the record is more developed for these other IP-enabled services.

⁸⁸ See *Order Instituting Rulemaking to Update Surcharge Mechanisms to Ensure Equity & Transparency of Fees, Taxes & Surcharges Assessed on Customers of Telecomm. Services in California*, Dkt. R. 21-03-002, Comments of Securus Technologies, LLC on Communications Division's Staff Report – Part 2 at 2 (Nov. 30, 2021) (describing Securus's ICS service as a real-time, two-way communications service using Internet protocol-enabled transport facilities).

⁸⁹ 47 USC § 1302(d)(1).

for several years now has equated “advanced telecommunications capability” as both fixed broadband service and mobile broadband service.⁹⁰ In this same vein, the CPUC may also interpret its duty in Section 706 to cover both fixed broadband service and mobile broadband service. Joint Intervenor reserve the discussion about the fixed broadband or mobile broadband service distinction until a later time but discuss both as advanced telecommunications capability, or otherwise known as high-speed broadband.

The “advanced telecommunications capability” statutory definition is instructive in determining that IPCS VCS, as a video telecommunications service, is a user service enabled by broadband telecommunications capability. Section 706(d) explains that advanced telecommunications capability is defined, “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability,” and that the “broadband telecommunications capability” is one that “enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”⁹¹ The definition provides two important anchors as discussed below.

The first anchor in this discussion is that the transmission media or technology that provides the broadband telecommunications capability is not dispositive because the definition states “without regard to any transmission media or technology.”⁹² Therefore, other than dial-up broadband service, which would not be considered “high-speed,” and therefore excluded from the definition, the media or technology used to transmit the high-speed broadband service is not determinative of whether the broadband service is within

⁹⁰ See e.g., Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 20-269, Fourteenth Broadband Deployment Report, FCC 21-18, at p. 6, para. 11 (2021) (stating that “the FCC continue[s] to assess advanced telecommunications capability by analyzing mobile and fixed services both separately and together for a more complete understanding of whether these services are being deployed to all Americans in a reasonable and timely fashion.”) (citing 47 U.S.C. § 1302(b)).

⁹¹ 47 USC § 1302(d)(1).

⁹² 47 USC § 1302(d)(1).

the statutory definition.²³ Moreover, since the FCC has identified that the statutory definition includes fixed and mobile broadband service,²⁴ for purpose of this discussion, the statutory definition would also include mobile broadband service. Therefore, all versions of advanced telecommunications capability may be used to provide video telecommunications, and this includes all versions of advanced telecommunications capability used to provide IPCS VCS.

The second anchor is the fact that the statutory definition is clear that within the statutory definition, broadband telecommunications capability should enable users to originate and receive the service “using any technology.” Meaning that the technology used for users to originate and receive the named services is not determinative for purpose of the statutory definition. For this reason, as the FCC has interpreted, the review pursuant to Section 706 includes the service available for mobile devices and not just fixed service devices. Therefore, for illustrative purposes, whether the broadband telecommunications capability is used to enable video telecommunications, such as IPCS VCS, through a kiosk connected to fiber, or a laptop connected to an ethernet cable, the review of both and other scenarios would still fall within the Section 706 statutory definition.²⁵

²³ For example, broadband telecommunications capability through cable coaxial or fiber, will not determine whether the broadband telecommunications capability falls outside of the advanced telecommunications capability definition in Section 706.

²⁴ See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269, Fourteenth Broadband Deployment Report, FCC 21-18, at p. 6, para. 11 (2021) (stating “[The FCC] continue[s] to assess advanced telecommunications capability by analyzing mobile and fixed services both separately and together for a more complete understanding of whether these services are being deployed to all Americans in a reasonable and timely fashion” and citing 47 U.S.C. § 1302(b)), and *Id.* at 2, fn. 5 (stating “[c]onsistent with the [FCC’s] conclusions in the 2018 *Report*, [the FCC] consider[s] both fixed and mobile services as capable of meeting the definition of “advanced telecommunications capability”). See also *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket 17-199, 2018 Broadband Deployment Report, FCC 18-10, page 7, fn 39 (2018) (stating “[a]lthough fixed and mobile service offer different capabilities and thus serve distinct consumer needs, [the FCC] find[s] that both types of service can indeed provide capabilities that satisfy the statutory definition of advanced telecommunications capability under section 706”)(internal citations omitted).

²⁵ Even in 2018, the FCC determined that within the context of the proper fixed service benchmarks discussion, it stated that fixed broadband service of up to 3 Mbps continue to “support upload intensive

More specifically in the carceral setting, Section 706 “advanced telecommunications capability,” or high-speed broadband service, transmits IPCS VCS and likely other services including those for the communities with special needs. With IPCS VCS, the user relies on a technology to transmit voice or video through high-speed broadband service, to eventually reach the destination, and in the other direction, to receive as well.²⁶ For the carceral setting, advanced telecommunications capability, or high-speed broadband, is strictly a transmittal mechanism in this sense.²⁷ This brief reserves further discussion on the other services in the carceral setting that high-speed broadband service enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.²⁸

B. Section 706 creates a duty to the CPUC to encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans.

Section 706 of the 1996 Act,²⁹ as amended, outlines a dual role for federal and state agencies with respect to the deployment of “advanced telecommunications

applications such as High Definition (HD) video calling, Virtual Private Network (VPN) platforms, telemedicine, and long-distance learning applications.” *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket 17-199, 2018 Broadband Deployment Report, FCC 18-10, page 10 (2018) (citing ITTA and WISPA comments in the FCC record).

²⁶ See e.g., *Order Instituting Rulemaking to Update Surcharge Mechanisms to Ensure Equity & Transparency of Fees, Taxes & Surcharges Assessed on Customers of Telecomm. Services in California*, R. 21-03-002, Comments of Securus Technologies, LLC on Communications Division’s Staff Report – Part 2 at 2 (Nov. 30, 2021) (describing Securus’s ICS service as a real-time, two-way communications service using Internet protocol-enabled transport facilities).

²⁷ Unlike in the free-world where high-speed broadband service enables a plethora of user services, in the carceral setting, users face rigorous security restrictions while using ICS VCS that prevent them from freely browsing through the Internet.

²⁸ 47 USC § 1302(d)(1). The Joint Intervenor’s propose that IP-enabled services other than voice and video calling be addressed after the CPUC develops a more complete record, such as the other services raised in the Scoping Memo, amongst them, private messaging service or tablet services. See Scoping Memo at Appendix 1. The role of Section 706 may come into sharper focus once the record is more developed for these other IP-enabled services.

²⁹ Pub. L. 104–104, title VII, §706, Feb. 8, 1996, 110 Stat. 153.

capability." The statute provides a definition of "advanced telecommunications capability,"¹⁰⁰ more commonly referred to as broadband internet.

According to the Senate Conference Report that explained the Section 706, the "[Federal Communications Commission] may preempt State commissions if *they* fail to act to ensure reasonable and timely access."¹⁰¹ The Senate Conference Report refers to a state commission's failure to act to ensure reasonable and timely access. Prior to this, the Senate Report for the bill that originated the text of Section 706, explains that this section "encourages States and the FCC to utilize regulatory incentives—and in particular, alternative regulation proceedings—as a means to promote the deployment of broadband capability," as it describes one illustrative example, that of elementary and secondary schools.¹⁰² The Senate Report further explains that the section was a "fail-safe" to ensure that the "bill achieves its intended infrastructure objective," the goal to "accelerate deployment of an advanced capability that enables subscribers in all parts of the United States to send and receive information in all its forms—voice, data, graphics, video—over a high speed switched, interactive, broadband, transmission capability."¹⁰³

Courts have recognized that Congress gave both the FCC and state commissions the authority to regulate, and did not "kick the states out of that arena."¹⁰⁴ Specifically, "mere worries that a policy will be 'frustrate[d]' by 'jurisdictional tensions' inherent in

¹⁰⁰ *Id.* § 706(c)(1) (codified as 47 U.S.C. § 1302(d)(1)) ("The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.").

¹⁰¹ Telecommunications Act of 1996, Senate Conference Report 104-230 to accompany S. 652 at p. 210 (1996) (Section 706 Advanced Telecommunications Incentives) (emphasis added) (Senate Conference Report to S. 652).

¹⁰² Telecommunications Competition and Deregulation Act of 1995, Senate Report 104-23 by the Senate Committee on Commerce, Science, and Transportation on S.652 at p. 50 (1995) (Senate Report to S. 652).

¹⁰³ Senate Report to S. 652, pp. 50-51.

¹⁰⁴ *New Cingular Wireless PCS LLC v. Picker*, 216 F. Supp. 3d 1060, 1062 (N.D. Cal. 2016); *see also Glob. Naps, Inc. v. Mass Dep't of Telecomms. & Energy*, 427 F.3d 34, 46 (1st Cir. 2005). The 6th Circuit requires a clear or plain statement, and Section 706(a) did not have such a statement to limit state ability to trump a municipality's discretion. *Tennessee v. FCC*, 832 F.3d 597, 613 (6th Cir. 2016).

the Federal Communications Act’s division of regulatory power between the federal government and the States does not create preemption authority.”¹⁰⁵ The *Mozilla* Court explained that the FCC had “lacked legal authority to categorically abolish all fifty States’ statutorily conferred authority to regulate intrastate communications.”¹⁰⁶ Though the *Mozilla* Court applied the *Chevron* test, relying on the *Verizon* Court’s finding that Section 706(a) to be vague,¹⁰⁷ the *Mozilla* Court determined reasonable the FCC’s 2018 Order rationale of its reading of Section 706.¹⁰⁸ The then-FCC in 2018 did not identify Section 706(a) as an independent grant of regulatory authority, and said that it was “hortatory.”¹⁰⁹

In California, the dual role in Section 706(a) remains and the D.C. Circuit decision is not controlling in the Ninth Circuit. First, the jurisprudence within the Ninth Circuit is favorable for Section 706(a) to grant a dual role amongst the FCC and the state commission, even to the point of ruling in support of the CPUC in prior litigation involving tension between FCC and CPUC actions.¹¹⁰ Second, the D.C. Circuit’s opinion applied agency deference under *Chevron*; this deference is anchored on a reasonable interpretation of the statute, an approach that potentially could change under the Biden Administration. Third, the D.C. Circuit only a few years earlier had supported a different

¹⁰⁵ *Mozilla v. FCC*, 940 F.3d 1, 85 (citing *Louisiana Public Serv. Comm. v FCC*, 476 U.S. 355, at 370, 375 (1986)).

¹⁰⁶ *Mozilla v. FCC*, 940 F.3d 1, 86.

¹⁰⁷ *Mozilla v. FCC*, 940 F.3d 1, 46 (citing *Verizon v. FCC*, 740 F.3d 623, 635-637 (D.C. Cir. 2014)).

¹⁰⁸ *Mozilla v. FCC*, 940 F.3d 1, 46. In addition to the D.C. Circuit, a few years before, the Tenth Circuit had similarly made a determination that the then-FCC had interpreted Section 706 reasonably, though it was related to another subsection, to Section 706(b). *Direct Communs. Cedar Valley, LLC v FCC*, 753 F.3d 1015, 1052-1054 (10th Cir. 2014).

¹⁰⁹ *Mozilla v. FCC*, 940 F.3d 1, 45-46 (citing *Restoring Internet Freedom*, WC Docket No. 17-108, 33 FCC Rcd at 472-473, para. 271 (FCC 2018)); *see also Restoring Internet Freedom*, WC Docket No. 17-108, 33 FCC Rcd at 472-480, paras. 271-283 (2018). Several years later, the FCC’s composition has changed and it is currently chaired by that the same commissioner who dissented from the original FCC decision that led to the litigation. The D.C. Circuit in *Mozilla* deferred to the FCC then, and may do so again if the FCC changes its approach to Section 706(a).

¹¹⁰ *New Cingular Wireless PCS LLC v. Picker*, 216 F. Supp. 3d 1060, 1062 (N.D. Cal. 2016).

FCC interpretation of Section 706(a).¹¹¹ Moreover, given recent developments at the FCC, including strong FCC Commissioner dissents about the FCC’s application of Section 706 and the methodology used to fulfill its Section 706 mandate, the FCC’s contemporaneous view of Section 706 may develop further.¹¹² For purposes of this proceeding, the Ninth Circuit’s jurisprudence controls and as explained, is favorable for Section 706(a) to grant a dual role amongst the FCC and the state commissions.

Therefore, Section 706 outlines a dual role shared between the FCC and the state commissions like the CPUC, to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” This action should “remove barriers to infrastructure investment” through price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Accordingly, the State PUCs have a dual role with the FCC, and in fact, states have a duty to encourage the deployment of advanced telecommunications capability, because if the FCC determines that a state commission has failed to act to ensure reasonable and timely access, Congress has authorized the FCC to preempt state action. This fail-safe mechanism for the FCC ensures that if the state does not ensure reasonable and timely access, then as a consequence, the FCC may step in.

C. State Commission action pursuant to Section 706 in the carceral setting.

The CPUC has the authority to encourage advanced telecommunications capability, and in the carceral setting, there is ample evidence of the need to review fully pursuant to Section 706. First, Section 706 provides the CPUC authority to utilize tools

¹¹¹ *Verizon v. FCC*, 740 F.3d 623, 628, 634, 644 (D.C. Cir. 2014).

¹¹² See e.g., Statement of Commissioner Jessica Rosenworcel, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 20-269, Notice of Inquiry, FCC 20-112, Attachment A-2 (Cmr. Rosenworcel 2020); Statement of Commissioner Geoffrey Starks, Dissenting, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 20-269, Notice of Inquiry, FCC 20-112, Attachment A-3 (Cmr. Starks 2020).

in a way that “is consistent with the public interest, convenience, and necessity.”¹¹³ The CPUC already has an ample record and findings in Phase I of this proceeding where it determined that there are IPCS providers operate locational monopolies and use their monopoly status within incarceration facilities to exercise market power.¹¹⁴ This work aligns with the FCC’s work in the carceral setting, and is bolstered by the FCC’s encouragement for states to continue their important work.¹¹⁵ The CPUC’s findings are equally applicable in Phase II because with a handful of exceptions, the same IPCS phone call providers also contract with carceral and detention facilities to provide IPCS VCS or other services as well.¹¹⁶ Therefore, for purposes of Phase II and beyond, the CPUC should again find that in the public interest, convenience, and necessity, the agency should undergo a thorough review of the “deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . in a manner consistent with the public interest, convenience, and necessity,”¹¹⁷ specifically in the carceral setting. The carceral and detention settings in California display a significant need for the CPUC to encourage the deployment of advanced telecommunications capability.

Second, the CPUC can “utilize[e] . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,” as set out in Section 706. As previously discussed, Congress created a dual role in Section 706(a) for the FCC and State Commissions. Therefore, the CPUC has several options available under Section 706. Most notably, the CPUC may utilize “measures that promote

¹¹³ 47 USC § 1302(a).

¹¹⁴ D.21-08-037, p. 21.

¹¹⁵ Letter from Ajit Pai, Chairman, Federal Communications Commission to Brandon Presley, President, National Association of Regulatory Utility Commissioners (July 20, 2020), available at: [DOC-365619A1.pdf \(fcc.gov\)](#). This letter was also sent to then-CPUC President Marybel Batjer as indicated in the letter.

¹¹⁶ *The Prison Policy Initiative, Inc. Comments on the Order Instituting Rulemaking to Consider Regulating Telecommunications Services used by Incarcerated People*, R.20-10-002, November 9, 2020, p. 6.

¹¹⁷ 47 USC § 1302(a) (Section 706(a) of the 1996 Telecommunications Act).

competition in the local telecommunications market” and “other regulating methods that remove barriers to infrastructure investment.”¹¹⁸ The CPUC’s review of IPCS non-voice services will help it determine which measures are needed to promote competition in the local telecommunications market or other regulating methods.

Pursuant to Section 706, the CPUC has a role in ensuring the encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. This work includes the advanced telecommunications capability that enables services in the carceral setting. For purposes of this proceeding as explained above, advanced telecommunications capability is high-speed broadband service that enables users to originate and receive several services, including video telecommunications such as IPCS VCS. Therefore, the CPUC has the authority to act in this proceeding with respect to ICS VCS and perhaps other non-voice ICS services enabled by high-speed broadband service.

V. THE COMMISSION HAS STATE AUTHORITY TO REGULATE VIDEO CALLING SERVICES

A. California law gives the Commission jurisdiction over IPCS providers

As the Commission states in its *Order Instituting Rulemaking* (OIR) launching the instant proceeding, IPCS carriers are “telephone corporations” subject to the Commission’s regulatory jurisdiction.¹¹⁹ Article XII, section 3 of the California Constitution authorizes the Commission to “fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a

¹¹⁸ 47 USC § 1302(a) (Section 706(a) of the 1996 Telecommunications Act).

¹¹⁹ R.20-10-002, *Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People* (OIR), October 8, 2020, p. 2; Cal. Pub. Util. Code § 233.

uniform system of accounts for all public utilities subject to its jurisdiction.”¹²⁰ The California Constitution further states that “[p]rivate corporations and persons that own, operate, control, or manage a line, plant, or system for...the transmission of telephone and telegraph messages...are public utilities subject to control by the Legislature.”¹²¹

The California Public Utilities Code defines telephone corporations as entities “owning, controlling, operating, or managing any telephone lines for compensation” in California.¹²² “‘Telephone line’” includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.”¹²³ Telephone corporations are public utilities.¹²⁴

As noted in PPI’s Opening Comments on the Order Instituting Rulemaking:

[IPCS providers] must adhere to the general provisions of California’s utility statutes, including the requirement that their rates and practices be just and reasonable. In exercising its powers, the Commission is guided by the legislature’s declaration of telecommunications policy, which includes promoting “lower prices, broader consumer choice, and avoidance of anticompetitive conduct,” “fair treatment of consumers,” and the equitable deployment of new technologies.¹²⁵

By their own admission, IPCS providers own, control, and manage systems used to facilitate communication by telephone.¹²⁶ Additionally, there is ample evidence in the

¹²⁰ Cal. Const. Art. XII, §6.

¹²¹ Cal. Const. Art. XII, §3.

¹²² Cal. Pub. Util. Code § 234 (a). Section 234(b) identifies two narrow exceptions to the definition of “telephone corporation”: (1) any hospital, hotel, motel, or similar place of temporary accommodation owning or operating message switching or billing equipment solely for the purpose of reselling services provided by a telephone corporation to its patients or guests, and (2) any one-way paging service utilizing facilities that are licensed by the FCC.

¹²³ Cal. Pub. Util. Code § 233.

¹²⁴ Cal. Pub. Util. Code § 216 (a)(1).

¹²⁵ PPI Opening Comments on OIR, November 9, 2020, pp. 2-3.

¹²⁶ GTL Opening Comments on OIR at pp. 1-2; Securus Opening Comments on OIR at pp. 1-2; *see* NCIC Opening Comments on OIR at pp. 4-5.

record that IPCS providers offer telephone service for compensation.¹²⁷ Accordingly, per Article XII, section 3 of the California Constitution, IPCS providers are public utilities. Similarly, per Public Utilities Code section 234, subdivision (a), IPCS providers are telephone corporations and therefore public utilities subject to the Commission's jurisdiction.

B. The Commission has authority under the State's police power to regulate VCS.

The Commission has “comprehensive jurisdiction to regulate the operation and safety of public utilities”¹²⁸ and its powers include the ability “do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of its jurisdiction.”¹²⁹ As the Commission noted in its ongoing Disaster Relief Proceeding (R.18-03-011):

The California Constitution and California statute designate the Commission as the principal body through which the State exercises its police power in the case of essential utility network services. Section 451 gives the Commission broad authority to regulate public utility services and infrastructure as necessary to ensure they are operated in a way that provides for the health and safety of Californians: The Commission has extensive authority to implement this requirement. Protections for Californians as consumers of telecommunication services are set forth in Sections 2890-2896. The Commission's public health and safety police powers are further reflected in the Commission's oversight of 9-1-1 service, referenced in several sections of the Public Utilities Code. Thus, police powers have been vested in the Commission by various provisions of the Public Utilities Code (e.g., Sections 451, 584, 701, 761, 768, and 1001). Pursuant to the police power authority vested by the California Constitution and the Public Utilities Code, and acting as the State's expert agency in matters of public utility infrastructure, the Commission has articulated health and safety requirements that

¹²⁷ Administrative Law Judge's Ruling Providing Staff Interim Rate Relief Proposal for Comment, Attachment 1, p. 1 (hereafter, Staff Proposal).

¹²⁸ *Hartwell Corp. v. Superior Ct. of Ventura Co.*, 27 Cal. 4th 256, 265 (2002).

¹²⁹ *San Diego Gas & Elec.*, 13 Cal. 4th at 915 (quoting Cal. Pub. Util. Code § 701 (internal quotation marks and emphasis omitted, alteration by court)).

apply to the communications networks....The Commission’s exercise of the State’s police power authorizes us to ensure that all facilities that carry 9-1-1 traffic, including remote terminals, are maintained to ensure uninterrupted connectivity during public emergencies, and to enable users to reach emergency services, regardless of the service provided over those facilities. The Commission’s authority, and that of other state agencies acting pursuant to the States’ police power, has been upheld repeatedly by both state and federal courts.¹³⁰

As PPI has already noted, communications services in correctional facilities “represent a critical method for maintaining family and societal connections, and low rates are a matter of public safety and community welfare.”¹³¹ Accordingly, action by the Commission to regulate video calling services is a legitimate exercise of the State’s police power.

Additionally, as discussed above, the Commission’s exercise of regulatory authority is guided by the legislature’s declaration of telecommunications policy, which includes avoidance of anticompetitive conduct.¹³² As previously noted by CforAT, PPI, and TURN in their Opening Comments on the OIR, the high cost and poor quality of current intrastate inmate calling services is a result of market failure.¹³³

C. California Law does not limit the CPUC’s jurisdiction to regulate telecommunications services.

The Commission should reject arguments that California narrowly proscribes the services subject to its jurisdiction. The Providers continue to argue that the regulatory classification of a service is exclusively determinative of whether the Commission has jurisdiction over that service.¹³⁴ However, nothing in California law restricts the Commission’s jurisdiction over video calling services. While California did have a

¹³⁰ D.21-02-029 (R.18-03-011), *Decision Adopting Wireline Provider Resiliency Strategies*, , February 18, 2021, pp. 13-15 (citations omitted).

¹³¹ PPI Opening Comments on OIR, p. 4.

¹³² PPI Opening Comments on OIR, pp. 2-3.

¹³³ CforAT Reply Comments on OIR at p. 2; CforAT Opening Comments on Staff Proposal at p. 4; PPI Opening Comments on OIR at p. 3.

¹³⁴ See Footnote 10.

statute in place for a period of time limiting the Commission’s authority over “IP-enabled services,” that statute sunset by its own terms on January 1, 2020.¹³⁵

In fact, California statutes generally take an expansive view of the Commission’s jurisdiction. California Public Utilities Code Section 709 includes, as policy goals, encouraging the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services¹³⁶ and assisting “in bridging the “digital divide” by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians.”¹³⁷ Nothing in Section 709 restricts the Commission to advancing these policy goals for telecommunications services *only*.¹³⁸ Similarly, California Public Utilities Code section 879, subdivision (b), states, in pertinent part, that “[t]he commission may change the rates, funding requirements, and funding methods [for the LifeLine program] proposed by the telephone corporations in any manner necessary, including reasonably spreading the funding among the services offered by the telephone corporations, to meet the public interest.” Notably, the plain language of the statute refers only to “*services offered* by telephone corporations,” not to “*telecommunications services* offered by telephone corporations.” Setting issues of federal law aside, under the plain meaning of Section 879(b), the Commission can properly impose LifeLine surcharges on any intrastate revenue collected by a telephone corporation, including revenue from video calling services, even if those services have not been classified as telecommunications services. Accordingly, the Commission’s authority under state laws is not restricted to telecommunications services.

¹³⁵ Cal. Pub. Util. § 710.

¹³⁶ Cal. Pub. Util. § 709(c).

¹³⁷ Cal. Pub. Util. § 709(d).

¹³⁸ Public Utilities Code section 709 does state that [t]he Legislature hereby finds and declares that the policies for telecommunications in California are as follows....” However, “telecommunications” is not the same as “telecommunications services.”

Additionally, state statute authorizes the Commission to regulate services that have not been classified as telecommunications services. The Federal Communications Commission (FCC) has decided that regardless of VoIP's status as a telecommunications service or an information service, VoIP must support universal service and can also be eligible for USF support.¹³⁹ Public Utilities Code Section 285 follows this logic and directs the Commission to "require interconnected VoIP service providers to collect and remit surcharges on *their California intrastate revenues* in support of ...public purpose program funds."¹⁴⁰ The Commission also allows VoIP providers to receive LifeLine subsidy funds.¹⁴¹ Even though the FCC has not yet determined whether VCS constitutes a telecommunications service or an information service, California can still, under state law, properly impose surcharges on that service.

D. CPUC has long recognized its jurisdiction over communication services.

Securus argues that the Commission has no jurisdiction over non-voice services because "[t]he Commission has recognized the limitations on its authority with respect to non-voice services, such as information services."¹⁴² Securus cites for support Decision 19-01-029, where "the Commission concluded that the FCC has classified text messaging as an information service and thus did not assess surcharges and user fees on such that service."¹⁴³ However, Securus's argument is without merit and relies on a gross mischaracterization of D.19-01-029. That Decision acknowledged a then-recent ruling

¹³⁹ Cal. Pub. Util. § 710.

¹⁴⁰ Section 285, subd. (b) notes that "[t]he Legislature finds and declares that the sole purpose of this section is to require the commission to impose the surcharges pursuant to this section to ensure that end-use customers of interconnected VoIP service providers contribute to the funds enumerated in this section, and, therefore, this section does not indicate the intent of the Legislature with respect to any other purpose."

¹⁴¹ D.16-10-039 (R.11-03-013). The Commission further held that "[t]he Commission declines to exercise authority under state law to assess surcharges or user fees on text messaging services which are classified as "information services" under the Act." *Id.* at p. 21, Conclusion of Law 2.

¹⁴² Securus Opening Comments on Administrative Law Judge's Ruling (Staff Proposal), April 30, 2021, p. 6, n. 8.

¹⁴³ Securus Opening Comments on Staff Proposal, p. 6, n. 8.

by the FCC categorizing text messaging as an information service, and then concluded that “[i]n light of the FCC’s ruling, the Commission declines to include text messaging among the services subject to surcharges and user fees *at this time*.”¹⁴⁴ At no point in the Decision did the Commission conclude that California law or past Commission decisions have limited its jurisdiction over non-voice services.

In fact, D.19-01-029 acknowledged that California statutes do not limit the Commission’s authority to voice services. The Commission noted that “[the Commission] is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers.”¹⁴⁵ The Commission examined the enabling statutes for its Public Purpose Programs,¹⁴⁶ each of which is funded through a surcharge collected by communications providers from customers. The Commission found that five of California’s six Public Purpose Programs’ enabling statutes did not limit their funding sources to telephone services.¹⁴⁷ Of the six enabling statutes, only one, Public Utilities Code section 2881(a) (authorizing the Deaf and Disabled Telecommunications Program),

¹⁴⁴ D.19-01-028 (CTIA PPP Application), p. 17.

¹⁴⁵ D.19-01-028, p. 16, citing *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 300.

¹⁴⁶ Those programs are:

- The California High Cost Fund-A, which promotes access to advanced services and deployment of broadband-capable facilities in rural areas (Pub. Util. Code §§ 275.6 (a) and 275.6(b)(5));
- The California High Cost Fund-B, which provides subsidies to carriers of last resort (COLRs) for providing basic local telephone service to residential customers in high-cost areas (Pub. Util. Code § 276.5);
- LifeLine, which promotes universal service by providing subsidies to low-income households (Pub. Util. Code § 871.5);
- The California Teleconnect Fund, which provides subsidies to schools, libraries, community colleges, government-owned hospitals/health clinics, and community-based organizations to offset the cost of advanced communications services (Pub. Util. Code § 280 (a));
- The California Advanced Services Fund, which promotes “deployment of high-quality advanced communications services to all Californians.” (Pub. Util. Code § 281); and
- The Deaf and Disabled Telecommunications Program, which provides telecommunications equipment to customers who are deaf or hard of hearing (Pub. Util. Code § 2881 (a)).

¹⁴⁷ D.19-01-028, p. 15.

restricts funding sources to surcharges on telephone services.¹⁴⁸ None of the six enabling statutes restrict the Commission from collecting surcharges on unclassified services.¹⁴⁹ Finally, the Commission noted that its list of basic service elements has not, and is not, restricted to “telecommunications services” as defined by the Communications Act.¹⁵⁰ For example, prior to December 12, 2018, the FCC had not classified text messaging as either a telecommunications service or an information service, and prior to that date, the Commission collected surcharges on the intrastate component of bundled prepaid wireless services between 2016 and 2018.¹⁵¹ Nothing in California statute or the Commission’s own decisions limit the Commission’s jurisdiction to voice-only or telecommunications services.

VI. THE CPUC SHOULD ADOPT INTERIM AND PERMANENT RATE CAPS AND REGULATIONS FOR VCS USED BY INCARCERATED PEOPLE

The CPUC has the authority to regulate VCS offered to people who are incarcerated and should adopt rate caps and regulations to ensure rates for VCS are just and reasonable.¹⁵² VCS is critical service for family members who cannot afford travel to a remote correctional facility, or who are prohibited from visiting in-person due to pandemic-related restrictions.¹⁵³ With the increasing trend to replace no-cost in-person visitation with paid VCS, both onsite and offsite, it is essential that families and loved ones of people who are incarcerated have sustainable access to VCS at just and reasonable rates.¹⁵⁴

¹⁴⁸ D.19-01-028, p. 15.

¹⁴⁹ D.19-01-028, pp. 15-16.

¹⁵⁰ D.19-01-028, pp. 15.

¹⁵¹ D.19-01-028, p. 20, Findings of Fact 2 and 3.

¹⁵² Public Utilities Code § 451 states that “All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful...”.

¹⁵³ *Comments of the Public Advocates Office on Proposed Decision Adopting Interim Rate Relief for Incarcerated Person’s Callings Services*, R.20-10-002, August 2, 2021, p. 4.

¹⁵⁴ *Opening Comments of The Utility Reform Network on the Staff Interim Rate Relief Proposal*, R.20-10-002, April 30, 2021, pp. 8-9.

VCS are also replacing traditional text telephones and telecommunications devices for the deaf (TTY/TDD) as a means of telecommunication for people with communications disabilities.¹⁵⁵ The CPUC must ensure that people with communications disabilities receive equitable access to VCS and that provided VCS meet or exceed the service standards of TTY/TDD enabled services.¹⁵⁶

Finally, rates for VCS are often significantly higher than for voice services¹⁵⁷ despite VCS being an essential service for many people who are incarcerated. The CPUC can and should use Phase II of this proceeding to develop and adopt rate caps and regulations on VCS to ensure that people who are incarcerated have just, reasonable, and affordable access to VCS.

A. The CPUC should adopt regulations for voice and VCS in this phase of the proceeding.

The CPUC should focus on adopting regulations for voice and VCS at this time and defer adopting regulations for other Internet Protocol (IP) enabled services until a more robust record is developed.¹⁵⁸ The CPUC has yet to obtain information on other IP-enabled products and services offered by IPCS providers to determine what the services are and how they are offered to customers. The CPUC and other stakeholders need to gain a better understanding of how other IP-enabled services, such as entertainment services, are used by people who are incarcerated, how prevalent these services are, and how much they cost. The CPUC should hold workshops to discuss how other IP-enabled services are used by people who are incarcerated. After the fact-finding workshops, the CPUC can decide on the need for regulation on other IP-enabled services.

¹⁵⁵ R.20-10-002, *Assigned Commissioner's Scoping Memo and Ruling* (Phase I Scoping Memo), January 12, 2021, p. 19.

¹⁵⁶ See, Public Utilities Code § 2881, requiring the CPUC to implement a program to provide telecommunications devices capable of serving the needs of individuals who are deaf or hard of hearing.

¹⁵⁷ Phase I Scoping Memo, p. 8, citing to *The Prison Policy Initiative, Inc. Comments on the Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People*, R.20-10-002, November 9, 2020, p. 7.

¹⁵⁸ Other IP-enabled services include services such as written electronic communications, entertainment services, and internet access services as described in the Phase II Scoping Memo, p. 11.

The schedule for this proceeding sets additional workshops after rebuttal testimony is served.¹⁵⁹ Based on this schedule, the CPUC could address other IP-enabled services in the latter half of Phase II or in Phase III. For Phase II, the CPUC should focus its attention on adopting permanent rates and regulations for voice and VCS.

VII. CONCLUSION

Commission action in this proceeding has so far helped to alleviate the burdensome cost impacts on incarcerated people and their families of using voice calling services. The next step is to ensure that Providers cannot just shift consumers to the unregulated VCS or other related markets.¹⁶⁰ The CPUC has the authority to regulate VCS and should exercise that authority to protect the users of these services from unreasonable cost impacts.

Respectfully submitted,

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January 28, 2022

¹⁵⁹ Phase II Scoping Memo, p. 14.

¹⁶⁰ See NCIC Application for Rehearing at 9-10 (Sep. 21, 2021) (“NCIC reasonably anticipates that ... IPCS providers will be forced to restrict the number of phones, as well as the available calling hours/minutes per day to encourage incarcerated persons to use non-regulated services, such as video calling, text messaging and email.”).

¹⁶¹ See Footnote 1.