

Before the
Public Utilities Commission of California
Sacramento, CA

In re

Rulemaking Proceeding to Consider Changes to Licensing Status and Obligations of Interconnected Voice over Internet Protocol Carriers

Rulemaking 22-08-008

**COMMENTS AND OBJECTIONS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

In response to the Order Instituting Rulemaking (the “OIR”) that the California Public Utilities Commission (the “CPUC” or “Commission”) issued August 30, 2022, and pursuant to Commission Rule 6.2, the Computer & Communications Industry Association (“CCIA”)¹ submits the following comments:

I. Introduction

This proceeding regards, in part, whether the Commission is authorized to regulate Voice over Internet Protocol (“VoIP”) services in two ways “to (a) collect Universal Service Fund (USF) and other surcharges from Nomadic VoIP providers and (b) adopt licensing requirements for Nomadic VoIP providers.” OIR at 5. This proceeding does not regard Non-interconnected VoIP services or providers. *See id.*

The OIR states that Nomadic VoIP is a variety of Interconnected VoIP provider. *Id.* at 4-5. That statement relies on a Frequently Asked Questions publication on the Federal Communications Commission (“FCC”) website, *id.* at 5; those FAQ focuses only on 911 services implemented pursuant to Section 506 of RAY BAUM’S Act.

Nomadic VoIP providers have never been subject to licensing requirements, formal registration requirements, or obligations to contribute to the Universal Service Fund (“USF”) of

¹ CCIA is a nonpartisan, not-for-profit trade association. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A complete list of CCIA members is available at <http://www.ccianet.org/members>.

California. OIR at 5-6. The Commission does not state its reasons for instituting a rulemaking that would alter, let alone reverse, the status quo.² Staff proposes that no licensing requirement, more specifically, no requirement to obtain a Certificate of Public Convenience and Necessity, should attach to a Nomadic VoIP carrier that already is certified as a Competitive Local Exchange Carrier or an Interexchange Carrier. OIR at A-2.

II. The Commission’s Authority to Impose USF Obligations or Other Surcharges on Nomadic VoIP Is Unclear.

The OIR opens a rulemaking whose scope will include the possible addition of new rules for which its administrative authority is questionable. In addition, the FCC’s preemption of state VoIP regulation that burdens interstate commerce³ has been affirmed against previous attempts to impose common-carrier regulation on IP-based service.

The Constitution of the State of California authorizes the Commission to regulate, *inter alia*, “[p]rivate corporations that own, operate, control, or manage a line, plant, or system for ... the transmission of telephone and telegraph messages[.]” Cal. Const. Art. 12 § 3. Pursuant to that provision, the California Public Utilities Code authorizes the CPUC to regulate “every public utility in the State,” Cal. Pub. Utils. Code § 701, which includes “every ... telephone corporation,” *id.* § 216. A “telephone corporation” is an entity “owning, controlling, operating, or managing any telephone line⁴ for compensation within this state.” *id.* § 234.

VoIP is “voice communications service” that (1) uses Internet Protocol at origination and/or termination “to enable real-time, two-way voice communication,” (b) requires “a broadband connection from the user’s location,” and (c) enables the user to receive calls from and send calls to the PSTN. Cal. Pub. Utils. Code § 239.

But there is no definition of “communications” in California. The Code defines only “telecommunications service,” and does so only for purposes of consumer privacy. Section

² The California Administrative Procedure Act requires, *inter alia*, that any proposed rule be accompanied by “[a] policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption” of the rule. Cal. Gov. Code § 11346.5.

³ *Vonage Holdings Corp.*, 19 FCC Rcd. 22404, 22411 (2004).

⁴ The term “telephone line” refers to “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.” *Id.* § 233.

2892, which solely regards consumer privacy,⁵ sends one to Section 224.4 for the definition of “telecommunications.” *Id.* § 2892.1. But Section 224.4 defines only “mobile data service,” “mobile paging service,” “mobile satellite telephone service,” and “mobile telephony service.” Cal. Pub. Utils. Code § 224.4.

Further, Section 2892 also defines “telecommunications” as “voice communication provided by a commercially available facilities-based provider of [VoIP] services.” Cal. Pub. Utils. Code § 2892.1. There is, however, no definition of “facilities-based” in the Code.

It is therefore unclear that VoIP service is a “communications service” or a “telecommunications service” in California, and as such the Commission’s jurisdiction and authority over VoIP, including Nomadic VoIP, which is the subject of this proceeding, is unclear.

In addition, the Commission’s definition of “Nomadic VoIP” does not appear to be codified in any statute or rule, calling into question its ability to regulate whatever entities it feels might deserve that classification. As stated above, the OIR grounds its definition of Nomadic VoIP in the FCC’s set of FAQs about implementing 911/E911 rules. Federal FAQs are not binding law, nor is it clear that guidelines adopted for one, very particular purpose could become the basis for adoption of a broad swath of unrelated rules in California.

The FCC’s *Vonage* decision in which it invoked ancillary jurisdiction to preempt most state VoIP regulation remains binding federal law. The U.S. Court of Appeals for the Eighth Circuit has twice held that *Vonage* prevents state commissions from imposing common-carrier regulations on VoIP.⁶ The actions outlined in the OIR are very likely preempted by this authority.

For these reasons, the IP-enabled services that are subject to the CPUC’s authority are not defined. As such, the Commission’s authority to adopt new, unprecedented rules for Nomadic VoIP services is not established.

⁵ Section 2892 appears in Chapter 10, Article 3 of the Public Utilities Code, which is devoted to “Customer Right of Privacy.” *Id.* §§ 2891-2894.10.

⁶ *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm’n*, 564 F.3d 900 (8th Cir. 2009) (Nebraska may not impose USF obligations on VoIP); *Charter Advanced Servs. (MN) v. Lange*, 903 F.3d 715 (8th Cir. 2018) (Minnesota may not classify and regulate VoIP as “telecommunications services”).

III. The Commission's Authority to Impose Licensing Requirements on Nomadic VoIP Service Is Unclear.

The OIR's scope includes whether "Section 285 Carriers," which are carriers that have never been subject to CPCN or formal registration requirements, OIR at 4, should be required to obtain licenses as CLECs or IXCs, *id.* at 6-7. For reasons unexplained, the Commission "no longer uses" the "Informal VoIP Registration Process" by which Nomadic VoIP carriers were, for years, permitted to operate. OIR at 5. The Commission's reason for now requiring Nomadic VoIP to submit to licensing requirements is not stated. *See id.* at 5-7.

Section 285 of the Public Utilities Code does not, as the OIR acknowledges, *see id.* at 6, authorize the Commission to impose any kind of licensing, registration, or operational regulations on any carrier.⁷ Applying the term "Section 285 Carrier" to Nomadic VoIP thus, in itself, makes the notion of imposing new licensing requirements on these carriers legally incongruous.

For the same reasons explained in Section II. above, it is not clear that the Commission may impose on Nomadic VoIP any type licensing process, and certainly not the onerous CPCN process applicable to CLECs and IXPs. The definition of "VoIP" is vague and incomplete, and thus its authority to act in the manner proposed is not established. In addition, and for the same reason, the issue of appropriate regulatory notice would arise were the proposed rules adopted, because the entities to whom the Commission intends to apply the new regulations are not properly identified.

CCIA suggests that the Commission should consider returning to the Informal Registration process for Nomadic VoIP providers, which gave the agency adequate and appropriate information about the entities providing this service to California residents. As stated above, the Commission's reasoning for discontinuing this method of oversight remains unclear, giving it no basis for the proposed, far more onerous licensing requirements. Rather than subject an undefined class of business to CPCN or similar processes, thus further burdening the Commission's resources, the right result here would be a return to Informal Registration.

⁷ Section 285 of the Public Utilities Code

[D]eclares 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 [*sic*] 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.

Cal. Pub. Utils. Code § 285(b).

IV. Conclusion

The Commission should not impose USF contribution requirements or similar surcharges on Nomadic VoIP providers, nor require those providers to undergo licensing requirements such as those imposed on local exchange and interexchange carriers. Rather, the Commission should return to the Informal Registration procedure for VoIP providers that it successfully employed for many years.

Respectfully submitted,



Matthew Schruers
President
Stephanie A. Joyce
Chief of Staff and Senior Vice President
Computer & Communications Industry Association
25 Massachusetts Avenue NW, Suite 300C
Washington, DC 20001
mschruers@ccianet.org
stephaniejoyce@ccianet.org

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CERTIFICATE OF SERVICE

I hereby certify in accordance with Commission Rule 1.9(e) that the foregoing
COMMENTS AND OBJECTIONS OF THE COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION (CCIA) were filed electronically on October 17, 2022, via the
Commission's Electronic Filing System and served on the following persons and those listed on
the Commission's Service List available at
https://ia.cpuc.ca.gov/servicelists/R2208008_91217.htm:

Commissioner John Reynolds
California Public Utilities Commission

Camille Watts-Zagha
Administrative Law Judge
California Public Utilities Commission

Susanne Casazza
Chief of Staff and Legal Advisor to Commissioner John Reynolds

/s/Stephanie A. Joyce
Stephanie A. Joyce