

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Proceeding to) RULEMAKING 22-03-016
Consider Amendments to General Order 133)

**VOICE ON THE NET COALITION COMMENTS
IN RESPONSE TO ORDER INSTITUTING RULEMAKING**

The Voice on the Net Coalition (“VON”)¹ hereby respectfully submits these comments in response to the Order Instituting Rulemaking (“OIR”), in the above-captioned proceeding.² In particular, the OIR seeks comments on whether existing service quality metrics should be extended to interconnected VoIP, and, if so, which metrics should apply. Simply put, the Commission does not have authority to apply service quality standards to interconnected VoIP. Moreover, the proposed service quality metrics are inapplicable to an application that travels over the Internet, via a customer-provided broadband connection.

Background

The OIR was the outgrowth of a petition filed on September 29, 2021, by the Public Advocate’s Office of the Public Utilities Commission (“Petition”) asking the Commission to open a rulemaking that would amend General Order 133-D to apply minimum service quality standards to broadband, wireless and VoIP services; whereas today they apply only to traditional providers of wireline telephone services.³ The Petition argued that the sunset of Public Utilities Code Section 710, which prohibited the Commission from regulating Internet communications, has created the opportunity for the Commission to expand its regulation of VoIP.

¹ VON is a trade association founded in 1996 to advocate for a fresh approach to regulation of Internet communications. For more information, see www.von.org.

² Order Instituting Rulemaking Proceeding to Consider Amendments to General Order 133, R.22-03-016 (issued March 23, 2022). Parties were required to file responses within 46 days after issuance of the OIR.

³ OIR at 10.

In response to the Petition, providers submitted comments explaining that the Commission does not have the authority to regulate interconnected VoIP.⁴ Notwithstanding these arguments, in Phase 1 of this proceeding, the OIR seeks comments on whether any existing service quality metrics should be applied to interconnected VoIP; which metrics; whether any metrics should be modified, or new metrics and reporting requirements developed.⁵ In addition, the OIR seeks comments on whether GO 133-Ds enforcement framework and penalty mechanism serve the public interest in ensuring appropriate investment in the state's infrastructure, or should it be modified to achieve this outcome.⁶

A. The Commission Cannot Apply Service Quality Metrics to Interconnected VoIP

VON supports those commenters who argue that the Commission does not have jurisdiction over interconnected VoIP generally. VON files these comments to explain why the Commission cannot regulate nomadic interconnected VoIP services, specifically.

The OIR fails to recognize that the FCC's regulatory scheme for nomadic interconnected VoIP preempts state regulation. Importantly, as the CPUC is aware and as the CPUC has conceded, under the FCC's Vonage Preemption Order ("Vonage Order"), nomadic interconnected VoIP providers are subject to the FCC's exclusive jurisdiction.⁷ In that Order, the FCC concluded that the characteristics of nomadic interconnected VoIP make it impractical to separate the interstate and intrastate components, and as a result state regulations must "yield

⁴ See OIR at 12-13, n. 30 (collecting comments explaining why the Commission cannot regulate interconnected VoIP services).

⁵ Id. at 16.

⁶ Id. at 17.

⁷ *Vonage Holdings Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), petitions for review denied, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) ("Vonage Order"); see Resolution M-4848 – Approval of Moratorium on Disconnection for Non-Payment and Fees Late Payment for Telephone Service During the Governor's Declared State of Emergency Due to the COVID-19 Pandemic, at 9 (Dec. 17, 2020).

to important federal objectives” for VoIP services.⁸ The FCC has generally applied a light-touch regulatory approach to VoIP providers to promote competition and the advancement of innovative services to the benefit of consumers. And, where necessary, the FCC has subject VoIP providers to certain targeted regulations, such as requiring the provision of 911 services and contributions to the federal universal service fund, and the protection of consumer information (but never service quality metrics). To date, this approach centered on FCC oversight, has led to the proliferation of VoIP services and numerous pro-competitive benefits to the voice marketplace more broadly.

If adopted by the Commission, the application of service quality metrics to interconnected VoIP, and specifically nomadic VoIP, will violate federal law and undermine the careful light-touch framework that has governed VoIP regulation for more than 18 years. The Commission is relying on the sunset of PUC Code Section 710 in 2020 to support its conclusion that federal policy does not preempt the application of state specific service quality metrics to nomadic interconnected VoIP. That assumes, though, that it was the existence of the PUC Code Section, and not federal law that appropriately limits the Commission’s authority. PUC Code Section 710 simply codified the *Vonage Order* with respect to its application to nomadic interconnected; but then critically expanded the prohibition on state regulation to include other Internet Protocol enabled services that may not have otherwise been afforded the same protection. The sunset may raise questions about the regulatory status of those other IP-enabled services but does nothing to upset the holding in the *Vonage Order* with respect to nomadic interconnected VoIP.

⁸ Id. at 22405.

Of particular note, the Commission has recognized these limits on its jurisdiction.⁹ As the FCC recognized in 2004, the “imposition of 50 or more additional sets of different economic regulations” on VoIP services “could severely inhibit [their] development.”¹⁰ More than 18 years later, not a single state regulates interconnected VoIP, except in two narrow circumstances permitted by the FCC, contributions to support state universal service funds and 911 networks.¹¹ To do otherwise, would subject VoIP providers to a patchwork of different and potentially conflicting state rules, and “risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet.”¹² This unique regulatory structure has been repeatedly upheld by federal courts.¹³

Moreover, at least 30 states and the District of Columbia have codified regulatory “safe harbors” for VoIP or IP-enabled communications.¹⁴ These states have recognized that there is no benefit to imposing legacy telephone regulations on VoIP, and that investment will be lost, and

⁹ *Vonage Holdings Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), petitions for review denied, *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (“Vonage Order”); see Resolution M-4848 – Approval of Moratorium on Disconnection for Non-Payment and Fees Late Payment for Telephone Service During the Governor’s Declared State of Emergency Due to the COVID-19 Pandemic, at 9 (Dec. 17, 2020).

¹⁰ Vonage Order ¶ 37.

¹¹ *Implementation of the NET 911 Improvement Act of 2008*, 23 FCC Rcd 15884 (2008) *Declaratory Ruling, Universal Service Contribution Methodology*, 25 FCC Rcd 15651 (2010).

¹² Vonage Order ¶ 37.

¹³ See, *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993 (D. Minn. 2003), aff’d, 394 F.3d 568 (8th Cir. 2004) affirmed 394 F.3d 568 (8th Cir. 2004); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), aff’d, 530 F.3d 676 (8th Cir. 2008); *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007); *PAETEC Commc’ns, Inc. v. CommPartners, LLC*, No. 08-Civ-0397 (JR), 2010 WL 1767193 (D.D.C. Feb. 18, 2010).

¹⁴ Alabama, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming.

competition restrained if regulatory ambiguities are allowed to remain in place. No state – other than California -- has repealed or permitted the sunset of such laws once enacted.

B. Existing Service Quality Metrics are Inapplicable to Interconnected VoIP

Even if the Commission had the authority to impose service quality metrics on interconnected VoIP, which it does not, the metrics themselves bear no reasonable relationship to how VoIP is provided to end user customers. Most significantly, VoIP is an application that travels over a broadband Internet connection procured by the customer, in the case of nomadic VoIP, from a third-party provider. This is a critical distinction from traditional wireline services, where a single service provider typically provides the circuits and the underlying services. Moreover, with nomadic VoIP service, the broadband provider may be different at home, at work, at the hotel where you may be on vacation, and at the coffee shop where you have stopped for breakfast. Not only is the broadband provider variable, so is the end point device from which you may be using the service – which could be a standard desk phone, an application launched on your cell phone; or running from a soft client on your laptop or desktop computer.

As a result, the concepts of installation intervals, installation commitments, customer trouble and out-of-service reports are inapposite in an environment where the ecosystem is dependent on multiple service providers. Each of these scenarios presents multiple points of failure for a) installation delays (delays installing the broadband network; delays getting the new handset; delays in porting telephone numbers from the former service provider); b) service outages (broadband is down; electricity is out; your cell phone or computer are not functioning properly). In none of these examples would the nomadic VoIP provider be responsible for the delay but would be subject to potential penalties for missing established service quality metrics. Arguably the only metric that might apply is “Answer Time”, however that presumes the VoIP

provider uses live agents. And while that may be the case for most, there is no regulatory or other legal obligation to have live agents, and the requirement to do so just to comply with California law would be unduly burdensome and expensive, particularly for those providers with a minimal number of customers in the state.

Finally, the idea that the Commission may seek to impose fines on interconnected VoIP providers that fail to meet service quality commitments is counter-intuitive at best. As it stands today, fines are applied to “**facilities-based** telephone corporations that offer TDM-based voice service” The structure recognizes the reality that service quality metrics only work for facilities-based providers that control the service from end-to-end. Nomadic VoIP service is dependent on the successful operation of not only the VoIP provider, but the broadband provider, the electric company; and the operation of the desk phone, cell phone, laptop or desktop computer providing the endpoint for the VoIP call.

Conclusion

VON opposes the application of service quality metrics to interconnected VoIP, and specifically to nomadic VoIP; the Commission does not have authority to impose such metrics and the metrics are inappropriate for a service that travels over the Internet via a customer-provided broadband connection.

Respectfully submitted,

THE VON COALITION

/s/ Glenn S. Richards

Glenn S. Richards
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, DC 20036

glenn.richards@pillsburylaw.com
(202) 663-8215

Its Attorney

May 9, 2022