

## **BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Proceeding to Consider ) Rulemaking 22-08-008  
Changes to Licensing Status and Obligations of )  
Interconnected Voice over Internet Protocol Carriers )

### **COMMENTS OF THE VOICE ON THE NET COALITION**

The Voice on the Net Coalition (“VON”)<sup>1</sup> hereby submits these comments in response to the Proposed Decision of Commissioner John Reynolds in the above-captioned proceeding.<sup>2</sup> The Commission should reject the PD as contrary to well-established law pre-empting state regulation of nomadic interconnected VoIP providers. If the Commission adopts the PD, it should eliminate the proposed barriers to entry for nomadic VoIP providers, including registration, reporting, transfer of control, and performance bond requirements. These comments are timely filed pursuant to an extension granted September 27, 2024 by Administrative Law Judge Camille Watts-Zagha.<sup>3</sup>

#### **Background**

The PD establishes the first-ever state-level comprehensive regulatory framework for providers of interconnected VoIP. It creates two new utility type designations – Digital Voice Nomadic (DVN) and Digital Voiced Fixed (DVF). As proposed, nomadic interconnected VoIP providers will be subject to a Nomadic Registration, required to post performance bonds, pay the CPUC User Fee, file annual operating and affiliate transaction reports, and inform the CPUC of any proposed transfers of

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<sup>1</sup> VON is a trade association that advocates for a fresh approach to regulation for Internet communications. For more information, see [www.von.org](http://www.von.org).

<sup>2</sup> Proposed Decision of Commissioner John Reynolds (the “PD”), R.22-08-008 (issued September 13, 2024); see also email ruling of ALJ Camille Watts-Zagha, R22-08-008 (issued September 27, 2024) (extending the comment deadline to October 10, 2024).

<sup>3</sup> Email ruling of ALJ Camille Watts-Zagha, R22-08-008 (issued September 27, 2024) (extending the comment deadline to October 10, 2024).

control. Each of these requirements is a significant barrier to entry and expressly pre-empted by federal law.

## Argument

### I. The PD misstates the scope of federal preemption.

The PD creates a dual regulatory structure for interconnected VoIP providers; suggesting that the process determined by the Commission “**in order to operate in California** depends on whether the interconnected VoIP service is fixed or nomadic.”<sup>4</sup> (Emphasis added). It defines the difference as follows: “A fixed interconnected VoIP service can be used at only one location, whereas a nomadic interconnected service may be used at multiple locations,” (quotations in original).<sup>5</sup> The PD recognizes that the Commission’s authority to regulate nomadic interconnected VoIP providers is limited by the 2004 FCC order broadly preempting state regulation of interconnected VoIP providers.<sup>6</sup>

While these nomadic interconnected VoIP service providers are telephone corporations under state law, based on market conditions and FCC policy twenty years ago, the FCC preempted states from imposing rate regulation, tariffing, or other requirements that operate as “conditions to entry” for nomadic interconnected VoIP service providers.<sup>7</sup>

Despite this recognition, the PD proceeds to impose conditions for entry on nomadic VoIP providers. The PD establishes a registration process required for nomadic interconnected VoIP providers to operate in California and requires providers to post a performance bond. These are significant conditions for entry that the Vonage Order prohibits.<sup>8</sup>

The Vonage Order is clear; states may not impose entry and other requirements on nomadic

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<sup>4</sup> PD at 16.

<sup>5</sup> Id. and fn. 38 (citing *Universal Service Contribution Methodology Proceeding, Report and Order of Proposed Rulemaking* 21 FCC Rcd 7518 (2006) at para. 3 (hereinafter “FCC USF Order”).

<sup>6</sup> PD at 16 (citing *In Re the Matter of Vonage Holdings Corporation’s Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* (Vonage Order) 19 FCC Rcd 22404 (2004)).

<sup>7</sup> PD at 16 and fn. 39 (citing the Vonage Order (paras. 22 and 46) and the FCC USF Order (para. 23)).

<sup>8</sup> PD at 22 (“Thus, DVN providers will be subject to **operating authority requirements** similar to wireless providers.” Emphasis added.)

interconnected VoIP providers that impermissibly interfere with the FCC’s valid exercise of its preemption authority.<sup>9</sup> Any state entry and certification requirements requiring the disclosure of financial information, operational and business plans or proposed service offerings, directly conflict with the FCC’s “pro-competitive deregulatory rules and policies.”<sup>10</sup>

To support these regulatory impositions, the PD states that the Vonage Order does not limit the Commission’s ability **to regulate** nomadic interconnected VoIP service providers in other areas such as consumer protection and public safety.<sup>11</sup> This is incorrect. What the Vonage Order says is that the FCC **expresses no opinion** regarding the applicability to nomadic interconnected VoIP providers of laws applicable to other businesses in the state, such as those concerning taxation, fraud, and other business practices.<sup>12</sup> In contrast to the conclusion in the PD regarding the permissiveness of regulation promoting public safety, the FCC specifically stated that even the imposition of 911 requirements as a condition to entry, would be preempted.<sup>13</sup>

The PD attempts to give the impression that the new requirements for nomadic interconnected VoIP providers are ministerial at best. But a closer reading suggests otherwise. For example, the Director of the Communications Division (or its successor) must approve a nomadic registration before issuing a Utility ID number and designating the registrant as a DVN.<sup>14</sup> The PD offers no explanation of what factors may be used to deny a registration or whether the denial is subject to appeal. For example, the Nomadic Registration Form requires the submission of resumes for

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<sup>9</sup> Vonage Order at para. 42.

<sup>10</sup> Id. at para. 20.

<sup>11</sup> PD. At 19 (citing the Vonage Order at para. 1).

<sup>12</sup> Vonage Order at para. 1.

<sup>13</sup> Id. at para. 14 and fn. 49.

<sup>14</sup> PD at 31. In addition, the PD states that the proposed \$250 Nomadic Registration fee is need to offset the costs of reviewing, processing and maintaining Nomadic registrations. PD at 32. If it can be reviewed, it can be rejected.

identified personnel.<sup>15</sup> Can Commission staff reject the registration if, in their opinion, those personnel don't possess adequate financial, managerial or technical expertise to operate as a provider of nomadic interconnected VoIP services? This is precisely the type of discretionary entry regulation that the Vonage Order was intended to avoid.

Moreover, upon a transfer of control, nomadic interconnected VoIP providers must submit an information-only letter describing changes in the provider's registration information.<sup>16</sup> However, the Commission may require that the transaction be reviewed in an application or other formal proceeding. The PD fails to offer any guidelines on when a transaction may require review or what happens if a transaction has previously closed.<sup>17</sup> Practically, this means that the Commission could require its review and approval of any transfers of control or other changes, which would be directly contrary to the FCC's direction to states that they cannot regulate nomadic VoIP.

The PD also creates an odd new category of provider, fixed interconnected VoIP Service with Nomadic Functionality, suggesting the Vonage Order does not apply and subjecting these entities to the more stringent licensing requirements.<sup>18</sup> The fact that a service has nomadic features and can be used from other broadband connections makes the service nomadic. Full stop. As the FCC specifically stated in the Vonage Order, "In particular, the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."<sup>19</sup>

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<sup>15</sup> PD at Appendix A, page 1.

<sup>16</sup> PD at p. 80.

<sup>17</sup> Id. For example, will the Staff notify parties that no further action is required?

<sup>18</sup> Id. at 21.

<sup>19</sup> Vonage Order at para. 32 (footnote omitted).

## II. The nomadic registration process is flawed.

Even if the Commission can impose registration requirements on nomadic VoIP providers, the process contemplated in the PD is internally inconsistent and contradictory. In order to qualify for nomadic registration, “interconnected VoIP service providers must attest under penalty of perjury that they do not have the capability to track intrastate and interstate calls, and thus their service falls within the Vonage Order.”<sup>20</sup> Even the PD is not clear on what it is requiring here. The Vonage Order makes clear tracking calls was not the sole factor for the FCC’s decision to preempt. “[E]ven if it were relevant and possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical and costly.”<sup>21</sup> In the Conclusions of Law, the PD states the provider should attest that “it cannot separate intrastate calls from interstate calls.”<sup>22</sup> However, the Nomadic Registration form includes an option to attest that the registrant is providing Nomadic Interconnected VoIP services pursuant to the FCC Vonage Order,<sup>23</sup> and the sample attachment to the Nomadic Registration Form includes a Sworn Affidavit stating that the provider “cannot track exact location of calls.”<sup>24</sup> Providers are left to guess what exactly the Providers are attesting to when they fill out the registration forms.

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<sup>20</sup> PD at 31.

<sup>21</sup> Vonage Order at para. 40

<sup>22</sup> Id. at 98.

<sup>23</sup> Id. at Appendix A, at 2. The Vonage Order characteristics went well beyond the inability to track calls. They included the ability to use the service anywhere in the world where the customer can find a broadband connection to the Internet; the use of specialized customer premises equipment; the availability of integrated capabilities and features allowing the customer to manage personal communications, including voice mail, three-way calling, online account and voice mail management; and, the availability of geographically independent telephone numbers not tethered to the user’s physical location. Vonage Order at paras. 5-8.

<sup>24</sup> Id. at Appendix A, at 4.

If a certification is required, though none should be, it should mirror the definition of nomadic interconnected VoIP provider in the PD -- a service that can be used at multiple locations. None of the other options – including most significantly, the attestation in Nomadic Registration Form – make any sense or provide the clarity necessary to avoid fears of penalties of perjury.<sup>25</sup> A simple definition of nomadic interconnected VoIP is more appropriate for a service that can be used from any broadband connection – including Wi-Fi and virtual private networks, and originate from a VoIP handset, an app on a cell phone, or a soft client on a computer.

The PD also establishes for the first time a requirement to submit proof by March 31, 2026 of an initial performance bond (minimum \$25,000), which will be used for the collection of fines, penalties, taxes, surcharges, fees and restitution to customers.<sup>26</sup> Nomadic interconnected VoIP providers are also now subject to filing annual affiliate transaction reports.<sup>27</sup>

All totaled, this is the type of burdensome, unnecessary entry regulation that the Vonage Order hoped to prevent.<sup>28</sup> No other state regulatory commission in the United States requires nomadic interconnected VoIP providers to post performance bonds; file annual reports of affiliate transactions; risks having registrations arbitrarily denied; or are otherwise subject to the whims of Commission staff unconstrained by specific rules and regulations for reviewing the various registrations and advice

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<sup>25</sup> The same can be said for the Sworn Verification in the Nomadic Registration Form. PD at Appendix A, pages 2-3, which includes a list that appears to suggest that an explanation related to a prior bankruptcy, violation of a rule related to public utilities, settled a dispute with a regulatory agency, or lost a license may be disqualifying for approval of a new registration. If the registration is not approved, will companies simply have to stop operating in California and terminate services to all existing customers?

<sup>26</sup> Id. at 69.

<sup>27</sup> Id. at 74-75.

<sup>28</sup> The PD states that the new obligation “do not function as a bar to entry.” PD at 106. That is not supported by the record nor is it possible to make that statement before the new obligations are in effect. VoIP providers may choose to relinquish existing authorizations and registrations; or those operating without an authorization or registration may simply exit the market. In either case, you cannot affirmatively declare rules that are not yet in place are not a bar to entry.

letters required to provide services in California. Indeed, more than 30 states have passed laws that prohibit the state regulatory commission from imposing any regulation on VoIP providers. And, significantly, to date, only California has allowed those laws to lapse.

## Conclusion

If adopted by the Commission, the registration process for nomadic interconnected VoIP providers will violate federal law and undermine the careful light-touch framework that has governed VoIP regulation for more than 20 years. By ignoring the large body of federal law upholding federal preemption of nomadic interconnected VoIP,<sup>29</sup> and without any relevant state authority,<sup>30</sup> this Commission alone wanders down an unsteady regulatory path that will likely result in litigation and provide no discernable benefits to residential, business or governmental users of internet communication services in California.

Nomadic VoIP has fundamentally changed the communications landscape, offering consumers lower prices, better features and increased functionality. The service has thrived in a light touch federal regulatory environment, particularly as it is unconstrained by a panoply of 50 state regulatory regimes. The PD offers a solution for a problem that does not exist.

Respectfully submitted,

### Voice on the Net Coalition

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<sup>29</sup> The Vonage Order has repeatedly been upheld by federal courts; and courts have gone further finding that VoIP services are best classified as information services, which are not subject to regulation by the states. See, *FTC ex rel. Yost v. Educare Ctr. Servs.*, 433 F. Supp. 3d 1008 (W.D. Tex. 2020) (finding that defendants VoIP services are best classified as information services and not telecommunications services; see also, *Charter Advanced Servs. (MN), LLC v. Lange*, 259 F. Supp. 3d 980 (D. Minn. 2017) (telecommunication services are subject to state regulation while information's services are not; and any regulation of an information service conflicts with the federal policy of nonregulation).

<sup>30</sup> In the past, the PUC as relied on the sunset of PUC Code Section 710 as the basis for its statutory authority. However, the sunset of a code section is not the same as positive authority to act, especially an action forbidden under federal law. PUC Code Section 285 also is not a basis for imposing traditional state telecommunications regulations on nomadic VoIP. Section 285 authorizes the PUC to collect state level USF charges on nomadic and fixed VoIP providers, as permitted by the FCC.