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The FCC Should Preempt California's Regulatory Regime for VoIP

by

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On May 11, California's market entry requirements for Voice-over-Internet-Protocol (VoIP) providers went into effect, with additional market entry and compliance requirements for VoIP providers taking effect in the months ahead. The California Public Utilities Commission's (CPUC) power grab in the innovative and competitive VoIP service market is unlikely to provide any net benefit to consumers. State-level market entry regulation also conflicts with the Federal Communications Commission's 2004 [*Vonage Preemption Order*](#).

Now that the FCC has a quorum, it should preempt California's VoIP regulatory regime. A [petition](#) filed in January (and re-filed in February) of this year by groups representing VoIP providers requests a declaratory ruling by the FCC that the CPUC's regulation conflicts with federal policy and agency precedent. The Commission should take up that petition and vindicate the free market-oriented federal policy framework under which VoIP services continue to thrive.

On November 12, 2024, the CPUC issued [Decision 24-11-003](#) establishing market entry requirements for interconnected VoIP services. The particular requirements imposed by the CPUC depend on whether the service is classified as a nomadic VoIP service (essentially, portable and accessible from any broadband connection using a number not tied to a specific

physical location) or fixed VoIP service (essentially, offered primarily to one geographic location over facilities that the VoIP provider owns or leases).

Under the CPUC's [decision](#), a nomadic VoIP provider must pay a fee, file registration forms, and make attestations under penalty of perjury regarding its service. The registrations require approval by the CPUC's Communications Division Director before the provider is permitted to offer nomadic VoIP.

The effective market entry requirements for fixed VoIP providers are more burdensome. All facilities-based VoIP providers must apply for and obtain a certificate of public convenience and necessity (CPCN) under California's Public Utility Code, which is assigned to an administrative law judge and subject to approval by a formal decision by the CPUC. Registration applications by non-facilities-based VoIP providers must undergo review by CPUC staff and receive an order of approval or denial by the CPUC's Executive Director.

In addition to requiring compliance with regulations applicable to legacy voice telephone providers – such as network resiliency and outage requirements and legacy voice consumer protection rules – the CPUC's decision requires VoIP providers to obtain a \$250,000 performance bond and annually file a report of affiliates that are public utilities or that have transacted business with it. Fixed VoIP providers also must file an annual report of financials and other business activities. Moreover, the CPUC's decision imposes transfer-of-control requirements on all VoIP providers: fixed VoIP providers are subject to the agency's transfer-of-control review and approval process that contains vague standards and can result in lengthy delays before a judgment is rendered, and nomadic VoIP providers are subject to an information only-filing requirement – which the CPUC acknowledges could serve as the basis for an escalated and more intense review requiring formal application in “rare instances when the circumstances warrant further review.”

It appears that the CPUC is asserting its authority over VoIP services without any rationale for doing so. From a policy standpoint, California's regulatory intrusion in the VoIP services market is not justified by any showing of market failure or likely consumer harm. Decision 24-11-003 cited no evidence of market failure or consumer harm that the newly imposed VoIP regulation is intended to remedy or prevent. It is doubtful that the costs would result in any corresponding net benefit to consumers – especially in light of the competitiveness of the market.

For more than 20 years, interconnected VoIP services have thrived in a free market-oriented environment, unimpeded by state regulatory restrictions. Freedom from state-level regulation has promoted innovation and investment in VoIP services, resulting in tremendous growth and competition. (According to FCC voice services reports, as of [June 2010](#), “there were 122 million end-user switched access lines in service and 29 million interconnected VoIP subscriptions,” and by [June 2024](#), “there were 18 million end-user switched access lines in service, 65 million interconnected VoIP subscriptions, and 388 million mobile subscriptions.”) However, the CPUC's new regulatory regime for interconnected VoIP services is irreconcilable with federal policy and law under the FCC's 2004 [Vonage Preemption Order](#).

In the *Vonage Preemption Order*, the FCC preempted state regulation of nomadic VoIP services. According to the FCC, a decision by the Minnesota Public Utility Commission to subject nomadic VoIP services to legacy telephone rules – including entry barriers and rate regulation – “directly conflicts with [the FCC’s] pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice.”

According to the *Vonage Preemption Order*: “State entry and certification requirements, such as the Minnesota Commission’s, require the filing of an application which must contain detailed information regarding all aspects of the qualifications of the would-be service provider, including public disclosure of detailed financial information, operational and business plans, and proposed service offerings. The application process can take months and result in denial of a certificate, thus preventing entry altogether.” In the order, the FCC recognized that the administrative process involved in entry certification and tariff filing “introduces substantial delay in time-to-market and ability to respond to changing consumer demands” and that such process impacts how those services are provided.

From the acknowledged conflict between state and federal policy for VoIP service significant jurisdictional implications followed. Recognizing that Vonage’s DigitalVoice VoIP offering enabled both intrastate and interstate communications, the Commission determined that state regulation of VoIP was preempted under the “impossibility exception” to dual federal-state jurisdiction of “jurisdictionally-mixed” services. The “impossibility exception” applies where it is impossible or impractical to separate the service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. In the *Vonage Preemption Order*, the Commission found that “Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber” and that its service is too multifaceted for simple ID of a user’s location to indicate jurisdiction.

Importantly, in *Minnesota Public Utilities Commission v. FCC* (2007), the U.S. Court of Appeals for the Eighth Circuit upheld the FCC’s preemption of state regulation of VoIP services. The court sustained the FCC’s reasoning that there was no practical means of identifying the geographic location of DigitalVoice subscribers and that the costs, as well as operational complexities, of tracking such information would reduce the benefits of using the Internet to provide service. The court determined the Minnesota regulatory requirements would harm deployment. Additionally, the court declined to second guess the FCC’s recognition that communications over the Internet involve technologies and capabilities that are very different from traditional landline calls.

Notably, in *MPUC v. FCC*, the Eighth Circuit sustained the FCC’s determination that it was unnecessary for the agency to decide whether interconnected VoIP is an “information service” under Title I of the Communications Act or a “telecommunications service” under Title II of the Act as predicate to preempting state VoIP regulation. According to the court, “[t]he impossibility exception, if applicable, is dispositive of the issue whether the FCC has authority to preempt state regulation of VoIP services.”

In the years since the *Vonage Preemption Order*, the FCC has further developed federal policy for VoIP services by selectively imposing on VoIP providers a limited set of affirmative duties that are calibrated to sustain a free market-oriented approach. Relying on direct statutory provisions as well as the agency’s ancillary authority, the Commission has applied to VoIP services rules regarding various matters, including service discontinuance restrictions, number assignment and portability standards, E911 rules, outage reporting, accessibility for individuals with disabilities, universal service contributions, rural call completion, robocalls, and caller ID authentication.

The imposition of state-level market entry restrictions would conflict with the carefully tailored federal policy that the FCC has fine-tuned for VoIP services. The negative effects of market entry restrictions on innovation, deployment, and competition that were identified in the *Vonage Preemption Order* apply equally to the types of market entry requirements imposed by the CPUC in its November 2024 decision.

The CPUC bases its claimed authority to regulate VoIP on a mistakenly narrow reading of the *Vonage Preemption Order*. It wrongly assumes that state-level entry regulation of fixed VoIP is permissible, despite the order setting forth a decided contrary position. The *Vonage Preemption Order* states that “the practical inseparability of other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent described herein” and that “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.” Also, the CPUC appears to assume that its entry regulations of nomadic VoIP would escape preemption because they are less stringent than the Minnesota entry restrictions preempted by the FCC over two decades ago. But even modest entry restrictions for nomadic VoIP conflict with federal policy and pose the same concerns regarding inhibiting market competition and deployment that the Commission articulated in the *Vonage Preemption Order*.

Until the FCC takes action to address the CPUC’s VoIP regulation and clarify the jurisdictional status of VoIP services, legal and regulatory uncertainty threatens to discourage innovation and competition in the VoIP market segment. The CPUC could try to further expand its regulatory reach over VoIP through investigations and enforcement actions ostensibly based on its newly claimed power. Other states might well follow California’s lead and increase their regulatory powers over VoIP services – unless the FCC steps in.

Notably, an FCC decision to preempt the CPUC’s VoIP regulation would reaffirm the *Vonage Preemption Order* – and not expand federal jurisdiction. That order expressly recognized that “states will continue to enforce generally applicable consumer protection laws, such as provisions barring fraud and deceptive trade practices” regarding VoIP services offered to consumers within states’ jurisdictions.” Accordingly, an April 28 [reply comment](#) filed in the FCC’s Delete, Delete, Delete proceeding by public interest groups that argued preemption would eliminate state laws regarding consumer protection and unfair business practices is misleading and mistaken. As the groups representing VoIP petitioners acknowledged in a June 12 *ex parte* [letter](#), FCC preemption of the CPUC’s decision would leave generally applicable state laws unaffected.

In sum, the Commission should act on the [petition](#) filed by the Cloud Communications Alliance and the Cloud Voice Alliance requesting that the FCC issue a declaratory ruling to preempt the CPUC's VoIP regulation and reaffirm the federal jurisdiction and policy toward VoIP services. By doing so, the Commission would reaffirm the established federal light-touch policy for VoIP services.

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