BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	
Rural Call Completion	WC Docket No. 13-39

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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I. INTRODUCTION

The California Public Utilities Commission ("CPUC" or "California") submits these comments concerning proposals in the Federal Communications Commission's ("FCC" or "Commission") *Second Further Notice of Proposed Rulemaking* ("*FNPRM*").[1] These comments address many, but not all, of the issues raised by the *Second Further FNPRM*. Silence should not be construed as agreement or disagreement. And the CPUC reserves the right to comment further in the reply round.

In the *Second Further FNPRM*, the Federal Communications Commission ("FCC") asks whether it should adopt new rules that, consistent with industry best practices, would require covered service providers (1) to monitor the rural call completion performance of their intermediate providers; and (2) to hold those intermediate providers accountable for their performance. The FCC also seeks comment on its proposal to eliminate the existing rural call completion data collection and reporting rules, which may become unnecessary if the FCC adopts the monitor-and-hold-accountable regime. The CPUC broadly supports the proposed rules, and offers some specific suggestions to bolster them.

The FCC also, however, seeks comment on whether it should apply its existing rules against blocking, choking, reducing, or restricting traffic to *intrastate* traffic. The CPUC cannot support such a measure. The FCC authority extends to *interstate* traffic and to such other areas as are specified in the 1934 Communications Act, as amended by

[1] *In the Matter of Rural Call Completion*, *Second Further Notice of Proposed Rulemaking*, WC Docket 13-39, FCC 17-92, released July 14, 2017; Federal Communications Commission, Rural Call Completion, 82 Fed. Reg. 34911 (July 27, 2017).

the 1996 Federal Telecommunications Act. Those other specified areas do not include authority to impose rules governing *intrastate* traffic, as discussed below.

II. DISCUSSION

A. The CPUC generally supports the FCC's proposed rural call completion requirements for covered providers.

In 2013, the FCC adopted rules to address several rural call completion problems.[2] One of the measures it took was to require so-called "covered providers," as defined in regulation,[3] to record, retain, and report certain information for each long-distance call attempt.[4] It appears that those requirements have not proven as effective as hoped.[5] The FCC therefore proposes now to require covered providers to monitor rural call completion performance, and to hold intermediate providers accountable for poor performance.[6] The CPUC generally supports these proposals.

As a preliminary matter, the FCC first questions whether it should retain the current definition of "covered provider," found in 47 C.F.R. § 64.2101.[7] Section 64.2101 generally defines a "covered provider" as "a provider of long-distance voice service that makes the initial long-distance call path choice for more than 100,000 domestic retail subscriber lines, counting the total of all business and residential fixed subscriber lines and mobile phones and aggregated over all of the providers' affiliates." The definition is

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[2] *In the Matter of Rural Call Completion, Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd. 16154 (2013) (*2013 RCC Order*).

[3] 47 C.F.R. § 64.2101.

[4] *2013 RCC Order*, 28 FCC Rcd. at 16174, ¶ 40.

[5] *Second FNPRM*, at ¶ 12.

[6] *Id.* at ¶ 11.

[7] *Id.* at ¶ 13.

neutral as to the type of carrier involved—that is, the rules cover both interexchange carriers and local carriers; both wireline and wireless carriers; both traditional TDM and VoIP carriers. The CPUC believes this to be a reasonable trade-off between covering an adequate number of calls without placing a burden on those smaller carriers that would be least able to bear it. The current definition is appropriate and should be kept.

The Commission next asks whether it should require covered providers to monitor the performance of intermediate providers—that is, the carriers transporting traffic between the originating carrier and the terminating carrier[8]—and to hold those intermediate providers accountable for poor performance.[9] The CPUC agrees that such a monitor-and-hold-accountable regime will be a more reliable barometer of overall performance than the existing data recording rules. Tracking intermediate providers' performance actually targets *who* is responsible for executing the call path and *where* the call path may have been interrupted.

The Commission also asks how best to monitor the performance of intermediate providers.[10] The CPUC has two suggestions. First, the current monitoring rules do not require the covered provider choosing the initial long-distance call path to identify least-cost routers along the call path. The CPUC therefore recommends that the FCC require the covered provider choosing the initial long-distance call path to identify each intermediate provider involved in the transmission of each call. Second, the CPUC

[8] *See* 47 C.F.R. § 1600(f) (defining "intermediate provider" as "any entity that carriers or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic.").

[9] *Second FNPRM*, at ¶ 15.

[10] *Ibid.*

believes that the FCC should impose metrics for tracking intermediate provider performance. The FCC should not leave it to the covered providers to develop those metrics, as doing so would likely lead to multiple different standards, which would be hard to measure against each other. In particular, the CPUC recommends that the FCC specify the form and frequency of the required monitoring. The scope of the required monitoring should leave little room for interpretation, since inconsistent data reporting was a problem in the previous data collection regime. The FCC should continue to require delineation of calls made to rural OCNs versus non-rural OCNs, and the data should be further delineated to account for calls to rural ILECs and CLECs.

The FCC seeks comment on whether and how it should clarify the circumstances in which a covered provider must hold one of its intermediate providers accountable for its rural call completion performance.[11] In other words, if the FCC adopts performance metrics targeting "sustained inadequate performance" by an intermediate provider, how should it define "sustained inadequate performance"?[12]

The CPUC believes that the FCC should establish consensus among the covered providers to develop percentage-based call-completion standards. The FCC should, at least initially, order two year-long monitoring periods. It should review the data collected after the first year. Intermediate providers who fail to meet those standards after that first year should be required, at a minimum, to meet the standards during the second year. If an intermediate provider still fails to meet the minimum standards after

[11] *Id.* at ¶ 16.

[12] *Ibid.*

year two, that underperforming provider should be eliminated from routes offered to the covered provider. The only exception should be for call paths for which there are no alternative routes, so long as the lack of an alternative route can be reasonably documented.

The FCC asks how it can best ensure compliance with the proposed performance monitoring requirements.[13] Is a certification or audit requirement needed to ensure compliance and, if so, how should such a requirement be implemented?[14]

A certification or audit requirement would make clear to covered providers and intermediate providers the importance that the FCC attaches to rural call completion. Such a requirement could be burdensome and costly, however, if the FCC requires carriers to collect, collate, and submit data on a quarterly basis. A one-year reporting interval would appropriately balance the burdens and the benefits. The annual submission should be timed to coincide with the annual performance review discussed above, so that the audit may be considered in connection with that performance review. Finally, these audits should also be provided to the state commissions, so that the states may review the data consistent with performance of state oversight.

Finally, the FCC seeks comment on additions or alternatives to its proposed rules.[15] The CPUC wishes to comment on one alternative in particular. The Commission asks whether it should maintain the current record-keeping and retention rules, but not the

[13] *Id.* at ¶ 18.

[14] *Ibid.*

[15] *Id.* at ¶ 19.

current reporting requirements.[16] The CPUC believes that this would be burdensome and duplicative of the new intermediate-provider monitor-and-hold-accountable rules. Requiring the collection of intermediate-provider performance data should, in the long run, prove to be more effective than the existing data collection rules at determining *who* is responsible for executing the call path, and *where* the call path may have been interrupted. That information is likely to be more useful that knowing what signal code resulted at the terminating end.

B. The CPUC supports the FCC's proposal to end the existing recording, retention, and reporting requirements for covered providers.

Believing that its existing recording, retention, and reporting rules are not particularly effective, the FCC proposes to eliminate those rules for covered providers, and seeks comment on this proposal.[17]

The CPUC concurs: the existing reporting rules appear to have been unable to provide conclusive data. As stated in the FCC's June 22nd report, the data collected have done little to help justify or initiate enforcement action.[18] As stated above, the CPUC agrees that the proposed intermediate-provider monitoring rules should gather more meaningful information. The CPUC therefore recommends that the existing recording, retention, and reporting requirements for covered providers be discontinued.

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[16] *Ibid*.

[17] *Id.* at ¶ 25.

[18] *In the Matter of Rural Call Completion, Report*, WC Docket 13-39, released June 22, 2017, ¶ 38.

C. The existing Safe Harbor rule should be retained.

The Commission previously adopted a Safe Harbor, under which covered providers can reduce their retention and reporting requirements.[19] To qualify, the provider must certify that they use no more than two intermediate providers in the call path.[20] The FCC now asks whether it should modify the Safe Harbor.[21]

The FCC should keep the Safe Harbor as it is. In order to qualify for the Safe Harbor, covered providers must certify that they route their calls through no more than two intermediate providers. That is, they must directly address one of the key reasons for the problems with rural call completion. The FCC should continue to incentivize covered providers to strike at the root of the problem.

California further notes that, while the FCC speaks of "modifying" the Safe Harbor rule, what it actually proposes here is to remove 47 C.F.R. § 64.2107 without setting forth a replacement. At a minimum, the CPUC recommends that the FCC not remove the Safe Harbor regulation until it can propose a viable replacement.

D. The FCC lacks authority to apply its blocking rules to intrastate traffic.

Under the old calling-party-pays regime, some carriers had an incentive to block or otherwise interfere with calls that would be expensive to hand off or terminate. Switching from that old regime to bill-and-keep would, it was hoped, eliminate that

[19] *See* 47 C.F.R. § 64.2107.

[20] 47 C.F.R. § 64.2107(a).

[21] *Second FNPRM*, ¶ 29.

incentive. But the progress, while real, has been slow and imperfect.[22] The FCC now proposes further measures to eliminate that practice; a worthy goal. It has begun doing so in the interstate realm, which is properly within the FCC's power.[23] The Commission now asks, however, whether it may do the same in the intrastate realm.[24] But here, however praiseworthy the goal may be, the means are wanting: the Commission lacks the legal authority to promulgate intrastate anti-blocking rules.

As is well understood, Congress historically divided the regulation of this country's telecommunications industry into co-ordinate and distinct spheres. This was true under the 1934 Act, and Congress maintained that separation of authority in the 1996 Act. Under Section 201(b), the FCC had the power to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate and foreign] communication service, shall be just and reasonable . . . ." Section 152(b) provides, on the other hand, that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." Historically, what belonged to the federal government belonged to the federal government, and what belonged to the states belonged to the states, and neither could disturb the other.[25] The only exception to the

[22] *See 2013 RCC Order*, 28 FCC Rcd. at 16163-16164, ¶¶ 17-18.

[23] *Ibid.*

[24] *Second FNPRM*, at ¶ 33.

[25] Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 373 (1986) (explaining that Section 152(b) is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction" in interpreting the Act's provisions).

general rule has arisen where the intrastate service is so entangled with the interstate service that the two are inseparable.[26]

The 1996 Act broke down some of those walls, giving the FCC reign over matters traditionally thought to inhere in the states. Where once the fence between the Commission and the states was "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf",[27] now "Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."[28] Section 201(b), in addition to giving the FCC broad jurisdiction over interstate and foreign matters, also gives the Commission the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" Chapter 5 of Title 47 of the U.S. Code. So Section 201(b) "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[29]

But still, the states have their place: the FCC may not "regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction."[30] Thus, even after the 1996 Act, the FCC "is generally forbidden from entering the field of intrastate

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[26] *Id.* at 375 n.4 (stating that the FCC may regulate intrastate matters "where it [is] not possible to separate the interstate and the intrastate components of the asserted FCC regulation").

[27] Iowa Utils. Bd. v. FCC, 120 F3d 753, 800 (8th Cir. 1997), *overruled by* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[28] AT&T Corp., 525 U.S. at 381 n.8.

[29] *Id.* at 380 (emphasis in original).

[30] AT&T Corp., 525 U.S. at 381 n.8.

communications service, which remains the province of the states."[31] When exploring the limits of the Commission's jurisdiction, therefore, the question is, "has Congress given the Commission license to stand in for the states?"

Here, it has not. The FCC has not identified, and the CPUC has been unable to find, any provision of the 1996 Act that gives the Commission the express authority to prohibit the blocking of intrastate traffic. Instead, in the *2013 Rural Call Completion (RCC) Order*, the Commission relied on "the prohibition against unjust and unreasonable practices in section 201(b) of the Act."[32] But, under Section 201(b)'s own terms, the Commission may remedy such practices only in its traditional sphere—interstate communications.

The FCC has carefully lodged its authority within the walls of the 1996 Act at other times. For example, as to the (soon-to-be-defunct) intermediary-monitoring rules, the Commission was careful to pin its action on Section 251(b)—that is, on the 1996 Act.[33] That the FCC has not done so here seems to indicate some doubt that the Commission has the authority.

This does not mean that carriers are free to block interconnecting calls—at least not in California. The California Legislature has prohibited the interruption of telecommunications traffic. "Customers have a right to expect that the telephone network

[31] *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (citing 47 U.S.C. § 152(b)).

[32] *2013 RCC Order*, 28 FCC Rcd. at 16163-16164, ¶ 18.

[33] *Id.* at 16171, ¶ 33.

throughout California is reliable, and that their calls will be completed . . . ."[34] Ensuring that our citizens' intrastate calls go through falls squarely within the police power, the sovereign's ancient prerogative to make and enforce laws protecting the health, safety, and general welfare.[35] California law thus provides: "Every telephone corporation and telegraph corporation operating in this State shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made."[36] In 1997, relying on that law, the CPUC concluded "that all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper."[37] The CPUC may enforce—indeed, must enforce—both the law and its decision.[38] California expects that other states have similar rules, and hope that some of the other state commissions will explain theirs, either here or in the reply round.

Therefore, while the CPUC lauds the Commission's intent here, we cannot agree that the FCC may put this intention into action.

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[34] *Re Competition for Local Exchange Service*, 76 CPUC 2d 458, 460, 1997 WL 787544 (1997). No Westlaw star page numbers are available for this decision.

[35] *See, e.g.*, Bond v. United States, __ U.S. __, __, 134 S. Ct. 2077, 2086 (2014) ("The States have broad authority to enact legislation for the public good — what [is] often called a 'police power.'"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (recognizing "the historic primacy of state regulation of matters of health and safety").

[36] Cal. Pub. Util. Code § 558.

[37] *Re Competition for Local Exchange Service*, 76 CPUC 2d at 460, 1997 WL 787544.

[38] Cal. Pub. Util. Code §§ 451, 452, 701, 2101, 2102.

III. CONCLUSION

The CPUC appreciates this opportunity to provide input to the FCC on the *Second Further NPRM*, and urges the FCC to adopt rules consistent with these comments.

Respectfully submitted,

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