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Sent: 7/5/2012 1:49:06 PM
To: Cherry, Brian K (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=BKC7);
Bottorff, Thomas E (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=TEB3)
Cc:
Bcc:
Subject: RE: SB 1161, jurisdiction, GO 95, and safety concerns

Tom, Thanks for the clarification. I would have found it amazing that VoIP did not use PG&E poles since pole access is so critical for being able to access homes and businesses and in some cases electrical power. Even if by some miracle VoIP providers did not use PG&E poles or joint use poles and if they used nearby poles, there is still a concern about the electrical safety of equipment and wires on poles close to utility poles. The Guejito fire was started when a lashing wire from a Cox telecommunications service hit an SDG&E wire in high winds.

I am concerned that SB 1161 as currently drafted contains no requirements that VoIP or IP-enabled service providers to comply with GO 95 and other CPUC safety, inspection, and consumer protection rules, except that VoIP has to contribute to the 911 service fund. GO 95's applicability is limited to companies over which the CPUC has jurisdiction. SB 1161 deprives the CPUC of regulatory authority or jurisdiction over VoIP or IP-enabled services except as specifically authorized by federal law or as provided for in the exceptions to the bill. All of the duties of GO 95, line tension, safety factors, vegetation management, etc. are contingent on CPUC jurisdiction.

As stated in GO 95 section 11 "The purpose of these rules is to formulate, for the State of California, requirements for overhead line design, construction, and maintenance, the application of which will ensure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of overhead lines and to the public in general. (Revised January 12, 2012 by Decision No. 1201032).

Note that GO 95 in Section I, 12, General Provisions, limits the applicability of GO 95 rules as follows:

"12 Applicability of Rules

These rules apply to all overhead electrical supply and communication facilities that come within the jurisdiction of this Commission, located outside of buildings, including facilities that belong to non-electric utilities." (emphasis added)

The broad language of Section 710(a) of SB 1161 and the lack of any exceptions that clarify that SB 1161 does not affect the CPUC's ability to enforce Certificate of Public Convenience and Necessity (CPCNs) or Telephone Corporation Franchises leaves open the question of whether, despite SB 1161, the Commission can exercise jurisdiction over VoIP providers or IP-enabled service providers who have CPCNs or Telco Franchises to comply with GO 95 or other safety rules including record-keeping, audit, and inspection rules. More than 100 VoIP providers have CPCNs and are Competitive Local Exchange Carriers (CLECs) who use the rights under the Telecommunications Act of 1996 to interconnect to the Public Switched Telephone Network (PSTN) and apply to states for a CPCN to operate as a telephone corporation. To be eligible for a CPCN the applicant must: have some telecom or relevant experience; a designated amount of financial assets; a good record in terms of fines, government sanction, etc.; and negotiate an interconnection agreement with an incumbent local exchange carriers (ILEC), in California: AT&T, Verizon, SureWest, or Frontier. The CPCN is approved in a full Commission decision which gives the holder the right to: interconnect to the PSTN per the 1996 Telecom Act to increase

competition for local telephone service; negotiate access to Investor Owned Utility (IOU) rights of way and poles; DEMAND access to poles, rights of way, and conduits from municipal utilities (per the Ca. Public Utilities Code); access the federal/state phone number databank; and provide service to the public. The CPCNs are issued with clauses that say that the holder is required to comply with all of the CPUC's rules, decisions, orders, and the California Public Utilities Code.

California's CPCNs are technology neutral and many CPCN holders interconnect in the technology of plain old telephone service (POTs), per the request of the ILECs, then switch upstream to VoIP and offer VoIP to residential and business customers. Some companies offer only VoIP, some offer a combination of POTs and VoIP, Internet, Wireless, or Video services. Video service providers are subject to the Digital Video Competition Act which allows pole attachment for Video services. Combination video and VoIP providers have to seek a separate authorization for non-video services and seek a CPCN for telephone service including VoIP. Some companies carry VoIP over the same line as POTs or Cable service. Some may have different facilities or lines for VoIP only. The jurisdictional concern would be the greatest where the facility or line is VoIP only because SB 1161 takes away CPUC jurisdiction over VoIP and IP-enabled service. If the facility or line is used for both POTs and VoIP or Cable and VoIP the CPUC could assert jurisdiction over the facility or line because the CPUC retains jurisdiction over POTs or Cable. SB 1161 may encourage the development of more VoIP only facilities and lines, and the FCC has said it would like to make Internet Protocol (IP) telephony the new standard by 2016. As POTs and IP-enabled services merge and facilities or lines become exclusively IP-enabled and not POTs facilities or lines, SB 1161 would remove CPUC jurisdiction over those facilities or lines.

As passed by the Assembly Utilities Committee SB 1161 provides in Section 710:

SEC. 3. Section 710 is added to the Public Utilities Code, to read:

710. (a) The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c). In the event of a requirement or a delegation referred to above, this section expands *does not expand* the commission's jurisdiction beyond existing state law. (emphasis in the original to indicate amendments adopted in the Utilities Committee)

(b) No department, agency, commission, or political subdivision of the state shall enact, adopt, or enforce any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law, that regulates VoIP or other IP enabled service, unless required or expressly delegated by federal law or expressly authorized by statute or pursuant to subdivision (c). In the event of a requirement or a delegation referred to above, this section expands *does not expand* the commission's jurisdiction beyond existing state law. (emphasis in the original to indicate amendments adopted in the Utilities Committee)

Some have suggested that the CPUC can argue that SB 1161 exempts from CPUC regulation and jurisdiction *VoIP services, not facilities*. The current version of SB 1161 does not make it clear that the CPUC's lack of jurisdiction over VoIP is limited only to VoIP "services" and that CPUC jurisdiction is preserved as to VoIP facilities, CPCNs, or Telephone Corporation franchises. SB 1161 says in Sec. 710(1) "The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol..." The bill uses the word "services" only in connection with prohibiting regulatory jurisdiction or control over "Internet Protocol enabled services." The bill does not make clear any ongoing CPUC jurisdiction over VoIP facilities, CPCNs, Telephone Corporation Franchises, or authorizations; to the contrary its text seems to broadly prohibit CPUC exercise of regulatory jurisdiction or control over VoIP and IP-enabled services except as "required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c)."

The definitions of VoIP and IP-enabled services in Section 239 of SB 1161 do not clarify that the bill does not apply to the FACILITIES, authorizations, or certificates such as the CPCNs or Telco Franchises of VoIP providers. The bill provides as currently drafted:

"SEC. 2. Section 239 is added to the Public Utilities Code, to read:

239. (a) (1) "Voice over Internet Protocol" or "VoIP" means voice communications service that does all of the following: (A) Uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from, or terminates at, the user's location in Internet Protocol or a successor protocol.

(B) Requires a broadband connection from the user's location.

(C) Permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

(2) A service that uses ordinary customer premises equipment with no enhanced functionality that originates and terminates on the public switched telephone network, undergoes no net protocol conversion, and provides no enhanced functionality to end users due to the provider's use of Internet Protocol technology is not a VoIP service."

SB 1161's VoIP definition is not limited to VoIP services. The definition includes interconnected VoIP that permits calls to be made to an received from the Public Switched Telephone Network (PSTN) which would include interconnected VoIP providers who have CPCNs or Telco Franchises.

The word "service" is used only for the definition of "IP enabled service" as follows:

"239(b) "Internet Protocol enabled service" or "IP enabled service" means any service, capability, functionality, or application using existing Internet Protocol, or any successor Internet Protocol, that enables an end user to send or receive a communication in existing Internet Protocol format, or any successor Internet Protocol format through a broadband connection, regardless of whether the communication is voice, data, or video."

Since there is no exception in the bill for enforcement of CPCNs or Telephone Corporation franchises or for CPUC safety, inspection, and audit, and consumer protection rules including those in the Code and GO 95, SB 1161 poses a serious argument that the CPUC may not retain jurisdiction to require VoIP, as well as IP-enabled services which are becoming the new standard in the telephone network, to comply with CPUC rules including safety rules. Nor do the bill's exceptions clarify this retention of jurisdiction over safety or consumer protection rules for VoIP or IP-enabled services, including any duty to comply with GO 95.

FERC regulates transmission pole safety but not distribution pole safety and delegates the adoption of rules regarding distribution pole safety to the states. There is a strong argument that FERC has expressly delegated pole safety rules to the states but can't delegate jurisdiction over VoIP or IP-enabled communications service providers.

The bigger litigation question is whether the FCC's administration of a "reverse preemption" option where the states could elect to create and administer their own pole safety rules in lieu of using the FCC's pole safety rules is sufficient to constitute an expression delegation by federal law to require VoIP and IP-enabled service providers to comply with GO 95 and other safety rules. Under 47 U.S.C. Sec. 224(c), the FCC authorized "reverse preemption" and allowed states to elect out of FCC pole attachment and safety rules so states could adopt and enforce their own pole attachment rules. States may elect to regulate their own pole attachment if the state certifies that: (1) it regulates the rates, terms, and conditions of attachments in its jurisdiction; (2) the state considers the interests of cable and

telecommunications service subscribers as well as the interests of electric and telephone utilities in regulating attachments; (3) the state has issued attachment rules and made them effective; and (4) those rules require the state to act on pole-attachment complaints within a specific time period. 47 U.S.C. § 224(c). California and 20 other states including the District of Columbia have elected reverse preemption. This system allows California to have uniform rules that apply to electric utilities and communications facilities over which the CPUC has jurisdiction.

Even if it were determined that the FCC expressly delegated pole safety rules to the CPUC and the states by allowing reverse preemption, GO 95 still requires that the CPUC have jurisdiction over the communications facilities to order that facility to comply with Go 95. The FCC has not expressly delegated regulation of facilities-based, interconnected VoIP to the states. Many VoIP providers argue the reverse, that under the FCC's 2004 Vonage case involving the Minnesota Public Utilities Commission, the FCC preempted state regulation of VoIP, although the Vonage case involved only nomadic, Internet-based VoIP providers, not facilities-based, interconnected VoIP providers who have CPCNs and would have equipment on poles or wires. The FCC made a statement in the Vonage case that if presented with facts involving facilities-based VoIP it would similarly exercise preemption. The FCC is not entitled to preempt by prediction and must provide notice of the facts and issues to be considered and allow comment on those issues.

There is no requirement in the exceptions to SB 1161 for enforcement of pole attachment and CPUC safety or consumer protection rules so it is arguable whether there is a state "requirement" of such compliance in the bill. SB 1161 says it "does not expand" CPUC jurisdiction beyond existing state law but does not make it clear that the CPUC **RETAINS** jurisdiction over CPCN holders or Telephone Corporations franchise holders, the facilities they build, safety, and services they provide as a result of those authorizations.

SB 1161's exceptions provide in relevant part that:

"710(e) This section does not affect any existing regulation of, *proceedings governing*, or existing commission authority over, non-VoIP and other non-IP enabled wireline or wireless service, including regulations governing universal service and the offering of basic service and lifeline service, *and any obligations to offer basic service*. (emphasis in the original to indicate amendments adopted in the Utilities Committee)

(f) This section does not limit the commission's ability to *continue to monitor and discuss VoIP services, including responding to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and to respond informally to customer complaints, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints.*" (emphasis in the original to indicate amendments adopted in the Utilities Committee)

Sections 710(a) and (b) state that :*"In the event of a requirement or a delegation referred to above, this section does not expand the commission's jurisdiction beyond existing state law.*" (emphasis in the original to indicate amendments adopted in the Utilities Committee)

Since 710(e) only applies to non-VoIP and other non-IP enabled wireline or wireless service, it does not clarify that the CPUC retains jurisdiction over VoIP and IP enabled wireline or wireless services that have CPCNs or telephone corporation franchises. Similarly Section 710(f) does not address the CPCNs, telco franchises, CPUC safety rules, or GO 95's applicability to VoIP or IP enabled services.

Other utilities over which the CPUC has jurisdiction such as electric, cable, and Plain Old Telephone Service utilities retain a duty to comply with GO 95, address and report unsafe conditions they observe from neighboring facilities including those not subject to GO 95. GO 95 contemplates that third parties

not subject to the rules may create unsafe conditions and imposes on the utility subject to GO 95 the duty to address that condition or provide notice. It does NOT subject third parties to GO 95 as jurisdiction under GO 95 is limited to "all overhead electrical supply and communication facilities that come within the jurisdiction of this Commission."

Section 12.6 of GO 95 provides:

"Third Party Nonconformance

When a third party that is not subject to the requirements of this Order causes a condition on or near a utility facility that does not conform with this Order, the utility shall be allowed reasonable time to address the condition by pursuing appropriate corrective action and/or notification procedures. While addressing this condition, the utility is in conformance with the Order.

Note: For purposes of this Rule, "reasonable time" is intended to account for the safety implications associated with the condition, discussions with the third party, engineering and/or construction manpower availability, and utility practices for addressing these types of conditions.

Note: Added January 13, 2005 by Decision No. 0501030."

SB 1161 could increase the need of electric, cable, and POTs telephone service utilities to address, monitor, and report the safety of any VoIP or IP-enabled facilities or lines, while at the same time creating arguments about the CPUC's jurisdiction over VoIP or IP-enabled facilities or lines. This may create issues with VoIP use of joint use poles if VoIP is not held to the same standards as other utilities. Even if VoIP facilities are on neighboring poles and not on joint use poles, improperly maintained facilities can present a hazard to other lives, property, and other utilities. *Electric utilities will remain subject to GO 95 and to the duty to address any unsafe conditions observed at neighboring third-party facilities.*

The CPUC's Consumer Protection and Safety Division (CPSD) found that poles overloaded with telecommunications equipment were one key cause of pole snapping in the high winds that brought down many Southern California Edison poles in November 2011. GO 95 requires that parties who wish to put equipment on poles make calculations and keep the calculation for inspection. If SB 1161 does not allow CPUC inspection, auditing, and record-keeping requirements, or the ability to bind VoIP and IP-enabled service providers to GO 95 or other safety rules, this raises safety risks for the public and other utilities subject to those rules. The Malibu fire in 2007 was sparked when 3 poles fell, one of which CPSD alleged was overloaded with telecommunications equipment. CPSD alleges that one of the defendants, a smaller company that operates wireless, prepay wireless, and prepaid VoIP service, did not calculate pole loading properly and did not retain documents regarding the pole loading calculation.

I appreciate your examination of SB 1161 and your thoughts about its potential impact on public safety, pole safety, fire, and other risks. If you believe the CPUC can hold VoIP and IP-enabled service providers to GO 95, the CPCNs, or Telco Franchises used to provide VoIP, or other CPUC rules or the Public Utilities Code, despite the language of SB 1161, that analysis would be helpful as well. As we have informed the legislature and the Governor's Office, we anticipate mighty and protracted legal battles about the CPUC's ability to enforce the CPCNs and Telephone Corporation franchises, notwithstanding the language of SB 1161.

The CPUC has proposed an amendment to clarify that SB 1161 does not impair the CPUC's authority to

enforce the terms of any CPCN or Telephone Corporation Franchise. The CPCNs were issued with clauses that say that the holder is required to comply with all of the CPUC's rules, decisions, orders, and the California Public Utilities Code. San Diego Gas & Electric proposed an amendment to add a safety clause to SB 1161. Senator Padilla reportedly promised SDG&E a safety amendment but none has been added. The last hearing on this bill will be August 8 or 15 at the Assembly Appropriations Committee. I want to make sure that the Legislature, the Governor's Office, the CPUC, and the public understand the safety concerns at stake in the current versions of this bill.

Thanks for taking a look at the bill. Commissioner Sandoval

From: Bottorff, Thomas E [mailto:TEB3@pge.com]
Sent: Wed 7/4/2012 6:47 AM
To: Sandoval, Catherine J.K.
Subject: SB 1161

Cathy,

I wanted to correct a misstatement that I made in our discussion regarding SB 1161 at the close of the CPUC's Safety Conference on June 26. During our conversation, I said that AT&T did not have VOIP facilities attached to poles in our service territory. I was under the wrong impression that AT&T used a cellular network that bypassed conventional wire transmission for VOIP services. I have since been informed that VOIP is also carried over cable, fiber and other service mediums through pole attachments. Please accept my sincere apology for my misunderstanding and incorrect communication.

I have also followed up with our Sacramento office regarding the concern that SB 1161 could deprive the CPUC of jurisdiction over the safety of these attachments, as we discussed. We will raise this concern with Senator Padilla and Assemblyman Bradford to determine whether it can be addressed in the bill.

Again, I'm very sorry for creating a misunderstanding and I want to thank you for bringing this issue to my attention.

Tom