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Cameron Easterling

Pacific McGeorge School of Law

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Public Utilities

Chapter 733: R.I.P. Regulations on V.O.I.P.

Cameron Easterling

Code Sections Affected

Public Utilities Code §§ 239, 710 (new).
SB 1161 (Padilla); 2012 STAT. Ch. 733.

I. INTRODUCTION

The Great Recession has hit California hard.¹ As of mid-2012, the state had one of the highest unemployment rates in the country.² In order to spark California's economy, Senator Alex Padilla turned his attention to the state's vibrant technological sector.³ Against this backdrop, Voice over Internet Protocol (VoIP) has emerged as a new communication technology.⁴ While traditional telephone technology is built on an analog foundation developed over one-hundred years ago, VoIP uses the Internet.⁵ This means that unlike a standard telephone, which is immobile and only used for voice, VoIP can be used to communicate in a variety of ways from a number of different places.⁶ VoIP's communication tools and services have greatly expanded, and its subscriber base increased by forty-six percent from 2008 to 2010.⁷ With similar growth found in many aspects of the technological sector, technology has become one of the leading jobs creators in California.⁸ Introduced by Senator Alex Padilla, Chapter

1. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 399 (2011), available at http://fcicstatic.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (on file with the *McGeorge Law Review*) (noting California among states that especially struggled during the recession); *California Budget Crisis*, N.Y. TIMES (May 14, 2012), http://topics.nytimes.com/topics/news/national/usstatesterritoriesandpossessions/california/budget_crisis_2008_09/index.html (on file with the *McGeorge Law Review*).

2. BUREAU OF LABOR STATISTICS, REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT SUMMARY 2 (2012), available at <http://www.bls.gov/news.release/laus.nr0.htm> (on file with the *McGeorge Law Review*).

3. See 2012 Cal. Stat. ch. 733, § 1 (including legislative findings that "California's innovation economy is leading the state's economic recovery").

4. CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FCC, VOICE OVER INTERNET PROTOCOL: FCC CONSUMER FACTS (2012), available at <http://transition.fcc.gov/cgb/consumerfacts/voip.pdf> [hereinafter FCC CONSUMER FACTS (2012)] (on file with the *McGeorge Law Review*).

5. *Id.*

6. *Id.*

7. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 5–6 (May 29, 2012).

8. 2012 Cal. Stat. ch. 733, § 1; see also MICHAEL MANDEL, TECHNET, WHERE THE JOBS ARE: THE APP ECONOMY (2012), available at <http://www.technet.org/wp-content/uploads/2012/02/TechNet-App-Economy-Jobs-Study.pdf> (on file with the *McGeorge Law Review*) (noting the large volume of employment by Internet application companies in California).

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733 potentially frees the technological sector to address California's economic woes by limiting the state's power to regulate VoIP and similar services.⁹

II. LEGAL BACKGROUND

While regulation on a national level is substantial,¹⁰ there has been deregulation in the railroad, trucking, and airline industries, animated by federal objectives to open the free market and increase competition.¹¹ The Telecommunication Act of 1996 generally followed this trend and introduced deregulation to the telecommunication field.¹² The VoIP Regulatory Freedom Act of 2004 and the Advanced Internet Communications Services Act of 2005 also included efforts to deregulate VoIP specifically, but both failed to pass.¹³ With this deregulatory foundation, the FCC¹⁴ found that the Minnesota Public Utility Commission could not regulate Vonage, a VoIP platform and business.¹⁵ There, the FCC held that state regulation of VoIP, and similar services, is preempted by federal objectives “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁶ Additionally, the FCC held that VoIP's mobility and expanded services mean that VoIP is an interstate commercial activity,¹⁷ and thus “state regulatory regimes [of VoIPs] would likely violate the Commerce Clause”¹⁸ Supporting deregulation of the technology,¹⁹ the FCC claimed that its “[o]rder clears the way for increased investment and

9. CAL. PUB. UTIL. CODE §§ 239, 710 (enacted by Chapter 733).

10. See 1 C.F.R. § 1.1–50 C.F.R. § 697.26 (2012) (illustrating that the amount of regulations affecting the United States is significantly large and broad in scope).

11. James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1091 (2004). It is important to differentiate this trend from other current trends, in banking law, towards regulation. See 12 C.F.R. §§ 1.1–197.21; *Dodd-Frank Legislation*, COMMITTEE ON FINANCIAL SERVICES, <http://financialservices.house.gov/dodd-frank/dfbills.htm> (last visited Jan. 8, 2013) (on file with the *McGeorge Law Review*) (illustrating increasing regulation).

12. Speta, *supra* note 11 (the Telecommunication Act of 1996, the Airline Deregulation Act of 1978, the Motor Carrier Act of 1980, and the Staggers Rail Act of 1980 were deregulation efforts based in the same free market competition jurisprudence); Telecommunications Act of 1996, 47 U.S.C. §§ 160–61, 222, 230, 251–76, 336–63, 549, 560–61, 571–73, 613–14, 1302 (2006); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.) (1982); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45, 49 U.S.C.) (1980); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.) (1988).

13. Amy L. Leisinger, *If It Looks Like a Duck: The Need for Regulatory Parity in VoIP Telephony*, 45 WASHBURN L.J. 585, 601 (2004).

14. See 47 U.S.C. § 151 (establishing the FCC as the agency in charge of interstate communication).

15. Press Release, FCC, FCC Finds That Vonage Not Subject to Patchwork of State Regulations Governing Telephone Companies (Nov. 9, 2004) (on file with the *McGeorge Law Review*).

16. Vonage Holdings Corp., 19 FCC Rcd. 22404, 22405 (2004) (internal quotation marks omitted).

17. *Id.* at 22413.

18. *Id.* at 22412.

19. 47 U.S.C. §§ 157, 253, 230.

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innovation in services like Vonage's to the benefit of American consumers."²⁰ Since the order, the FCC has allowed a few regulations, including those protecting privacy, adding 911 emergency protocols, allowing fees to universal service programs, notifying consumers of service disruptions, and ensuring use of the service is available to those with disabilities.²¹

At the state level, the California Constitution gives California's Public Utility Commission (CPUC) the power to regulate telecommunication services, stating the CPUC "may fix rates, establish rules, examine records[] . . . for all public utilities subject to its jurisdiction."²² Pursuant to Section 709 of the California Public Utility Code, the CPUC has a telecommunications policy to "promote economic growth, job creation[] . . . lower prices, broader consumer choice, and . . . [t]o remove the barriers to open and competitive markets"²³

III. CHAPTER 733

Chapter 733 aims to "reaffirm California's current policy of regulating" VoIP: no state agency may regulate "VoIP or other IP enabled service, unless required or expressly delegated by federal law or expressly authorized by statute"²⁴ Specifically, Chapter 733 declares that deregulation of California's Silicon Valley is necessary for economic recovery in the state and abroad.²⁵ Additionally, Chapter 733 defines VoIP broadly as any service for communications over the Internet, "regardless of whether the communication is voice, data, or video."²⁶ Finally, Chapter 733 lists several utility laws that are not affected by the deregulation.²⁷

IV. ANALYSIS

Chapter 733 is a result of jurisprudential trend, inspired by free market objectives.²⁸ Analysis of Chapter 733 reveals three related possible outcomes: a decrease in laws protecting consumers, loss of state government revenues and regulations, and benefits to the economy.²⁹

20. *Vonage*, 19 FCC Rcd. at 22405.

21. See FCC CONSUMER FACTS (2012), *supra* note 4 (listing these regulations as exceptions for public safety); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 8–10 (May 29, 2012).

22. CAL CONST. art. 12, § 6; SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 8–10 (May 29, 2012).

23. CAL. PUB. UTIL. CODE § 709 (West 2004).

24. 2012 Cal. Stat. ch. 733, § 1.

25. *Id.*

26. PUB. UTIL. § 239 (enacted by Chapter 733).

27. *Id.* § 710(c) (enacted by Chapter 733).

28. See *supra* text accompanying notes 11–14, 16 (revealing the free market emphasis of the FCC).

29. See *infra* text accompanying notes 39, 43–45, 47 (discussing these three impacts at length).

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A. Impact of the FCC Order and Chapter 733

Presently, twenty-four states and the District of Columbia have followed the FCC's order by limiting state regulation, except in those areas the FCC has authorized.³⁰ Eighteen other states have similar pending legislation as well.³¹ While the CPUC has followed a hands-off approach to VoIP, the legislature has not explicitly prohibited regulation at the state level as called for by the FCC.³²

Thus, as another offspring of the FCC order permeated with similar free market deregulation objectives,³³ Chapter 733 is clear: no aspect of California's government is to regulate VoIP-like services, unless authorized by the FCC.³⁴ However, Chapter 733 also addresses the CPUC's fears that deregulation will eliminate the Commission's ability to regulate anything Internet related.³⁵ Specifically, Chapter 733 provides that it does not affect non-VoIP services, FCC-authorized regulations, or utility laws that fall outside the scope of the FCC order.³⁶

B. Potential Loss of Consumer Protections

Despite these provisions, those opposing the law³⁷ still feel that Chapter 733 will bring the CPUC's fear of losing regulatory control over all things Internet-related to fruition.³⁸ Opponents claim that without protection, consumers will find themselves in an unregulated environment, which is open to abuse, unreliability,

30. OFFICE OF SEN. ALEX PADILLA, SB 1161 FACT SHEET (2012) [hereinafter SB 1161 FACT SHEET]; SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 7–8 (May 29, 2012) (reporting that states following the FCC order include: Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Maine, Minnesota, Missouri, North Carolina, New Jersey, Nevada, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin); CAL. PUB. UTIL. COMM'N, SB 1161 (PADILLA)—COMMUNICATIONS: VOICE OVER INTERNET PROTOCOL AND INTERNET PROTOCOL ENABLED COMMUNICATIONS SERVICE 18–29 (2012), available at http://www.cpuc.ca.gov/NR/rdonlyres/7F24CA0D-8DCB-45FC-9041-B92D355DBE28/0/581185v1SB_1537_Leg_Memo_11277_5_10_Co mm_Agenda.pdf (on file with the *McGeorge Law Review*); SHERRY LICHTENBERG, NAT'L REGULATORY RESEARCH INST., THE YEAR IN REVIEW: THE STATUS OF TELECOMMUNICATION DEREGULATION IN 2012 (2012), available at <http://www.nrri.org/documents/317330/0179150e-ef83-4e94-bf94-80c7af830ab6> (on file with the *McGeorge Law Review*).

31. CAL. PUB. UTIL. COMM'N, *supra* note 30.

32. SB 1161 FACT SHEET, *supra* note 30.

33. 2012 Cal. Stat. ch. 733, § 1.

34. CAL. PUB. UTIL. CODE § 710 (enacted by Chapter 733).

35. CAL. PUB. UTIL. COMM'N, *supra* note 30.

36. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 8–10 (May 29, 2012); FCC CONSUMER FACTS (2012), *supra* note 4.

37. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 12 (May 29, 2012) (stating that opposition includes the American Civil Liberties Union, American Association of Retired Persons, and representatives of consumers, minorities, and unions).

38. *Urge Your State Senator to Oppose SB 1161, the Removal of Consumer Protection for Internet Enabled Services*, AARP (June 6, 2012), <https://action.aarp.org/site/Advocacy?cmd=display&page=UserAction&id=2213> (on file with the *McGeorge Law Review*); CAL. PUB. UTIL. COMM'N, *supra* note 30.

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lack of access, and discrimination.³⁹ Overall, they see the law as a power grab⁴⁰ by large companies—like AT&T, Verizon, and Comcast—that offer VoIP services, allowing them to act with little oversight from the CPUC.⁴¹

C. Impacts on the Telecommunication Regulatory Scheme

Chapter 733 also has large potential impacts on state government.⁴² The CPUC's analysis of Chapter 733 projected possible losses of millions of dollars since VoIP companies and users will no longer be subject to utility fees and taxes.⁴³ Additionally, removing VoIP from the regulatory framework could impact multiple regulations (including those encouraging diversity in contracts from utility companies for minorities and women) and public safety laws (regarding telephone poles and rerouting of calls for hostage situations).⁴⁴ Finally, Chapter 733 could lead to millions of dollars in litigation costs to determine what regulations are affected or even allowed by Chapter 733.⁴⁵

D. Potential Economic Impacts Based on Past Deregulation

Comcast, Microsoft, and coalitions of small businesses, minorities, and workers⁴⁶ cite to recent economic successes in Silicon Valley as evidence that deregulation of technological sectors such as VoIP will provide better and cheaper access.⁴⁷ These proponents of Chapter 733 have had success criticizing the CPUC's analysis as counterintuitive, prompting the CPUC to admit that it could not vouch for their report's accuracy.⁴⁸ In fact, the United States has a legal and economic history of supporting deregulation, beginning with a trend of deregulation in the transportation and telecommunication industries, leading to the FCC order, and now finally Chapter 733.⁴⁹ The Interstate Commerce Act of 1887, the Airline Deregulation Act of 1978, the Motor Carrier Act of 1980, the Staggers Rail Act of 1980, and the Telecommunications Act of 1996 all generally

39. GREENLINING INST., SB 1161 THREATENS CALIFORNIA PHONE CUSTOMERS (2012), available at <http://greenlining.org/resources/pdfs/SB1161factsheet.pdf> (on file with the *McGeorge Law Review*).

40. *Id.*

41. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 8–10 (May 29, 2012).

42. *See infra* text accompanying notes 43–45 (discussing the impact to state government).

43. CAL. PUB. UTIL. COMM'N, *supra* note 30, at 14–17.

44. *Id.* at 18–29; GREENLINING INST., *supra* note 39.

45. CAL. PUB. UTIL. COMM'N, *supra* note 30, at 18–29.

46. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1161, at 12 (May 29, 2012).

47. 2012 Cal. Stat. ch. 733, § 1; Steven Maviglio, *Will the PUC Force California to Become the First State to Regulate the Internet?*, TECH WIRE (May 23, 2012), <http://techwire.net/?p=3669> (on file with the *McGeorge Law Review*).

48. *Id.*; *see also supra* text accompanying notes 43–45.

49. *See supra* text accompanying notes 11–15 (revealing several deregulation efforts in telecommunications and the FCC order).

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resulted in decreased regulation, destruction of monopolies, more competition, and lower prices.⁵⁰ Chapter 733's deregulation objectives are another extension of this overarching trend, and proponents expect that the economic impact of Chapter 733 will follow this same path.⁵¹

V. CONCLUSION

Chapter 733 preserves the free market for VoIP and similar services.⁵² Supporters of the law claim that this deregulated market will help the economic recovery.⁵³ Opponents view the deregulation as detrimental, where big business is free to hold up consumers without protection.⁵⁴ Despite these claims, Chapter 733 simply reinforces a legal trend of deregulation, following the FCC order.⁵⁵ Ultimately, Chapter 733 conforms to Senator Padilla's claim that the legislation simply places "in statute the regulatory approach our state and frankly our country has pursued for many, many years"⁵⁶

50. Speta, *supra* note 11, at 1092; William A. Niskanen, *Economic Deregulation in the United States: Lessons for America, Lessons for China*, 8 CATO J. 657, 659–60 (1989) (empirically documenting the positive effects of deregulation, including increased efficiency, major cost decreases, and better service directly due to the Airline Deregulation Act of 1978, the Motor Carrier Act of 1980, and the Staggers Rail Act of 1980); *see also* Thomas W. Hazlett, *Economic and Political Consequences of the 1996 Telecommunications Act*, 23 CATO INST. REG. 36 (1999) (CLECs "take market share from established incumbent telephone carriers," and "revenues show a strong overall growth trend" as "'165 new phone companies [have been] spawned by the law.'").

51. Speta, *supra* note 11, at 1092; SB 1161 FACT SHEET, *supra* note 30.

52. 2012 Cal. Stat. ch. 733; Vonage Holdings Corp., 19 FCC Rcd. 22404, 22439 (2004).

53. SB 1161 FACT SHEET, *supra* note 30.

54. Marc Lifsher, *Bill Would Strip PUC's Oversight of Land Lines Critics Say*, L.A. TIMES (Apr. 13, 2012), <http://articles.latimes.com/2012/apr/13/business/la-fi-phones-deregulation-20120414> (on file with the *McGeorge Law Review*).

55. *See supra* text accompanying notes 11–14, 16 (revealing the free market emphasis of the FCC).

56. Maviglio, *supra* note 47.