BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of AT&T California (U 1001 C) and AT&T Corp. (U 5002 C) for Rehearing of Resolution M-4842.

APPLICATION OF AT&T CALIFORNIA (U 1001 C) AND AT&T CORP. (U 5002 C) FOR REHEARING OF RESOLUTION M-4842

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Pursuant to Public Utilities Code Section 1731(b)(1) and Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission[1] ("Commission"), and Rule 8.1 of General Order 96-B,[2] Pacific Bell Telephone Co. d/b/a AT&T California (U 1001 C) and AT&T Corp. (U 5002 C) (collectively "AT&T") respectfully submit this application for rehearing of Resolution M-4842 ("Resolution") issued on April 17, 2020. The Resolution imposes obligations on landline and VoIP telecommunications service providers, including mandatory waiver of certain service fees, that are contrary to law. AT&T requests that rehearing be granted, and those obligations be removed.

I. INTRODUCTION

As previously reported to the Commission,[3] AT&T is attuned to the unprecedented and unique pressures imposed on Californians by the COVID-19 pandemic and the related shelter-in-place orders throughout the state, causing many people to suffer a loss or reduction in income,

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[1] CAL. CODE REGS. tit. 20, § 16.1. This Application is timely filed pursuant to *id.* § 16.1(a).

[2] Rule 8.1 of General Order 96-B provides that "[t]he utility submitting an advice letter, any person submitting a protest to the advice letter, and any person who commented on a draft or alternate resolution under Rule 14.5 of the Rules of Practice and Procedure may apply for rehearing of a resolution." Pursuant to Public Utilities Code Section 311(g)(2) and Rules 14.6(a)(1) and (a)(2) of the Commission's Rules of Practice and Procedure, the Commission waived the comment period thereby preventing AT&T from commenting on the draft resolution.

[3] *See e.g.*, Advice Letter No. 48336 of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C), submitted May 1, 2020; Advice Letter No. 4346 of AT&T Corp. (U 5002 C), submitted May 1, 2020; Advice Letter No. 171 of AT&T Mobility, submitted May 1, 2020; Advice Letter No. 6 of Cricket Wireless LLC, submitted May 1, 2020. *See also* Letter from Brenda Clark, AT&T Regulatory Affairs Director, to Robert Osborn, CPUC Communications Division Director (March 18, 2020) (responding to request for information re. AT&T response to COVID-19 crisis as it relates to health and safety of AT&T employees); Email from Brenda Clark, AT&T Regulatory Affairs Director, to Michael Minkus, CPUC Policy Advisor, and Robert Osborn, CPUC Communications Division Director (March 24, 2020) (response to Requests for Information on Providers' Activities related to COVID-19); Letter from Fassil Fenikile, AT&T Regulatory Affairs Asst. Vice President, to Marybel Batjer, CPUC President, et al., (March 28, 2020) ("AT&T's Customer Protections in Response to COVID-19 Health Crisis"); Letter from Fassil Fenikile to Robert Osborn, CPUC Communications Division Director (May 1, 2020) (describing AT&T's broadband offerings for low-income eligible households).

as recognized by Governor Gavin Newsom's March 4, 2020 state of emergency proclamation. In response, AT&T has acted swiftly to provide customer relief and financial support for initiatives and organizations to help Californians as demonstrated by its commitment to FCC Chairman Pai's Keep Americans Connected Pledge, waiving late payment fees and allowing home phone, internet, and postpaid wireless customers experiencing economic hardship due to COVID-19 up to 90 days to pay full past due balances in addition to other measures. AT&T makes significant voluntary efforts to ensure the welfare of its customers during disasters and emergency events such as the COVID-19 pandemic, including the types of measures listed in the Resolution and others, and devotes significant human resources, equipment, and support as part of its commitment to its customers and the State of California.

While AT&T supports appropriate actions by the Commission that are within its lawful authority to assist those harmed by the COVID-19 pandemic, the Commission's mandate of certain requirements in the Resolution constitutes legal error that should be corrected upon rehearing. Granting rehearing will not harm consumers. As described above, AT&T proactively and voluntarily took actions, beyond those imposed by the Resolution, to address the impact of COVID-19 on its consumers, well before the Commission adopted the Resolution.

AT&T also works collaboratively with the Governor's office and the California Office of Emergency Services ("Cal OES"), the Commission, and other stakeholders, as part of the California Utilities Emergency Association ("CUEA") to determine how best to ensure the public, first responders, and governmental agencies have the necessary access to communications services during disasters or emergencies. This coordinated, flexible approach

allows AT&T to best fulfill its goal as a corporate citizen to provide consumer assistance in each circumstance as part of supporting the State's response to emergencies.[4]

Acknowledging that disaster preparedness requires collaboration between the public and private sectors, the California Emergency Services Act ("ESA") provides that humanitarian assistance to the public by private entities during states of emergency is to be voluntary, not compelled.[5] The Resolution, however, seeks to turn voluntary aid efforts by landline and VoIP communications providers into mandates. That creates legal problems. In particular:

- The requirements imposed on landline communications providers exceed the Commission's authority, because they conflict with and infringe on the authority the Legislature gave to the Governor and Cal OES under the ESA. The Commission's attempt to regulate in an area where authority has been delegated to others is improper, as the Commission has recognized in the past.
- The requirements compel landline carriers to provide various products and services for free, for a year or more, which creates an unconstitutional taking.
- The requirements relating to messaging services (voicemail) are preempted because voicemail is an information service, not a telecommunications service, and therefore is not subject to common-carrier-type state regulation.
- The requirements related to inside wiring and jacks are unlawful because inside wiring is competitive and deregulated, and the Resolution offers no reason for re-regulating it.
- The obligation to abide by all the requirements through April 16, 2021, "with an option to extend,"[6] is neither explained nor supported by any record evidence or legal authority.
- The Resolution errs in treating VoIP service as a regulable telephone service.
- Federal law precludes the Commission's extension of public utility rate regulation to VoIP service.

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[4] *See e.g., AT&T Initial Comments*, Rulemaking (R.) 18-03-011, at 4 (May 2, 2018). ("AT&T's method of deploying its consumer assistance, leaving it to people with actual knowledge of the effects of a disaster on its network and its customers and their community, best serves the public.").

[5] Gov. Code § 8588.1(b) ("All participation by businesses and nonprofit associations in this program shall be voluntary.").

[6] Resolution M-4842 at 4.

- The Commission does not have jurisdiction under federal law to impose the Telephone Requirements VoIP providers.

AT&T respectfully requests that the Commission grant rehearing and remove these obligations. Rather, consistent with Government Code Section 8588.1's mandate that "[a]ll participation" by private businesses in emergency preparedness and response programs "shall be voluntary," the requirements at issue here should be classified as recommendations that landline and VoIP providers may follow on a voluntary basis.

I. BACKGROUND

The Resolution imposes the following requirements ("Telephone Requirements") on "facilities based and non-facilities-based landline providers (*e.g.*, 9-1-1/E9-1-1 providers, LifeLine providers, VoIP providers, COLRs, and other landline providers)," related to the COVID-19 pandemic:

> 1. Waiver of one-time activation fee for establishing remote call forwarding, remote access to call forwarding, call forwarding features and messaging services;
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> 2. Waiver of the monthly rate for one month for remote call forwarding, remote access to call forwarding, call forwarding, call forwarding features, and messaging services;
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> 3. Waiver of the service charge for installation of service at the temporary or new permanent location of the customer and again when the customer moves back to the premises;
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> 4. Waiver of the fee for one jack and associated wiring at the temporary location regardless of whether the customer has an Inside Wire Plan;
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> 5. Waiver of the fee for up to five free jacks and associated wiring for Inside Wiring Plan customer upon their return to their permanent location;
>
> 6. Waiver of the fee for one jack and associated wiring for non-Plan customers upon their return to their permanent location.[7]

[7] Resolution M-4842 at 8.

Communications providers "shall retroactively apply [these measures] from March 4, 2020"[8] "through April 16, 2021, with an option to extend."[9] The Resolution points to no statute or order that authorizes the Commission to impose these requirements.

II. ARGUMENT

A. The Telephone Requirements are Unlawful for Several Reasons

As relevant here, California recognizes two separate limitations on agency action. "First, agency action must 'be within the scope of authority conferred' by the Legislature, and cannot be inconsistent with its authorizing statutes."[10] "Second, even if an agency action is consistent with its authorizing statutes, the action may still be deemed void if it conflicts with another statute."[11] The Telephone Requirements run afoul of both limitations, because, as explained below, the ESA creates a comprehensive statutory scheme to address states of emergency and confers on the Governor's office all emergency powers provided by the Act. Under the ESA, the Commission does not have authority to impose requirements relating to a state of emergency unless and until the Governor's office expressly authorizes it do so, as discussed below. While the Resolution points to Governor Gavin Newsom's Executive Order N-28-20 as "requesting that the Commission monitor the measures undertaken by public and private utility providers to implement customer service protections in response to COVID-19,"[12] that Executive Order does

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[8] Resolution M-4842 at 12.

[9] *Id*. at 4.

[10] *County of San Diego v. Bowen*, 166 Cal.App.4th 501, 508 (2008).

[11] *Id.*

[12] Resolution M-4842 at 2.

not authorize the Commission to impose the Telephone Requirements.[13] The Commission therefore did not have authority to issue the Telephone Requirements here.

1. The ESA Creates a Comprehensive Statutory Scheme That Assigns Authority for Responding to Emergencies to the Governor's Office

The ESA declares that it is the responsibility of the state to "mitigate the effects of natural, manmade, or war-caused emergencies . . . and generally to protect the health and safety and preserve the lives and property of the people of the state."[14] To "ensure that preparations within the state will be adequate to deal with such emergencies," the ESA "provide[s] for the assignment of functions to state entities to be performed during an emergency and for the coordination and direction of the emergency actions of those entities."[15] Specifically, the ESA confers on the Governor's office all the emergency powers provided by the ESA.[16] The Governor is responsible for declaring states of emergency[17] and coordinating all efforts to respond to states of emergency, including the development of a single State Emergency Plan, as well as coordination with political subdivisions of the state, other states, and the federal government.[18]

The ESA provides that *the Governor* "may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter,"[19] including "whenever

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[13] Executive Order N-28-20, available at https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf.

[14] Gov. Code § 8550.

[15] Gov. Code § 8550(c).

[16] Gov. Code §§ 8550(a), 8565.

[17] Gov. Code §§ 8625, 8558.

[18] Gov. Code § 8569.

[19] Gov. Code § 8567(a).

practicable" those orders and regulations that can be "prepared in advance" of an emergency.[20] The ESA lists actions the Governor may take in the event of an emergency, including "[a]scertain the requirements of the state" for "necessities of life" and "[p]lan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for that use."[21]

The ESA creates Cal OES and makes it "responsible for the state's emergency and disaster response services for natural, technological, or manmade disasters and emergencies, *including responsibility for activities necessary to prevent, respond to, recover from, and mitigate the effects of emergencies and disasters* to people and property."[22] The Governor "shall assign all or part of his or her powers and duties . . . to the Office of Emergency Services."[23] The Governor also "*may* assign to a state agency any activity concerned with the mitigation of the effects of an emergency of a nature related to the existing powers and duties of such agency," at which time it shall "become the duty of such agency to undertake and carry out such activity on behalf of the state."[24] The Governor, however, assigns such authority to state agencies as needed for specific disasters, and has not assigned the Commission any blanket authority to impose requirements on telephone corporations regarding all declared states of emergency.

Consistent with the ESA, the key planning documents for responses to emergencies and disasters confirm that lead authority is vested in entities other than the Commission. The State of California Emergency Plan (dated October 2017) does not authorize the Commission to impose

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[20] Gov. Code § 8567(c).

[21] Gov. Code § 8570(a), (b), (i), (j).

[22] Gov. Code § 8585(e) (emphasis added).

[23] Gov. Code § 8586.

[24] Gov. Code § 8595.

the requirements at issue here. The Plan lists the California Natural Resources Agency – not the Commission – as the lead agency to "[p]rovide resources and support to responsible jurisdictions and in partnership with the private sector to restore gas, electric, water, wastewater and telecommunications."[25] The Plan also lists the California Utilities Emergency Association ("CUEA") – not the Commission – as one of the lead entities to "[p]reserve[] California's infrastructure, including transportation systems, energy systems, utilities, dams, and other critical components" and states that the CUEA "[s]upports and sustains the personnel required to operate and maintain the physical infrastructure" during a state of emergency.[26]

Similarly, the Commission's Internal Emergency Response Plan and Protocols (dated October 2015) recognizes the leading role of OES and the Natural Resources Agency, and also recognizes the Commission's limited support functions: "In California, overall the Governor's Office of Emergency Services . . . coordinates emergency response."[27] "The Emergency Services Act describes emergency management responsibilities of state agencies," and "[f]or the major industries regulated by the CPUC, the Statewide Emergency Plan lists the California Natural Resources Agency as 'lead' statewide."[28] In addition, "[a]s of October 2013, the Statewide Emergency Plan delegates much of the CPUC's role to the [CUEA] as the supporting

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[25] Cal OES, *State of California Emergency Plan 2017*, at 93, (2017), https://www.caloes.ca.gov/PlanningPreparednessSite/Documents/California_State_Emergency_Plan_2017.pdf.

[26] *Id.* at 89.

[27] CPUC, *Internal Emergency Response Plan and Protocols Roles and Responsibilities During an Emergency or Catastrophic Event*, at 5 (2015), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Safety/Safety%20Action%20Plan%20Emergency%20Response%20October%202015%20v1-2_2.pdf.

[28] *Id.*

organization to Cal OES for gas, electric, water, wastewater, and telecommunication utilities."[29] And while the "CPUC requires each utility to have an emergency operations plan, *a utility, as the operator of the system, is in the best position to assess the damage to its infrastructure and to formulate and to execute restoration plans*."[30] The plan further states that "[d]uring an emergency, *the CPUC shall not micro-manage a utility and its emergency response*."[31]

2. The Telephone Requirements Interfere with and Undermine the Comprehensive Scheme Created by the ESA

Agencies have only such power as is delegated to them by law.[32] Accordingly, agencies cannot assume or exercise authority that has been assigned to another arm of government. As the California Supreme Court stated in *Bagley v. City of Manhattan Beach*, "[w]hen the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization."[33] Many other cases apply the same principle.[34]

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[29] *Id.* at 6.

[30] *Id*. at 3 (emphasis added).

[31] *Id.* at 14 (emphasis added).

[32] *County of San Diego*, 166 Cal.App.4th at 508.

[33] *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 24 (1976).

[34] *Security National Guaranty, Inc. v. California Coastal Com.*, 159 Cal.App.4th 402, 418-19 (2008) (California Coastal Commission did not have authority to designate property as an environmentally sensitive habitat area (ESHA) because that designation affected an amendment to a city's local coastal program (LCP), and the Coastal Act assigns the task of drafting and amending the content of an LCP exclusively to the local government); *Yu-Ling Teng v. District Director, U.S. Citizenship and Immigration Services*, 820 F.3d 1106, 1109 (9th Cir. 2016) (where Immigration Act of 1990 vests "sole authority to naturalize persons as citizens of the United States" to the executive branch/Attorney General, including authority "to correct, reopen, alter, modify, or vacate an order naturalizing the person," federal courts do not have authority to amend certificates of naturalization); *U.S. v. Maes*, 2007 WL 611246, at *1 (E.D. Cal. 2007) (Veterans' Administration could not impose penalties for possession of alcohol or drugs where authority in that area had been given to Congress); *National Ass'n of Regulatory Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976) ("[T]he allowance of 'wide latitude' in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority.").

The Commission's imposition of the Telephone Requirements here, however, violates that principle by regulating in an area reserved to Cal OES. While the Resolution does not cite any enabling statute authorizing the Commission to impose the Telephone Requirements, the Resolution purports to "apply the customer protection measures adopted in …D.19-08-025" in which the Commission contends that it has authority to impose the Telephone Requirements under Section 451 of the Public Utilities Code.[35] But while Section 451 or other provisions may give the Commission broad authority, they cannot allow the Commission to override the Legislature's choice to delegate complete, specific authority regarding emergencies to Cal OES, which takes precedence over the general authority regarding public utilities granted by Section 451.[36] As the California Court of Appeals has explained, "even if an agency action is consistent with its authorizing statutes, the action may still be deemed void if it conflicts with another statute."[37] To the extent the Commission intends to rely on Section 451 to justify the Resolution's mandates, this is an improper attempt to rely on the general authority under Section 451 conferred upon the Commission as an end run around the comprehensive authority over public utilities' response to emergencies that the Legislature granted to Cal OES in the ESA.[38] That is unlawful.

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[35] *Decision Adopting an Emergency Disaster Relief Program for Communications Service Provider Customers*, Decision (D.)19-08-025 at 32.

[36] Code Civ. Proc. § 1859; Civil Code § 3534; *People v. Kennedy*, 168 Cal.App.4th at 1223, 1239 (2009).

[37] *County of San Diego,* 166 Cal.App.4th at 508.

[38] Nor is there any argument that Section 451 deals with public safety and therefore authorizes the Telephone Requirements as an exercise of "police power." *See* D.19-08-025 at 33. Although some cases note that *the state* can establish regulation of public utilities as an exercise of its "police power" (and Article XII of the California Constitution), they do not say that the Commission *itself* has "police power." *E.g.*, *Pac. Tel & Tel. Co. v. Superior Court*, 60 Cal. 2d 426, 428 (1963). Rather, it is well-established that the scope of the Commission's authority is defined and limited by the authority the Legislature chooses to delegate to it by statute. *Assembly of State of Cal. v. Pub. Util. Comm'n*, 12 Cal. 4th 87, 103-04 (1995).

3. The Resolution Is an Unexplained Departure from Precedent

Consistent with the law, the Commission previously declined to exercise jurisdiction over matters covered by the ESA, precisely because the ESA vests primary responsibility for coordinating and developing emergency responses with the Governor and the Cal OES, and not with the Commission. The Resolution here is directly inconsistent with that prior ruling, yet the Commission does not explain (or even address) that prior ruling. Agency orders that depart from precedent without providing a reasoned basis for doing so are unlawful.[39]

In Decision 86192, a petition asked the Commission to issue a general order to require each electrical utility within the state, once a year, to include with every customer's periodic billing statement instructions explaining emergency steps that the customer should take in case of a nuclear incident at a facility owned or operated by a utility in the state.[40] After noting its "broad supervisoral and regulatory" authority over public utilities under statutes like Sections 451 or 701,[41] the Commission explained that it always must view those powers "against other relevant legislative enactments, and may, after doing so, sometimes either share its jurisdiction with other agencies – as in the air pollution field, and as in some aspects of the health and safety

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With regard to emergency preparedness and response, the Legislature delegated authority to other agencies.

[39] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981 (2005) (an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."). An arbitrary and capricious regulation of this sort is itself unlawful. *See United States v. Mead Corp.,* 533 U.S. 218, 229-230 (2001).

[40] *In re Comm'n Declined to Exercise Jurisdiction*, Decision 86192, 80 CPUC 290, 1976 WL 36471, *1 (Aug. 3, 1976).

[41] *Id.* at *2.

fields – or, as here, refrain from attempting to exercise jurisdiction at all, where to do so would be improper."[42]

The Commission explained that "[u]nder well-established principles of statutory interpretation," the "specific provisions" of the ESA "will govern in respect to that subject,[43] as against any general provision for that subject such as might logically be *inferred* from a liberal reading" of §§ 451, 701, and 768 of the Public Utilities Code – "although the latter, standing alone, would have been broad enough to include the subject to which the more particular provisions relate."[44] The Commission explained that it must assume the Legislature was "aware of existing related delegation of supervisory and regulatory authority to this Commission," and that there was no evidence the Legislature contemplated "overlapping or duplicated responsibilities" "in this critical and highly technical area."[45] Instead, "the evidence is that the Legislature intended to centralize responsibility in the Governor's office."[46] And "whereas here, the Legislature has enacted a comprehensive statutory scheme in a highly technical area, providing for the preparation and adoption of emergency disaster programs, including evacuation; has enacted specific lines of authority to coordinate and disseminate public information; and has lodged this responsibility in the Governor and another state agency, it is clear that it *would be an act in excess of our jurisdiction for this Commission to inject itself into*

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[42] *Id.* at *5.

[43] In that instance, the "subject" covered by the ESA was dissemination of instructions to the public in response to a nuclear emergency or disaster. *Id*. at *4.

[44] *Id.* at *4.

[45] *Id.* at *4.

[46] *Id.* at *4.

that area."[47] Similarly, Decision 13-07-019, the Commission stated that "while the Commission's public safety duties and authorities are broad, our regulatory reach has its limits" and recognized that where authority over a subject or area has been granted to another agency, the Commission cannot assert power over the same subject or area, but rather must remain within the limits of the authority actually delegated to it.[48]

The situation here is the same, and the Telephone Requirements are every bit as much an act in excess of the Commission's jurisdiction. The only difference here is that the Commission reached the entirely opposite result, deciding that it could regulate and impose emergency-response mandates in the area where the ESA delegates full authority to the Governor and Cal OES. Yet the Resolution does not acknowledge, discuss, or distinguish the Commission's own prior, on-point ruling, much less provide a reasoned basis for departing from it. That unexplained departure from precedent is legal error.[49]

B. The Telephone Requirements Each Create an Unconstitutional Taking

All six of the Telephone Requirements would obligate landline and VoIP carriers to waive fees for unregulated products or services for which customers otherwise would have to pay.[50] In other words, they require landline and VoIP carriers to provide something for nothing.

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[47] *Id.* at *5 (emphasis added). The Commission noted that the policy statement of the ESA indicates that "*all* emergency functions of the State. . . are to be coordinated through the Office of Emergency Services." *Id.* at n.10 (internal quotation marks omitted).

[48] *Decision to Extend Critical Emergency Access Protections of Enhanced 9-1-1 Provisioning to Business Customers and Multi-Line Telephone System Users in California*, Decision (D.) 13-07-019 at 27; *see also, id*. ("[P]rimary responsibility for the operation and maintenance of the 9-1-1 system may rest with other state agency(ies) such as the California Technology Agency, not to the Commission. Thus, we must acknowledge that the Commission's ability to fully effectuate an Enhanced 9-1-1 solution in California is limited to those actions that fall within the scope of the Commission's authority.").

[49] *See* cases cited *supra*, n.37.

[50] Resolution M-4842 at 8.

While landline and VoIP providers can and do voluntarily provide such benefits to customers during emergencies and disasters, forcing them to do so at the compulsion of the state is an unconstitutional taking, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Indeed, the Telephone Requirements are a textbook example of an unconstitutional appropriative taking (one in which the government appropriates private property by compelling a company to provide a service or produce an output with no compensation).[51] The Legislature implicitly recognized this in its enactment of the ESA, which expressly requires that when the government requests or requires private entities to provide services to the public in the event of an emergency – which is precisely what the Telephone Requirements do – those private entities must be compensated by the state.[52] The Resolution, however, would expressly prohibit landline and VoIP providers from charging for the products and services they would be compelled to provide under the Telephone Requirements.

What the Resolution does is no different from requiring Apple to provide free repair service to all iPhone users during a state of emergency, regardless of whether the user purchased

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[51] *See, e.g.*, *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920) (company could not be compelled to operate railroad where it could not do so without a loss); *Standard-Vacuum Oil Co. v. United States*, 127 F. Supp. 195, 196-97 (Ct. Cl. 1955) (government liable to oil company for products appropriated to government's use); *Chi. League Ball Club v. City of Chicago*, 77 Ill. App. 124, 138-39 (Ill. App. 1898) ("[W]here private property is pressed into the public service, or is seized and appropriated to the public use, in an emergency at a time of impending public danger, then the government is bound to make restitution to the owner.").

[52] Gov. Code § 8572 provides:

> In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state *and the state shall pay the reasonable value thereof*. (Emphasis added).

See also, Gov. Code § 8570(i) (the Governor may "[p]lan for the use of any private facilities, services, and property and, when necessary, and when in fact used, *provide for payment* for that use under the terms and conditions as may be agreed upon.") (emphasis added).

an Apple Care plan, or requiring Best Buy to repair or replace computers and televisions for no charge regardless of whether the customer had purchased a product replacement plan. Either of those companies could voluntarily take those actions in response to an emergency, but the government could not *compel* them to do so, much less to do[53] so without compensation.[54] The situation is no different with regard to the Telephone Requirements.

The Resolution claims to simply "extend" the customer protection measures established in D.19-08-025 to the COVID-19 state of emergency.[55] While the Resolution was not issued as part of R.18-03-011, the Emergency Disaster Response rulemaking in which D.19-08-025 was issued, the Resolution nevertheless fails to acknowledge the multiple applications for rehearing of D.19- 08-025 filed by CTIA, AT&T, and the VoIP Coalition objecting to the Commission's extra-jurisdictional mandates.[56] Like D. 19-08-025, the Resolution imposes obligations to provide, for free, and for a year or more, services that normally carry a charge. And like D.19-08-025, the Resolution does not justify an unconstitutional taking,[57] nor does it address the takings arguments

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[53] Gov. Code § 8588.1 provides, in part:

> (a) The Legislature finds and declares that this state can only truly be prepared for the next disaster if the public and private sector collaborate.
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> (b) The office may, as appropriate, include private businesses and nonprofit organizations within its responsibilities to prepare the state for disasters under this chapter. *All participation by businesses and nonprofit associations in this program shall be voluntary*. (Emphasis added).

[54] Gov. Code § 8572.

[55] Resolution M-4842 at 4.

[56] *Application of CTIA And AT&T Mobility For Rehearing Of Decision 19-08-025*, Rulemaking (R.) 18-03-011 (Sept. 23, 2018); *AT&T California (U 1001 C) and AT&T Corp. (U5002 C) Application for Rehearing of Decision 19-08-025*, Rulemaking (R.) 18-03-011 (Sept. 23, 2018); and *VoIP Coalition Application for Rehearing of Decision 19-08-025, Decision Adopting an Emergency Disaster Relief Program for Communications Service Provider Customers,* Rulemaking (R.) 18-03-011 (Sept. 23, 2018).

[57] *Encino Motorcars*, 136 S. Ct. at 2126 ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.").

that AT&T and others have made throughout R.18-03-011.[58] While providers already have voluntarily provided the relief described in the Telephone Requirements, the Commission cannot claim there is no harm in making the requirements mandatory. Such reasoning does not hold up. There is a large difference between voluntary actions and actions compelled and enforced by the government.

C. The Obligations Regarding Messaging Services and Charges Are Preempted

The first and second Telephone Requirements require telephone corporations to waive the one-time installation fee and the monthly charge for "messaging services," meaning voicemail and related services. Messaging services like voicemail, however, have long been classified as "information services" (or, before that, as "enhanced services").[59] Information services are entirely distinct, *i.e.*, "mutually exclusive," from telecommunications services.[60] Because of that difference, state commissions are preempted from subjecting information services to economic or common-carrier-type regulation.

The Ninth Circuit recognized long ago that "[f]rom the inception of the enhanced services industry [the former name for "information services"], the FCC has declined to regulate

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[58] *See*, *e.g.*, *Comments of AT&T on Proposed Decision*, Rulemaking (R.) 18-03-011, at 11-12 (Aug. 5, 2019); *Application of AT&T California (U 1001 C) and AT&T Corp. (U 5002 C) for Rehearing of Decision 18-08-004*, at 12-14 (Sept. 19, 2018).

[59] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 F.C.C.2d 384, at ¶ 97 and n.34, ¶ 104 (1980) ("*Computer II*"), *aff'd sub nom. Computer and Commc'n Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[60] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, at ¶ 43 (1998) ("[T]elecommunications services and information services are mutually exclusive categories."); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012, at ¶ 34 n.50 (1998) ("Under the 1996 Act, any service with a communications component must be either a 'telecommunications service' or an 'information service' (but not both)."); Cal. Rev. & Tax. Code § 42004(k) (the terms "telecommunications services" and "information services" have the same meaning as under federal law).

it in the interest of promoting competition among providers of enhanced services."[61] In 1996, Congress made several additions to the federal Communications Act to reinforce this point. To begin with, it "codif[ied] the Commission's decades old distinction" between what are now called telecommunications services and information services, and thereby "indicated, consistent with the [FCC's] long-standing policy of non-regulation, that information services not be regulated."[62] Congress also added Section 153(51), which states that a communication service provider "shall be treated as a common carrier under [the federal Communications Act] *only* to the extent that it is engaged in providing *telecommunications services*," as opposed to information services.[63] Interpreting this provision, the FCC recently told the Eighth Circuit that, by virtue of Section 153(51), "the Communications Act expressly forbids Federal or State common-carrier regulation of information services."[64] Congress also added Section 230 to the federal Communications Act in 1996, declaring a federal policy "to preserve the vibrant and competitive market that presently exists for the Internet and other interactive computer services," including "any information service," "unfettered by Federal or State regulation."[65] Section 230

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[61] People of the State of California v. FCC, 39 F.3d 919, 923 (9th Cir. 1994); see also Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 F.C.C.2d 384, at ¶¶ 7, 114 ("enhanced services should not be regulated under the [federal Communications] Act" and must be free from public utility regulation).

[62] Vonage Holdings Corp., 19 FCC Rcd. 22404, at n.118 (2004) ("Vonage Order"); Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 FCC Rcd. 3307, at ¶¶ 16-17 and n.64 (2004) ("Pulver Order").

[63] 47 U.S.C. § 153(51) (emphasis added).

[64] Brief of the Federal Communications Commission as Amicus Curiae in Support of Plaintiffs-Appellees, filed in Charter Advanced Services (NM), LLC v. Lange, 8th Cir. No. 17-2290, at 11, 2017 WL 4876900 (filed Oct. 27, 2017); id. at 10 ("Under the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation."). See also Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) ("[State] regulations that have the effect of regulating information services are in conflict with federal law and must be pre-empted.").

[65] 47 U.S.C. § 230(b)(2) and (f)(2).

demonstrates that "federal authority [is] preeminent in the area of information services" and that information services "should remain free of regulation."[66] Thus, "any state regulation of an information service conflicts with the federal policy of nonregulation."[67]

The requirements imposed by the Resolution are economic common-carrier-type regulation, in that they apply to all "telephone corporations" in California and are blanket requirements regarding the rates, terms, or conditions for providing service by any communications provider that offers service to the general public.[68] That is contrary to the established national policy against such regulation of information services, and Telephone Requirements 1 and 2 are therefore preempted.

D. The Inside Wiring Requirements Exceed the Commission's Authority

Telephone Requirements 4 through 6 require landline providers to waive fees for inside wiring and jacks for all customers at their temporary location (even if the customer has not purchased an Inside Wiring Plan) (no. 4) and for inside wiring and jacks for all customers upon return to their permanent location (even if the customer has not purchased an Inside Wiring Plan) (nos. 5 and 6).[69] Those requirements exceed the Commission's authority.

Beginning in 1997, the FCC took a number of actions "to increase competition for inside wiring services [and] to promote entry into the market for those services."[70] In 1999 and 2004, this Commission held that inside wire service was "fully competitive" for AT&T and Verizon

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[66] *Pulver Order*, 19 FCC Rcd. 3307, at ¶ 16.

[67] *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

[68] *See Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶ 195 n.730 (2018) (listing examples of "public utility-type" regulation), *appeal pending*.

[69] Resolution M-4842 at 4.

[70] *Detariffing the Installation and Maintenance of Inside Wiring*, 7 FCC Rcd. 1334, at ¶ 3 (1992).

and made it a "Category III" service under the New Regulatory Framework, subject only to a rate ceiling.[71] And then in 2006, the Commission fully deregulated rates for inside wiring repair: "[N]either statutes nor market conditions make it necessary to continue price regulation for any of the services 'associated' with basic service. In particular, we see no reason to continue price regulation of . . . inside wire maintenance plans."[72]

States have recognized that, once inside wire plans are deregulated due to competition, state commissions have no authority to re-regulate them and set or control rates.[73] Yet that is exactly what the Commission is doing by requiring certain providers to provide inside wire service, even if temporarily, for free to customers that otherwise would have to pay something for it. Moreover, the Resolution offers no rationale for its abrupt departure from precedent and its re-regulation of inside wire repair, nor does it acknowledge the departure from past practice, even though the departure undermines providers' justified reliance on inside wire plans being

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[71] Application of Verizon California Inc. (U 1002 C), a Corporation, for Authority to Re-Categorize Inside Wire Maintenance Plans and Billable Repair Service From Category II to Category III Service Offerings, Decision (D.) 04-05-048, 2004 Cal. PUC LEXIS 250, Conclusion of Law 15 (Cal. P.U.C. 2004); Application of Pacific Bell (U 1001 C), a Corporation, for Authority to Categorize Business Inside Wire Repair, Interexchange Carrier Directory Assistance, Operator Assistance Service and Inmate Call Control Service as Category III Services, Decision (D.) 99-06-053, 1999 Cal. PUC LEXIS 309, Conclusion of Law 12 (Cal. P.U.C. 1999).

[72] Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities, Decision (D.) 06-08-030, 2016 Cal. PUC LEXIS 367, at 156 (2006).

[73] *Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 275 (Mich. 2008) ("[T]o the extent the order prohibits SBC from charging for services associated with a problem caused by inside wiring, it is improper. . . .The PSC cannot regulate that service and must amend its order to eliminate that improper regulation."); *Wang v. BellSouth Telecomms., Inc.*, 2007 WL 3012647, at *1 (N.C.U.C. 2007) ("Inside wiring plans are not regulated by the Commission. . . . Because the Commission does not regulate inside wiring plans, . . . [t]he Commission lacks the jurisdiction to enforce any action for exemption from charges under this specifically nonregulated service."); *Decker v. BellSouth Telecomms., Inc.*, 2006 WL 1458013, at *1 ("Complainant takes issue with the amounts that BellSouth billed him for repairs of telephone jacks inside his residence. Such equipment and the charges for servicing such equipment, however, are not subject to this Commission's jurisdiction [because it had ordered them detariffed]. . . . As the charges that are the subject of the complaint are outside of our jurisdiction, we lack the authority to consider the complaint or to grant Complainant's requested relief.").

deregulated. That lack of explanation and conflict with past practice renders the inside wire requirements unlawful.[74]

In addition, the requirement to provide inside wire service for free to customers that do not have an inside wire plan is unlawful because it reduces the competitiveness of the market for inside wire repair. As a result of the decisions cited above, inside wire maintenance is a competitive service and not subject to rate regulation. Customers are free to buy such services from their local service provider, or from another entity, or not to buy a plan at all and pay for repairs on an as-needed basis. The Resolution, however, forces communications providers to provide the same "insurance" coverage to everyone at no charge. That makes inside wire plans less desirable because consumers know that in one of the situations where a plan would be most useful, a state of emergency, they will receive the same benefits as a subscriber regardless of whether they purchased an inside wire plan. That conflicts with the FCC's national policy of promoting competition in the provision of inside wire services,[75] which means it is preempted.[76]

E. Extension of the Telephone Requirements to VoIP Service Constitutes Legal Error Because This Action Exceeds the Commission's Jurisdiction as a Matter of State and Federal Law

The Resolution concludes that the Telephone Requirements shall apply to "facilities-based and non-facilities-based landline providers (*e.g.*, 9-1-1/E9-1-1 providers, LifeLine Providers,

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[74] *Encino Motorcars*, 136 S. Ct. at 2126 (to avoid being arbitrary and capricious, an agency departing from existing policy and practice must "display awareness that it is changing position," "show that there are good reasons for the new policy," and "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account") (internal quotation marks omitted).

[75] *Detariffing the Installation and Maintenance of Inside Wiring*, 7 FCC Rcd. 1334, at ¶ 3.

[76] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives).

providers of voice-over-internet protocol, Carriers of Last Resort, and other landline providers)."[77] As detailed below, the Resolution's extension of the Telephone Requirements to VoIP service exceeds the Commission's jurisdiction as a matter of state law, and is preempted by federal law. The Commission does not have jurisdiction over VoIP service – and may not lawfully regulate VoIP providers as public utilities.

1. VoIP Service Is Not a Telephone Service

Public utility regulation of VoIP service is preempted by federal law and the Commission cannot circumvent this preemption by addressing "VoIP providers" instead of VoIP service itself. Moreover, the Resolution may not rely on the flawed justification for asserting jurisdiction contained in D.19-08-025 which erroneously suggests that VoIP service is a telephone service by cobbling together selective portions of the Public Utilities Code while disregarding the overall statutory scheme and framework. Initially, D.19-08-025 states that (i) the Commission has broad jurisdiction over "telephone corporations" as "public utilities;"[78] (ii) "telephone corporations include every corporation … controlling … a telephone line;" and (iii) a "telephone line" is defined in terms of physical facilities that "facilitate communication by telephone," including conduits and poles, as well as real estate.[79] However, D.19-08-025 erroneously concludes that "the means by which a telephone corporation provides service –

[77] Resolution M-4842 at 7.

[78] D.19-08-025 at 9, citing Pub. Util. Code §§ 216 and 234.

[79] D.19-08-025 at 9, citing Pub. Util. Code § 233, which defines a "telephone line" as "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, or controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

analog, wireless technology or Internet protocol (IP) technology – does not affect whether the provider is a public utility telephone corporation."[80] This conclusion is legal error.

There is no support generally for the Commission to find that VoIP service provided over a telephone line is a "telephone service" subject to the Commission's jurisdiction under Pub. Util. Code §§ 216 and 234 as erroneously asserted in D.19-08-025. VoIP is an IP-enabled service. Internet protocol ("IP") is a communications protocol, which is a system of rules for data exchange by devices,[81] and thereby, VoIP is not the same as traditional voice wireline telephone service. Importantly, the Resolution fails to reflect that VoIP is not a service provided over a "telephone line," and instead requires a "broadband connection." Pub. Util. Code § 239(a) defines VoIP as follows:

> (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.

The Legislature enacted Pub. Util. Code § 239 in 2012, while the definition of "telephone line" was adopted in 1951[82] – more than 60 years earlier. This fact underscores the Legislature's intent to distinguish VoIP from traditional "communications by telephone" via a "telephone line." Closely related, the Resolution also ignores a fundamental component of the definition of

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[80] D.19-08-025 at 9.

[81] *See* Newton's Telecom Dictionary (definition of "protocol").

[82] Pub. Util. Code § 233 (Stats. 1951, c.764. 2032, § 233); Derivation Stats.1915, c.91, p. 115, § 2.

"telephone line" – the line must be used to "facilitate communication by *telephone"*[83] – *i.e.*, telephone service provided over the public switched telephone network.

The Commission itself previously has recognized as recently as six years ago that the provision of VoIP service does not in and of itself make an entity a "telephone corporation."[84] The Resolution fails to explain this stunning departure from Commission precedent – nor could it since the Commission's long-standing practices further confirm that the Commission does not have authority to regulate VoIP service.[85]

For example, unlike telephone corporations, VoIP providers have long operated in the state without obtaining certificates of public convenience and necessity ("CPCNs"), and the Commission has not taken any enforcement action against VoIP providers for operating without the requisite authority. The different legal status of VoIP providers and telephone corporations is even reflected in the legislative history of Section 710, in which the Senate Committee Report acknowledges that "[t]o date, the CPUC has declined from regulating VoIP service and making VoIP providers subject to the same regulations that are applicable to 'telephone corporations.'"[86] For all these reasons, it is legal error for the Resolution to assert jurisdiction over VoIP service as if it were a telephone service and that the Commission can regulate VoIP services in the manner set forth in the Resolution.

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[83] *Id.*

[84] D.14-01-036 at 20 (the Commission "has not deemed VoIP providers to be 'telephone corporations' under the Public Utilities Code."). *See also* D.09-08-029 at 44 ("[T]here may be other unregulated companies, such as Voice Over Internet Providers or VoIPs, that may operate under different safety regulations than telephone utilities.").

[85] The Commission cannot modify a prior decision without providing proper notice pursuant to Pub. Util. Code § 1708.

[86] Chapter 733, Stats. 2012 ("SB 1161"), § (1)(b) (emphasis added); *see also* Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing Apr. 17, 2012) ("Senate Committee Report") at 6.

2. Federal Law Precludes the Commission's Extension of Public Utility Rate Regulations to VoIP Service

By not addressing VoIP service and instead improperly regulating it as if it is a telephone service, the Resolution adopts of a number of public utility-style regulatory obligations that conflict with federal law and are therefore preempted. The Resolution specifies the mandatory "fees," "activation fees," "monthly fees" and "service charges" associated with certain aspects of VoIP service provisioned to customers impacted by a disaster as set out in the following table:[87]

VoIP Service Feature	**"Fee" or "Service Charge" Imposed by the Resolution**
"establishing remote call forwarding, remote access to call forwarding, call forwarding features and messaging services"	Activation fee must be $0.00
"one month for remote call forwarding, remote access to call forwarding, call forwarding, call forwarding features, and messaging services"	Monthly fee must be $0.00
"installation of service at the temporary or new permanent location of the customer and again when the customer moves back to the premises"	Service charge must be $0.00
"one jack and associated wiring at the temporary location regardless of whether the customer has an Inside Wire Plan"	Fee must be $0.00
"up to five free jacks and associated wiring for Inside Wiring Plan customer upon their return to their permanent location"	Fee must be $0.00
"one jack and associated wiring for non-Plan customers upon their return to their permanent location"	Fee must be $0.00

[87] *See* D.19-08-025 at 32.

Any extension of common carrier-type rate regulation to VoIP (which fee-waiver mandates necessarily entail) is precluded by federal law. While the Federal Communications Commission ("FCC") has not classified VoIP as either a telecommunications service or an information service, it has consistently rejected attempts to subject VoIP to the same regulatory regime as traditional telephone service and preempted state commissions from regulating VoIP as a public utility.[88] Moreover, a federal court of appeals recently held, "[i]n the absence of direct guidance from the FCC," that a fixed, interconnected VoIP service is an "information service" under the federal Communications Act.[89] Accordingly, the Eighth Circuit determined that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law."[90] Thus, the Resolution's attempt to regulate VoIP service directly conflicts with the FCC's deregulatory policy for information services and is preempted.[91]

This federal preemption broadly applies to any regulation of VoIP service, and is particularly applicable to "economic" regulations, such as "price control" and "the specification of both quality standards and conditions of service."[92] In a brief to the Eighth Circuit, the FCC

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[88] *See e.g.*, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 ¶ 1 & n. 78 (2004) ("Vonage Order"), aff'd, *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Pulver Ruling*, 19 FCC Rcd 3307 (2004).

[89] *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) (application for rehearing en banc denied; petition for certiorari pending sub nom. *Dan M. Lipschultz et al. v. Charter Advanced Services (MN)*, LLC, et al., Case No. 18-1386).

[90] *Id*. at 718 (quoting Minnesota Pub. Util. Comm'n v. FCC, 483 F.3d 570, 580 (8th Cir. 2007)). *See also California v. FCC*, 39 F.3d 919, 923 (9th Cir. 1994).

[91] *See Charter v. Lange*, 903 F.3d at 718-19 (rejecting Minnesota PUC's attempt to regulate Charter's Spectrum Voice VoIP service as a "telecommunications service").

[92] *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 450 ¶ 13 (1981). *See also*, *In re Restoring Internet Freedom,* Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 427-28 ¶ 195 (2018) (preempting "any state or local measures that would effectively impose …

explained that, "[w]hile the FCC has imposed certain non-economic obligations on VoIP service when necessary to address matters such as customer safety and network management, it has generally refrained from imposing economic regulation on VoIP."[93]

The FCC further stated that "[u]nder the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation," and that a state commission's "sweeping assertion of regulatory authority over VoIP service threatens to disrupt the national voice services market."[94]

Here, the Resolution is clearly preempted insofar as it specifically directs the fees and rates that VoIP service providers can charge customers for VoIP services under certain conditions, as set forth in the table above. Even if well-intentioned, these requirements amount to economic regulation and run afoul of both state and federal law.

F. The Duration of the Telephone Requirements Is Unsupported and Unlawful

The Resolution requires landline providers to comply with the Telephone Requirements for 12 months after a state of emergency is declared or for a period determined by Cal OES.[95] That duration requirement is unlawful and should be removed. The Resolution provides no

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'economic' or 'public utility-type' regulations" on non-telecommunications services like broadband service); *see also*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 975-76 (2005) (supporting preemption of common carrier requirements); *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003); *NARUC v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976); *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512, 541 ¶ 83 n.34 (1981) (supporting preemption of public utility-type regulation), *pets. for review denied, Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[93] Brief for FCC as Amicus Curiae in *Charter v. Lange* at 10 n.1 (Oct. 27, 2017), available at: https://docs.fcc.gov/public/attachments/DOC-347483A1.pdf ("*FCC Amicus Curiae Brief*"). In contrast to the public safety requirements that the FCC has adopted for interconnected VoIP (e.g., provision of E911 service), the Resolution imposes economic rate regulation on various fees and service charges without any direct connection to customer safety.

[94] *Id*. at 10, 18.

[95] Resolution M-4842 at 4, 12.

rationale and cites no evidence for the presumptive 12-month period, which has no connection to any actual or expected duration of a state of emergency or the need for remedial measures. The length and scope of any customer assistance measures cannot be predetermined because each disaster is unique and calls for different levels and types of response. That makes the requirement arbitrary and capricious.

III. CONCLUSION

AT&T remains steadfast in its commitment to aid the public in times of disaster or emergency, as with the COVID-19 pandemic, but that aid must remain flexible to meet the unique needs of each emergency. Coordination with Cal OES, both directly and through CUEA, rather than regulatory mandates, will ensure the best preparation for and response to states of emergency. For all the reasons described herein, the Telephone Requirements in the Resolution should be removed.

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Respectfully submitted,

By: /s/

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