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OF THE STATE OF CALIFORNIA

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Application of CTIA for Rehearing of Resolution M-4842	Application No. _____ (Filed May 18, 2020)

APPLICATION OF CTIA AND AT&T MOBILITY 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] CTIA[3] and AT&T Mobility[4] files this Application for Rehearing ("Application") of Legal Division Resolution M-4842 ("Resolution"),[5] which was issued on April 16, 2020. The Resolution requires wireless carriers to implement measures that the Commission adopted in R.18-03-011 (the "Wireless Requirements")[6] in response to the recent declarations of a State of Emergency in California due to the COVID-19 pandemic.

I. INTRODUCTION AND SUMMARY

The wireless industry remains committed to responding quickly and constructively to all disasters affecting California consumers, and have done so in response to the COVID-19

[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 CTIA from commenting on the draft resolution.

[3] CTIA – The Wireless Association ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[4] AT&T Mobility refers to the following entities: New Cingular Wireless PCS, LLC (U 3060 C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U 3015 C).

[5] *Emergency Authorization and Order Directing Utilities to Implement Emergency Customer Protections to Support California Customers During the COVID-19 Pandemic*, Resolution M-4842 (issued April 17, 2020).

[6] *See* D.19-08-025, R.18-03-011 (Sept. 23, 2019) ("Decision").

pandemic. In particular, in response to the COVID-19 pandemic, wireless carriers in California have taken numerous steps, including voluntarily: suspending disconnections for nonpayment and late fees for customers affected by the pandemic; providing additional usage allowances (including additional voice minutes, text messaging, and megabytes of data); providing SIM cards, mobile device chargers, and other equipment to state and local government agencies and hospitals; and providing reduced-price data plans in partnership with schools to facilitate learning from home, especially for students that otherwise lack home Internet access.

Wireless carriers' relief measures are targeted to address the challenges facing California consumers as a result of the COVID-19 pandemic. Wireless carriers have implemented these measures voluntarily, and will continue to implement appropriate measures to assist consumers through this crisis, and future crises.

Although the Resolution states that it is intended to address the COVID-19 pandemic, it is not reasonably designed to do so, and is also unlawful for a number of reasons. The Wireless Requirements imposed by the Resolution, which are simply the requirements adopted in R.18-03-011,[7] are inapplicable to the circumstances of the COVID-19 disaster declaration. Indeed, the requirements adopted in R.18-03-011 are triggered only in response to disasters that "result[] in the loss or disruption of the delivery or receipt of utility service."[8] The COVID-19 crisis has caused many hardships, but a loss or disruption of wireless service has not been one of them. Nevertheless, the Resolution purports to apply the Wireless Requirements in this instance where they are not applicable. In addition, some of the requirements would be affirmatively

[7] *See* D.18-08-044, D.19-08-025.

[8] R.18-03-011, Ordering Paragraph 2; *see also* Resolution at 3 ("The customer protection measures adopted in R.18-03-011 apply in cases where a gubernatorial or presidential declared emergency relates to the *disruption or degradation of service*. The COVID-19 pandemic represents a different type of emergency….") (emphasis added).

counterproductive in the context of an infectious disease pandemic, such as providing Wi-Fi or charging stations – services that may encourage people to congregate in violation of social distancing mandates.

CTIA and AT&T Mobility have previously demonstrated that the Wireless Requirements are unlawful because they are preempted by federal law, constitute unconstitutional takings without just compensation, exceed the Commission's lawful jurisdiction, and were adopted without due process of law.[9] Nevertheless, despite having twice challenged the Commission's attempts to impose the Wireless Requirements, and despite the wireless carriers' desire to focus on operating their networks to continue serving customers during the current pandemic, CTIA and AT&T Mobility find it necessary to file the instant Application because the Resolution, like the Decision upon which it relies, is unlawful. Accordingly, CTIA and AT&T Mobility hereby reiterate their previously tendered arguments[10] regarding the unlawfulness of the Wireless Requirements, and urge the Commission to reconsider or entirely withdraw the Resolution.

II. THE WIRELESS REQUIREMENTS ARE UNLAWFUL

A. The Wireless Requirements Violate Title III of the Federal Communications Act of 1934, As Amended

Title III of the federal Communications Act of 1934, as amended (the "Communications Act"), makes clear that transmission on radio frequencies shall be governed exclusively by the federal government:

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[9] *See* Application of CTIA and AT&T Mobility for Rehearing of Decision 19-08-025, R.18-03-011 (Sept. 23, 2019) ("CTIA and AT&T Mobility Rehearing Application"); Application of CTIA and AT&T for Rehearing of Decision 18-08-044, R.18-03.011 (Sept. 19, 2018). This Application uses the same naming convention for the Commission's mandates as described in the CTIA and AT&T Mobility Rehearing Application, at 4, n. 14.

[10] CTIA and AT&T Mobility note for the Commission that the arguments presented in this Application are a nearly verbatim reiteration of the same arguments made in the CTIA and AT&T Mobility Rehearing Application.

> It is the purpose of this chapter … *to maintain the control of the United States over all the channels of radio transmission*…. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio … except under and in accordance with this chapter….[11]

Following this general reservation of exclusive jurisdiction over radio transmission, Congress vests the Federal Communications Commission ("FCC") with authority "from time to time, as public convenience, interest, or necessity requires"[12] to regulate use of radio spectrum in terms of the nature of service to be offered,[13] spectrum to be used,[14] transmission power,[15] times of operation,[16] location, areas, or zones of operation,[17] apparatus stations may use,[18] as well as jurisdiction over other many other matters, some of which are less relevant to the matter at bar.

When Congress devised a regulatory framework specific to mobile services, it reiterated the exclusivity of the FCC's jurisdiction initially articulated in Section 301. Addressing the preemption of state regulation of mobile services, the statute reads in pertinent part: "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[19] As addressed in more detail *infra*,

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[11] 47 U.S.C. § 301 (emphasis added).

[12] 47 U.S.C. § 303.

[13] 47 U.S.C. § 303(b).

[14] 47 U.S.C. § 303(c).

[15] *Id.*

[16] *Id.*

[17] 47 U.S.C. § 303(d) & (h).

[18] 47 U.S.C. § 303(e).

[19] *Id.* § 332(c)(3)(A).

pursuant to explicit Congressional legislation and the Supremacy Clause,[20] the FCC has exclusive jurisdiction under Title III of the Communications Act over the use of spectrum—including as relates to the time and location of operation, the operation and density of wireless facilities, the quality of service provided, and other service characteristics.[21]

In its exercise of this exclusive jurisdiction, the FCC has explicitly held that "local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network" due to preemption pursuant to Section 332.[22] To the extent wireless carriers would be required to satisfy the mandates represented by the Wireless Requirements, this would constitute exactly the type of impermissible state regulation of market entry that Section 332(c)(3)(A) prohibits.

As CTIA and AT&T Mobility have noted previously, the Seventh Circuit held in *Bastien* that the "[Communications A]ct makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure."[23] The Ninth Circuit cited *Bastien* with approval,[24] and found that "determinations of public interest, safety, efficiency, and adequate competition, [are] all inquiries specially within the expertise of the

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[20] U.S. CONST. art. VI (federal laws "shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the contrary nonwithstanding"). This "provides Congress with the power to pre-empt state law." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

[21] *See generally* 47 U.S.C. §§ 301, 303, 307, 308, 319, and 332.

[22] *See* Gonzales v. Oregon, 546 U.S. 243, 258-259 (2006) (explicitly citing the Communications Act as an example of a statute that grants the FCC authority to speak with the force of law via its rulemakings because it grants the FCC "broad power to enforce all provisions of the statute"; *see also* National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

[23] *Bastien v. AT&T Wireless Servs*., 205 F.3d 983, 988 (7th Cir. 2000).

[24] *Telesaurus VPC, LLC v. Power,* 623 F.3d 998, 1010-11 (9th Cir. 2010) (agreeing with *Bastien* that preemption under Section 332(c)(3)(A) is to be read broadly and the Communications Act's savings clause for state jurisdiction narrowly).

FCC."[25] Accordingly, the Commission cannot substitute its judgment for the FCC's regarding matters such as the required times of operation, location of transmitting and receiving antennas, mobile station locations, classes to be served, services to be offered, adequacy of coverage or capacity, or any other matters inherent or attendant to the FCC's exclusive authority over the use of spectrum.[26] Unfortunately, the Wireless Requirements do just these things.

As a result, the Wireless Requirements violate Title III of the Communications Act and constitute prohibited market entry regulation by imposing requirements regarding where and when to operate radio frequency equipment and what services to offer. The COW/COLT Requirement, Hot Spot Requirement, and Loaner Phone Requirement all usurp "the control of the United States over all channels of radio transmission,"[27] imposing obligations to transmit radio signals at particular *locations* or to operate transmitters or receivers at particular *times.* Again, such authority is vested exclusively in the FCC by the Communications Act. The Commission's imposition of requirements, however well intentioned, that dictate the placement and time of operation of radio transmitting devices, or the nature of service to be provided, intrudes on the FCC's exclusive authority over the use of spectrum and fundamentally substitutes the Commission's judgment for the FCC's regarding market entry requirements.

Location. The COW/COLT Requirement, Hot Spot Requirement, and Loaner Phone Requirement each dictate the location of transmission and reception antennas, including mobile stations—as detailed above, in violation of the exclusive vesting of such authority with the

[25] *Id.* at 1008. *See also* 47 U.S.C. § 301 (vesting FCC with discretion to regulate as the "public convenience, interest, or necessity requires….")

[26] *See Bastien* at 986 ("There can be no doubt that Congress intended complete preemption when it said 'no state or local government shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service'" (emphasis in original)).

[27] 47 U.S.C. §301.

FCC.[28] Specifically, the COW/COLT Requirement requires deployment and operation of mobile cell sites to areas defined by the Commission as having inadequate capacity. The Hot Spot Requirement requires that wireless licensees operate radio frequency transmitters "where impacted wireless customers seek refuge from fires." And the Loaner Phone Requirement requires operation of mobile stations at county and city shelters.

Accordingly, these three Wireless Requirements are all location of operation requirements—which can only be imposed by the FCC under its exclusive authority to regulate the use of radio frequencies, including determining market entry requirements. They substitute the Commission's judgment for the FCC's regarding how, when, and where to operate on radio frequencies—exactly the type of state regulation found to be preempted in *Bastien*.[29] And these three Wireless Requirements also substitute the Commission's judgment for the FCC's regarding whether operation on radio frequencies promotes the "public interest, safety, [and] efficiency."[30] Such are the very spectrum regulation and market entry "inquiries specially within the expertise of the FCC"[31] that the Commission is preempted from regulating.

Time of Operation. The FCC is vested with exclusive authority to determine the hours of operation for wireless service providers and, indeed, for all manner of radio communications.[32]

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[28] *Id.* §§ 301, 303(d) & (h), 307(b), 308(b), and 319(a).

[29] *See Bastien* at 989-90 (finding that coverage and signal reliability are matters reserved to the FCC alone for determination).

[30] *Telesaurus* at 1008. Among the justifications offered by the Commission were that it was acting to ensure wireless facilities are efficient and adequate, and promote public safety. D.19-08-025 at pgs. 10, 53, and 58. *See also* 47 U.S.C. § 301 (assigning to the FCC the obligation to regulate the use of radio spectrum "as public convenience, interest, or necessity requires").

[31] *Telesaurus* at 1008.

[32] 47 U.S.C. §§ 301, 303(c), 307(b), 308(b), and 319(a).

Indeed, the FCC has exercised its authority to regulate time of operation in many instances.[33] The Wireless Requirements run afoul of the FCC's exclusive authority in this regard in several different ways. First, the Wireless Requirements arise when there is a disruption or degradation to wireless service.[34] While there is unsustainable ambiguity regarding how long a service disruption or degradation must persist in order to trigger the Wireless Requirements,[35] regardless of the length of time, establishing such a trigger constitutes a *de facto* time of operation requirement (*i.e.*, a "must operate at all times" obligation). Only the FCC can impose regulations regarding the times that a wireless provider can or must operate on radio spectrum, and no state can impose such a requirement.

Separately, the Wireless Requirements are applicable for at least twelve months once activated.[36] On account of this, the COW/COLT Requirement requires operation of COWs/COLTs for twelve months in areas "that need additional capacity"; the Hot Spot Requirement requires operation on unlicensed spectrum for twelve months "where impacted wireless customers seek refuge from fires"; and the Loaner Phone Requirement requires operation of mobile stations (and attendant transmit and receive facilities) for twelve months at

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[33] *See, e.g.,* 47 C.F.R. § 73.1740 (setting minimum operating hours for all commercial broadcast stations); 73.1725(a) (limiting hours of operation of Class B AM radio stations during nighttime hours); *id.* at § 73.1705(c) (permitting authorization of AM radio stations on a share-time basis); *id.* at § 73.1735 (permitting some AM radio stations to operate at different power levels during nighttime hours); *id.* at § 80.93 (prescribing hours of operation for maritime radio stations).

[34] *See, e.g.,* D.19-08-025 at 66. The Commission should note that if degraded service is not a time of operation regulation, it would still constitute prohibited regulation of wireless network service quality or reliability of signal. *See Bastien* at 989-90.

[35] *See infra* Section II.E (void for vagueness).

[36] *See id.* at 60. D.19-08-025 may allow for a shorter period if so declared by CalOES, but as explained *infra*, the Commission's delegation of such discretion to CalOES is unlawful. Accordingly, and for ease of reference, this Application refers to the effective period for the Wireless Requirements as twelve months. The Wireless Requirements violate federal law regardless of the length of the required period of operation, because the Commission is preempted from ordering such operation in the first instance.

county and city shelters. Each of these requirements to operate wireless facilities for twelve months is a time or hours of operation requirement and jurisdiction over operation on radio spectrum is, as discussed above, exclusively reserved to the FCC. It is also important to recognize that Congress explicitly constrained the FCC's authority to change the time a licensed station is required or permitted to operate. Such changes are subject to the consent of the licensee, unless the FCC makes a public interest determination.[37] Neither of the methods delineated by Congress involve a state commission imposing hours of operation requirements. Clearly, only the FCC can set or change licensees' times of operation, and by imposing both *de facto* and actual hour of operation requirements, the Commission's Wireless Requirements facially violate the Communications Act and the FCC's exclusive jurisdiction thereunder. As discussed above regarding the Commission's attempts to impose location requirements, the Commissions attempts to impose time of operation requirements constitute radio spectrum regulation that the courts, such as in *Bastien,* found to be preempted.

In addition to preempting state market entry regulation, Section 332 also preempts states from regulating the rates of a commercial mobile service—such as wireless voice. As a result, to the extent that the Loaner Phone Requirement requires wireless carriers to provide not just wireless phones, but to offer free service on those phones, the Loaner Phone Requirement constitutes prohibited rate regulation of a commercial mobile service.

The Commission has offered a variety of theories to justify its attempted imposition of the Wireless Requirements, including claiming it is empowered to do so by the "other terms and conditions" authority over commercial mobile service reserved to states under Section 332.[38]

[37] *See* 47 USC §303(f).

[38] *See, e.g.,* D.19-08-025 at 11.

The Commission's assertions as to its jurisdiction in this matter are incorrect. As shown above, the Wireless Requirements are in fact rate and entry regulation, and as a result are expressly preempted. The Commission generally asserts as a defense that Section 332 "does not preempt state police power, and that is what [the Commission exercises] here."[39] This too is incorrect. Federal intent to preempt state authority regarding the issues covered by the Wireless Requirements is clear[40] and where such clear preemption exists, the courts have held that the assertion of state police power is unavailing[41]—for the Supremacy Clause remains the law of the land even when a state asserts its police power.[42]

B. The Wireless Requirements Are Subject to Field Preemption Due to Existing FCC Regulation

Based on much the same rationale detailed *supra* that proves the Wireless Requirements are preempted under Title III, the Wireless Requirements are also subject to field preemption due to existing FCC regulations. Field preemption applies where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state [or local] laws on the same subject."[43] Federal regulations preempt state and local laws in the same manner as

[39] *Id.* at 35.

[40] *See* 47 U.S.C. §§ 332(c)(3), 301, and 303; *see also California v. FCC*, 905 F.2d 1217, 1225 (9th Cir. 1990) (federal preemption of customer premise equipment such as handsets).

[41] *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 448 F.3d 1067, 1071 (9th Cir. 2006).

[42] *Id.*

[43] *Hillsborough Cnty. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985) (internal quotation marks omitted).

congressional statutes.[44] And "although the term 'field preemption' suggests a broad scope, the scope of a field deemed preempted by federal law may be narrowly defined."[45]

The Hot Spot Requirement, the COW/COLT Requirement, and the Loaner Phone Requirement each order wireless carriers to operate on radio frequencies at particular times and locations. As discussed above, the FCC's occupation of the field of spectrum regulation and usage is well-established,[46] given the federal agency's statutory mandate to define a "unified and comprehensive regulatory system."[47] Wireless carriers will continue to provide Wi-Fi access and loaner phones for displaced customers in emergency situations as they have in the past, and will deploy COWs and COLTs after disasters—but the Commission lacks the authority to *require* wireless carriers to do so.

Further, the FCC has established a regulatory framework for resiliency, finding that the voluntary commitments set forth in the industry's Cooperative Framework "presents a more appropriate path forward to improving wireless resiliency and provider transparency" and on that

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[44] *See Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3rd Cir. 2008)).

[45] *Farina*, 625 F. 3d at 120 n.25 (quoting *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3rd Cir. 1999)).

[46] *See Cellco P'ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012); *see also, e.g.*, *Southwestern Bell Wireless Inc. v. Johnson Cnty. Board of Cnty. Comm'rs*, 199 F.3d 1185, 1190 (10th Cir. 1999); *Freeman v. Burlington Broadcasters Inc.*, 204 F.3d 311, 320 (2d Cir. 2000); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994).

[47] *NBC v. United States*, 319 U.S. 190, 214 (1943); *see also* 47 U.S.C. § 152(a) (FCC holds exclusive jurisdiction over "all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States"); *see also generally* 47 C.F.R. Part 15 (establishing comprehensive rules and procedures for the use of unlicensed spectrum, including Wi-Fi as well as other bands such as TV White Spaces).

basis "refrain[ed] from adopting further regulations."[48] In doing so, the FCC has left no room for California to impose its own resiliency requirements—for the FCC's policy of non-regulation in this area is entitled to as much preemptive effect as a policy of affirmative *ex ante* regulation would have.[49]

C. The Hot Spot Requirement Is Barred by Federal Preemption of State Regulation of Internet Access Services

The Hot Spot Requirement requires wireless carriers to offer broadband Internet access services at particular locations using particular technologies directed by the Commission. This is contrary to the FCC's decision to preempt most state and federal regulation of broadband Internet access services.[50] The FCC invoked broad preemption to protect the federal policy of non-regulation of information services.[51] In this regard, the prior *Open Internet Order*, adopted during the Obama Administration, included similarly broad preemptive language barring state regulation that would interfere with the federal approach.[52] Moreover, the FCC specifically preempted any state regulation that imposes common carrier-type requirements on broadband

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[48] *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, Order, 31 FCC Rcd 13745, 13746 (2016).

[49] *Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *see also Computer & Commc'ns Indus. Assoc. v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), (quoting *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982)); *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007); *Farina*, 625 F.3d at 134 (quoting *Hillsborough Cnty.,* 471 U.S. at 713).

[50] *See Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 428-29 ¶¶ 194-95 (2018).

[51] *See id.* at 426-27 ¶ 194.

[52] *See id.* at 427 ¶ 194 & n.728, *citing Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 (2015) (subsequent history omitted).

Internet access service.[53] The obligation to provide such services at times and locations and via means specified by the Commission is the type of regulation that has been treated as *per se* common carriage.[54]

D. The Wireless Requirements Also Violate the U.S. Constitution

The Fifth Amendment to the United States Constitution prohibits "private property [from] be[ing] taken for public use, without just compensation";[55] this proscription is applicable to the states through the Fourteenth Amendment.[56] The Wireless Requirements unquestionably compel wireless carriers to put their private property to public use without any compensation. This point is illustrated below relative to the Loaner Phone Requirement, but the other Wireless Requirements also compel wireless carriers to put their private property to public use without any compensation and are therefore equally barred by the Constitution.

The Loaner Phone Requirement requires wireless carriers to "provide mobile phones to customers seeking shelter from a disaster to use temporarily at a county or city shelter."[57] This obligation extends for a period of no less than twelve months,[58] and constitutes an unconstitutional taking. When the government appropriates private property, a taking occurs.[59]

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[53] *Id.* at 426 ¶ 195.

[54] *See, e.g.*, *FCC v. Midwest Video,* 440 U.S. at 689, 706 (1979) (obligation to operate a minimum number of channels and hold certain channels open for specific users).

[55] U.S. CONST. amend V.

[56] *See id.* amend XIV, § 1.

[57] D.19-08-025 at 67.

[58] *See id.* at 60.

[59] *See Horne v. Dep't of Agric.*, 135 U.S. 2419, 2429 (2015) ("But when there has been a physical appropriation, 'we do not ask … whether it deprives the owner of all economically valuable use' of the item taken.") (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) at 323).

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[60] That carriers' "loaner" mobile phones are appropriated by the Commission for others "to use temporarily," which is not further defined,[61] is of no account, because "retain[ing] a contingent interest of indeterminate value does not mean that there has been no physical taking…."[62] Indeed, wireless carriers have no way of knowing how long the deprivation will last, particularly given that some fire-related shelters have remained open for extended periods of time (and the requirement extends for a period of no less than 12 months), nor the condition of their property (and therefore its value, if any) upon return. There is no question that the "loaner" phone requirement constitutes a taking. It is unconstitutional for the Commission to impose this requirement without paying just compensation, and the Commission has failed to do so.

Regarding the remainder of the Wireless Requirements, each usurps wireless carriers' control over their property and requires it to be put to public use at locations the Commission designates, for a duration the Commission specifies, at a rate (free) the Commission determines,[63] and for a class the Commission defines. No less than with the Loaner Phone Requirement, the Decision dramatically severs and diminishes (if not destroys) wireless carriers' bundle of rights relative to their property without any compensation. Thus, the remainder of the Wireless Requirements violate the Fifth Amendment.

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[60] *Tahoe-Sierra Pres. Council*, 535 U.S. 302 at 323.

[61] *See infra* Section II.E (void for vagueness).

[62] *Tahoe-Sierra Pres. Council*, 535 U.S. 302 at 323.

[63] The Commission is fully proscribed from regulating wireless carriers' rates. *See* 47 U.S.C. § 332(c)(3)(A) and discussion at Section II(A), *supra*.

Wireless carriers do not suggest the Commission attempt to calculate and pay the just compensation due to make the Wireless Requirements lawful. There is no indication that the legislature intended to vest the Commission with discretion or authority to commit State funds for that purpose. Therefore, and considering the other legal infirmities of the Wireless Requirements, wireless carriers ask that they be allowed to continue the voluntary approach to customer assistance measures that has proven successful in the past.

E. The Wireless Requirements Impermissibly Exceed the Commission's Authority Under State Law

Finally, the Wireless Requirements also exceed the Commission's authority under state law. The Decision cites to the Commission's broad authority over "telephone corporations" as "public utilities" in the state,[64] yet fails to grapple with the fact that providing electrical power (the Charging Station Requirement), Wi-Fi access points (the Hot Spot Requirement), and loaning phones (the Loaner Phone Requirement) are not functions of "telephone corporations" at all.[65]

The Decision also invokes the Commission's authority under Section 701 of the Public Utilities Code, which affords the Commission broad authority to "supervise and regulate every public utility in the State" and to "do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and

[64] D.19-08-025 at 9-11 (citing CAL. PUB. UTIL. CODE §§ 216, 234, 1001, 7901a).

[65] *See* CAL. PUB. UTIL. CODE §§ 234(a), 235 (a telephone corporation is "every corporation or person owning, controlling, operating, or managing any telephone line for compensation," where a telephone line "includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires"). As discussed in the previous section, the FCC has preempted the regulation of wireless network facilities (the COW/COLT Requirement).

jurisdiction."[66] Broad though this authority may be, California courts have established clear boundaries on this authority, which the Wireless Requirements exceed. California courts have repeatedly determined that the powers and jurisdiction the Commission exercises under Section 701 "must be cognate and germane to the regulation of public utilities."[67] Similarly, the Commission's decisions in rulemakings cannot constitute abuses of discretion or exercises of power beyond that possessed by the Commission.[68]

The Wireless Requirements constitute an abuse of discretion and are not cognate and germane to the Commission's oversight and regulation of public utilities. Specifically, the Commission's Wireless Requirements are not rationally related to the Commission's limited "other terms and conditions" jurisdiction or the underlying service, and are grossly overbroad temporally. The Commission can no more require wireless carriers to offer the Wireless Requirements than it can require them to, for example, pave roads to city and county shelters or distribute food at those locations, because none of these services has any causal nexus to the source of the Commission's jurisdiction. That wireless providers offer none of these as services

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[66] *Id.* § 701 ("The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."). The Commission also cites its authority under CAL. CONST. art. XII, §§ 1-6 and CAL. PUB. UTIL. CODE §§ 451, 761, 762, and 1001, but the broadest expression of the Commission's authority is under Section 701. Because the Commission's broad authority under Section 701 is inadequate to support its actions, there is no need for this Application to address why narrower grants of authority also are insufficient to support the Commission's attempt to impose the Wireless Requirements.

[67] *See, e.g.*, *Morel v. Railroad Comm'n*, 11 Cal. 2d 488, 492 (1938); *S. Cal. Gas Co. v. Pub. Utils. Comm'n*, 24 Cal. 3d 653, 656 (1979); *Consumers Lobby Against Monopolies v. Pub. Utils. Comm'n*, 25 Cal.3d 897, 905 (1979). The Commission's exercise of power can only be "cognate and germane" if the Legislature itself possesses the power to confer relevant authority upon the Commission. This Application has already discussed *supra* the Commission's lack of jurisdiction to impose the Wireless Requirements and it will not revisit that issue here.

[68] *See* CAL. PUB. UTIL. CODE § 1757. We have explained at length *supra* why the Commission is preempted from imposing the Wireless Requirements. Because any state jurisdiction the Commission may have has been preempted, their imposition is beyond the Commission's jurisdiction.

commercially reinforces this conclusion. Under California law, the Commission has jurisdiction over public utilities, which includes telephone corporations. The Commission's jurisdiction under California law over wireless providers arises from their ownership, control, operation, or management of facilities used to communicate by telephone (although the extent of that jurisdiction relative to wireless providers is circumscribed by the Communications Act; some examples of such are discussed *supra*).[69] Accordingly, the requirement to provide electricity, Wi-Fi service, and loaner phones to displaced customers cannot be cognate and germane to the Commission's regulation of telephone corporations and is an abuse of discretion.

The same irrationality exists regarding the complete disassociation of the length of any service interruption with the length of the obligation to offer the Wireless Requirements. Here, it is important to note only that the Commission imposes a minimum 12-month obligation for service disruptions that could last seconds, minutes, or a few hours, but certainly rarely longer than a few days.[70] A year-long imposition of the Wireless Requirements in light of the fact that service surely will have been restored long in advance is an abuse of discretion. It is also an abuse of discretion insofar as it fails to recognize that the nature of the service wireless providers offer – mobility – enables customers to continue to use wireless service at locations not experiencing any service issues.

The Wireless Requirements also bear no rational relationship to the events the Commission identifies as triggering them. If service is disrupted or degraded, neither loaner phones nor charging stations will address the problem. If a consumer is in need of a loaner phone or a charging station, it is because she has lost her phone and/or is stranded away from

[69] *See id.* §§ 216, 233, and 234.

[70] *See, e.g.*, Workshop Comments of CTIA, R.18-03-11 at 4-5 (filed October 17, 2018).

home, not because wireless service has been disrupted. Similarly, there is no causal nexus between disrupted or degraded voice service and the need to provide Wi-Fi. Thus, the event that triggers the Wireless Requirements, voice service disruption or degradation, has no rational relationship to the obligations imposed.

Certain elements of the Wireless Requirements also are impermissibly vague.[71] For instance, the Wireless Requirements must be provided beginning "upon the issuance of the emergency proclamation and conclude no sooner than twelve (12) months from the date of commencement or as appropriately determined by CalOES."[72] Yet CalOES neither terminates emergency proclamations nor directs wireless carriers with regard to the provision of services. Thus, the term is undefined. This apparent attempt to delegate authority to CalOES to establish the term for provision of the Wireless Requirements also represents an impermissible delegation. The Commission offers no basis for its authority to delegate this responsibility to CalOES and none exists. Other terms used or standards set in the Wireless Requirements, such as the triggers for the Wireless Requirements, are also undefined and thus impermissibly vague.

Finally, the Commission's adoption of the Wireless Requirements is contrary to California law because it infringes on the authority and responsibility that the Legislature gave to the Governor and CalOES under the California Emergency Services Act.[73] The Commission's attempt to regulate in this area is improper, as the Commission has recognized in the past.

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[71] The void for vagueness doctrine requires "that regulated parties should know what is required of them so they may act accordingly," and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012).

[72] D.19-08-025 at 24.

[73] CTIA and AT&T Mobility concur in the arguments in this regard made in AT&T California (U 1001 C) and AT&T Corp. (U 5002 C) Application for Rehearing of Decision 19-08-025, p. 4-12. While

III. CONCLUSION

For the foregoing reasons, CTIA and AT&T Mobility respectfully urge the Commission to reconsider its imposition of the Wireless Requirements in the Resolution. The Commission should instead rely on the voluntary approach that has benefitted consumers in past disasters.

Respectfully submitted May 18, 2020, at San Francisco, California.

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CalOES also is preempted from imposing the Wireless Requirements, the state law authority to impose such mandates is vested in CalOES, not the Commission.

[74] In accordance with Commission Rule 1.8(d), counsel for CTIA is authorized to sign these comments on behalf of AT&T Mobility.