BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Emergency Disaster Relief Program.	Rulemaking 18-03-011 (Filed March 22, 2018)

REPLY COMMENTS OF THE NATIONAL CONSUMER LAW CENTER ON PROPOSED DECISION ADOPTING WIRELESS PROVIDER RESILIENCY STRATEGIES

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July 6, 2020

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I. INTRODUCTION

The National Consumer Law Center (NCLC) respectfully submits these reply comments on the June 11, 2020 Proposed Decision of Commissioner Batjer in the above captioned proceeding. NCLC has reviewed the reply comments filed by Center for Accessible Technologies, TURN and Access Humboldt, and supports those reply comments.

II. THE PROPOSED REGULATIONS ARE NOT EXPRESSLY PREEMPTED, NOR ARE THEY BLOCKED BY FIELD PREEMPTION OR CONFLICT PREEMPTION

The Commission is squarely within its authority to promulgate the protections in this Proposed Decision ("PD") and it must act expeditiously.[1] The stakes are high as we are in the midst of fire season knowing that the "failure of California's communication network during prior wildfire seasons and PSPS events resulted in a loss of service to customers and endangered the lives of customers and first responders."[2] The Commission has authority to act to protect the health and safety of its residents per the 10th Amendment to the U.S. Constitution.[3] The Commission has also determined that wireless providers are telephone corporations and therefore public utilities under Public Utilities Code §216, 233 and 234, authorizing its jurisdiction over wireless service.[4]

Yet, the obstructionist wireless industry dismisses the life and death nature of this PD and erroneously argues that the Commission is expressly preempted by 47 U.S.C. §332(c)(3)(A).[5] T-Mobile even states that the Commission's only "role" is to "*encourage* wireless carriers to maintain resilient networks during emergencies and PSPS events."[6]

The wireless industries' assertions regarding the Commission's authority in R.18-03-011, particularly the express preemption of §332(c)(3)(A), has been previously addressed in this

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[1] As noted in the PD, "The record before the Commission exposes the lack of a uniform and structured approach to ensuring that the communications providers are addressing their responsibility to provide safe and reliable service during emergency events." (PD at 6).
[2] PD at 4.
[3] PD at 15-16. *See Medtronic v. Lohr*, 518 U.S. 470, 475 (1996) (The "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives limbs, health, comfort and quiet of all persons.) and Pub Util. Code §451 ("Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.").
[4] *See* PD at 20 - 21.
[5] *See e.g.*, CTIA Comments on PD at 4-7; AT&T Comments on PD at 2-3, Verizon Comments on PD at p.10 and T-Mobile Comments on PD at 5-7.
[6] T-Mobile Comments on PD at 7.

proceeding.[7] Section 332(c)(3)(A), as interpreted by federal Courts, the FCC, and this Commission, is an example of cooperative federalism, where the federal government has authority to regulate "the entries of or rates charged by commercial mobile service and private mobile service" and States have the authority to regulate "the other terms and conditions of commercial mobile service."[8] The wireless industry attempts to inappropriately expand the understanding of "the entries of or rates charged" and overly constrict what is considered "terms and conditions" in an attempt to shoehorn the PD into its preemption analysis.

The back-up power requirement does not attempt to regulate spectrum, bar market entry, or regulate rates;[9] rather the Commission is acting within its police power during disasters and times of crisis when "people are trying to escape from a threatened area or communicating with 9-1-1 centers".[10] Verizon cites *Bastien*[11] as supportive of its preemption position.[12] However, as noted by the Commission, *Bastien* is not persuasive because in that case, the plaintiff was specifically requesting the buildout of more cell towers in conflict with the FCC's market buildout plan for that area.[13] The Commission properly points to more relevant precedent that supports the Commission's authority to develop these narrow public safety regulations.[14]

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[7] *See e.g.*, Public Advocates Reply to Responses to Motion for an Immediate Order Requiring Communications Providers to Complete Calls and Deliver Data Traffic and Provide Other Post-Disaster Consumer Protection Relief (July 1, 2019) at 4-6; TURN Reply Comments on the PD Adopting an Emergency Disaster Relief Program for Communications Service Provider Customers (Aug, 12, 2019) at 1-2, and Response of the Public Advocates Office, TURN, CforAT and NCLC to Application for Rehearing of D.19-05-025 filed by AT&T, CTIA, AT&T Mobility and VoIP Coalition (Oct. 8, 2019) at 14-15.

[8] 47 U.S.C. §332(c)(3)(A); *See also*, *Core Communications, Inc. v. Verizon Pennsylvania*, Inc. 493 F.3d 333, 335 (3d Cir. 2007)(cooperative federalism).

[9] Not all matters that may indirectly affect wireless rates constitute rate regulation. See *Spielholtz v. Superior Court* (2001) 86 Cal. App. 4th 1366; *Fedor v. Cingular Wireless* (7th Cir. 2004), 355 F.3d 1069, 1074.

[10] PD at 5.

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

[12] Verizon Comments on PD at 10.

[13] *See* Commission's discussion of *Bastien* at PD at 26.

[14] *See Telesaurus VPC, LLC v Power* 623 F.3d998, 1007(9th Cir., 2010) (preemptive effect of §332 is case dependent); *In the Matter of Wireless Consumers Alliance, Inc.* 15 FCC Rcd I7021 (2000) (No "per se" impact on rates by state court order); *Pacific Bell Wireless v. Public Utilities Comm'n* (2006) 140 Cal.App.4th 718, 733 (finding rate regulation only where "principal purpose and direct effect are to control rates."); *Murray v. Motorola* (D.C. Cir. 2009) 982 F. 2d 764, 775 (We agree with the *Farina* court that "Congress's intent in enacting [section 332(c)(3)(A)] was to prevent the states from obstructing the creation of nationwide cellular service coverage, and not the preemption of health and safety and police powers." *Farina*, 578 F.Supp.2d at 761).

CTIA continues to argue that resiliency requirements are tantamount to rate and entry regulation.[15] In D.19-08-025, the Commission discussed this issue in detail, beginning with its important recognition that "the federal statute expressly preserves state jurisdiction over all other matters not falling within the categories of rate or entry regulation, including the 'other terms and conditions' of wireless service," and highlighting that consumer protection matters fall within "terms and conditions."[16] Indeed, the Commission has repeatedly found that the issues addressed in the PD, including backup power, network resiliency, and critical facility location information, along with related issues of service quality and emergency communication, are essential for its exercise of its duty to ensure that customers have access to safe and reliable telecommunications service.[17] The PD sets out narrowly tailored, nondiscriminatory requirements to ensure that customers receive reliable service during periods of emergency; as the PD itself sets out in detail, this is within the Commission's authority acting under the state's police powers.

CTIA further argues that the Commission is barred from acting due to conflict preemption, stemming from a purported clash between the requirements of the PD and FCC actions.[18] Here too, the carriers overstate the role the FCC has taken in this field. The FCC itself described its wireless resiliency order only as "an initial path forward to improving wireless resiliency."[19] Such an "initial" step cannot express an intent to preempt state action that falls within legitimate police powers. Moreover, CTIA fails to acknowledge that a core tenet of the voluntary framework adopted by the FCC was ensuring resiliency through cooperation and transparency with state and local emergency agencies, just as the Proposed Decisions operationalizes in its Resiliency Plans and Emergency Operations Plans.[20]

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[15] CTIA Comments on PD at 4-9. Carriers such as AT&T and T-Mobile/Sprint also make brief arguments, but primarily express direct support for the comments submitted by CTIA.
[16] D.19-08-025 at 11-12.
[17] *See, e.g.* Order Instituting Rulemaking in R.11-12-001 (Service Quality) at 1-2; D.14-01-036, issued in R. 11-03-013 (LifeLine) at 1-4; D.16-12-066, issued in I.14-05-012 (Rural Call Completion), at 22-28; D.19-08-025 at 2-15. *See also* Cal. Pub. Util. Code §451.
[18] CTIA Comments on PD at 9-13, repeatedly citing *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Network, Including Broadband Technologies,* Order, 31 FCC Rcd 13745 (2016).("FCC Wireless Resiliency Order")
[19] FCC Wireless Resiliency Order at para. 11. Indeed, the Commission's work in this docket corresponds with the FCC's re-examination of its voluntary framework in light of numerous outage experiences during several major hurricanes. *Public Safety and Homeland Security Bureau Seeks Comment on Improving the Wireless Resiliency Cooperative Framework* (PS Docket 11-60), DA 19-242 (April 1, 2019).
[20] FCC Wireless Resiliency Order at para 1; *See also* 47 USC §615 (Congress directs the FCC to "encourage and support efforts by States to deploy comprehensive end-to-end emergency

Verizon and CTIA also argue that the Commission is preempted from including information services, such as "access to internet browsing" and text messaging, as part of the minimum level of service a wireless provider must support during a power outage.[21] Here again, the carriers merely reargue their previously stated positions and ignore the PD's clear and detailed description of its authority under California law to adopt these requirements. The Commission should dismiss the carriers' overly narrow interpretation of state authority over information services.

The FCC's classification of broadband access and text messaging as information services does not prevent the Commission from adopting the PD pursuant to its federal and state statutory authority to "protect the public safety and welfare" of its consumers.[22] The federal District Court has found that the FCC's decision to reclassify broadband as an information service under Title I actually *limits* federal regulatory authority and weakens any claims of express preemption over information services.[23] And while CTIA characterizes the Proposed Decision's requirements as "classic" forms of utility regulatory authority that it claims invoke conflict preemption with the FCC's deregulatory policies for broadband,[24] the *Mozilla* Court disagrees and further finds that, "What the [FCC] calls the 'federal policy of nonregulation for information services,' …. cannot sustain the Preemption Directive either."[25] The *Mozilla* Court further acknowledges that state commissions can fill the gap left by reclassification and adopt measures to support the needs of consumers of information services through universal service policies, consumer protection rules and, most relevant here, exercise of police powers.[26]

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communications infrastructure and programs" and to "consult and cooperate with State and local officials responsible for emergency and public safety.").

[21] Verizon Comments on PD at 5; CTIA Comments on PD at 12-13.

[22] 47 USC §253(b); Public Utilities Code §451.

[23] CTIA Comments on PD at p. 12;. *Mozilla v. FCC,* 940 F.3d 1, 75 (D.C. Cir. 2019) (…where the Commission lacks authority to regulate [Title 1], it equally lacks the power to preempt state law.")

[24] CTIA Comments on PD at 13; CTIA's citation to *Charter Advanced Servs (MN), LLC v Lange*, 903 F.3d 715 (8th Cir. 2018) to support preemption does not apply here for several reasons, including that the Court was reviewing a more sweeping set of regulations that applied to specific VoIP service offerings and was not intended to be a more general exercise of state police powers.

[25] *Mozilla v. FCC,* 940 F.3d 1, 78 (D.C. Cir. 2019).

[26] *Mozilla v. FCC*, 940 F.3d 1, 80-81 (D.C. Cir. 2019) ("Not only is the [FCC] lacking in its own statutory authority to preempt, but its effort to kick the States out of intrastate broadband regulation also overlooks the Communications Act's vision of dual federal-state authority and cooperation in this area specifically…[citing numerous federal law sections that preserve state authority under police powers and consumer protection and affordability]) See, also *p.* 59-63 (Court extensively cited to the wildfire situation in California when it remanded the FCC's Title 1 designation and deregulation policies finding that FCC did not properly consider the impact of this deregulatory policy on public safety and a state

The Commission has the support of state precedent as well. Verizon can only muster a 2013 Commission complaint case to support the carriers' information services preemption analysis.[27] None of the carriers address more recent actions by the Legislature, that evidence an intent to support broader Commission authority over information services such as broadband, including the sunset of Public Utilities Code Section 710[28] and the adoption of SB 822, *the California Internet Consumer Protection and Net Neutrality Act of 2018*.[29] These actions, along with the numerous directives from the Legislature to the Commission regarding wildfire safety, network resiliency, and back-up power as cited in the PD, create a framework for the Commission to require robust back up power for voice, texting, and broadband services.

III. CONCLUSION

The Commission recognizes the urgent need to step in to fill the regulatory gap left by the FCC and exercise its police power to craft narrowly tailored regulations that ensure that wireless broadband customers have basic levels of service during emergencies.[30]

Respectfully submitted,

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July 6, 2020

commission's role preserving public safety, "[T]he harms from blocking and throttling during a public safety emergency are irreparable. People could be injured or die.").

[27] Verizon Comment on PD at 2, citing an inapposite case wherein the Commission found it has no jurisdiction to require AT&T or Verizon to extend and improve last mile facilities to serve to meet the demands of a single customer.

[28] Public Utilities Code §710(h) "This Section shall remain in place until January 1, 2020 and as of that date is repealed…… ; AB1366 (2019, Daly and Obernolte) on Committee Hold pursuant to Section 29.10.

[29] SB822 (Chapter 976, September 30, 2018), Civil Code §3100, et seq. Finding that California is dependent on the "open and neutral Internet that supports vital functions regulated under the police power of the state."

[30] PD at 21 (Rules adopted in PD fall under police powers and FCC may preempt state law "only when and if it is acting within the scope of its congressionally delegated authority." (*Mozilla* at 75).