

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:	
In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	WC Docket No. 17-84
In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	WT Docket No. 17-79

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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I. Introduction

The California Public Utilities Commission (“CPUC” or “California”) submits these comments concerning proposals in the Federal Communications Commission’s (“FCC” or “Commission”) Notices of Proposed Rulemaking (“NPRMs”), and Notices of Inquiry, each of which the FCC intends to serve the purpose of eliminating barriers to infrastructure investment in the wirelines and wireless networks, respectively.¹ Although we will address the items in both proceedings, California offers one set of joint comments in light of our view that the wireless and wireline networks are ever less distinct.² These comments address many, but not all, of the issues raised by the two *NPRMs*. Silence should not be construed as agreement or disagreement. The CPUC reserves the right to comment further in the reply round.

¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (Wireline Deployment NPRM)*, WT Docket No. 17-84; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Wireless Deployment NPRM)*, WT Docket No. 17-79.

² The description of the nationwide public safety broadband network in 47 U.S.C. § 1422(b) is helpful here:

The ... network shall be based on a single, national network architecture that evolves with technological advancements and initially consists of:

- 1) **a core network** that ... provides the connectivity between [a] radio access network; and ... the public Internet or the public switched network; and
- 2) **a radio access network** that ... consists of all cell site equipment, antennas, and backhaul equipment, based on commercial standards, that are required to enable wireless communications with devices using the public safety broadband spectrum.

As we see it, the core network also connects to a last-mile distribution network, with either numbers or Internet addresses at its endpoints. Roughly speaking, we understand the aggregate of the core and last mile wired distribution network as the subject of the *Wireline Deployment NPRM*, and the Radio Access Network as the subject of the *Wireless Deployment NPRM*.

The CPUC find helpful many of the pro-competitive suggestions in the *Wireline Deployment NPRM*. It appears, however, that one of the FCC’s goals in the *Wireline Deployment NPRM* is to unravel many of the rules adopted in the *2015 Technology Transitions Order*,³ and refined in the *2016 Technology Transitions Order*.⁴ Those rules were promulgated less than two years ago and the refinements went into effect just last summer. The *2015 Order* remains on appeal before the D.C. Circuit and, up until recently, the FCC defended it vigorously.⁵ Since the *2015 Order*, the facts on the ground have not changed; only the Executive Branch has changed. As both a legal and a policy matter, a change of administration is not enough to justify changing the rules. The CPUC respectfully submits that many sections of the *Wireline Deployment NPRM* represent a “180 degree turn” away from a precedent that the FCC has “not persuasively distinguished,” rendering any rules adopted through this process subject to question.⁶

The *Wireless Deployment NPRM* is something of a different matter, since there the FCC is proposing new rules, some of which we support, and others of which we do not. The CPUC comments accordingly. There again, the FCC is proposing to undo a sharing of authority over poles and rights-of-way (“ROWS”) that has been in effect for two decades, and the FCC must justify any such reversal.

³ 30 FCC Rcd 9372.

⁴ 31 FCC Rcd 8283.

⁵ U.S. Telecom Ass’n v. FCC, D.C. Cir. No. 15-1414, *docketed* Nov. 12, 2015.

⁶ Louisiana Pub. Serv. Comm’n v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999); *see also* Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change But an agency changing its course must supply a reasoned analysis”).

The CPUC broadly supported the *2015 Order*, and still does. It was well-reasoned, it appropriately balanced competition and new investment with consumer protection, and it was supported by an extensive record. To the extent that these two *NPRMs* would undo the *2015 Order*, the CPUC generally disagrees with that goal. These comments—which restate many of the comments the CPUC submitted in support of the *2015 Order*—explain why.⁷

In these comments, the CPUC first addresses those portions of the two *NPRMs* that overlap. The CPUC then proceeds through those issues that are unique to the *Wireline Deployment NPRM*.

II. Issues common to both NPRMs

A. California has opened a rulemaking proceeding to consider many of the pole and conduit issues covered in the FCC’s broadband deployment notices.

1. California has “reverse preempted” federal law on pole attachment issues.

Federal law requires public utilities to provide “a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by” the utility, unless the utility is unable provide access because of “insufficient capacity and for reasons of safety, reliability and generally applicable engineering principles.”⁸

⁷ See CPUC Comments, GN Docket No. 13-5 et al. (filed Feb. 26, 2015). We incorporate our previous comments by reference.

⁸ 47 U.S.C. § 224(f). A “Pole attachment” is “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4).

Within that framework, states can elect to regulate the rates, terms, and conditions for pole attachments under state law, when they certify to the Commission that they will do that, and in so doing “consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the [pole owners’] utility services.”⁹ California has made this certification, and is thus one of the “twenty states and the District of Columbia [which] have reverse-preempted Commission jurisdiction over the rates, terms, and conditions of pole attachments in their states.”¹⁰

California law authorizes the CPUC to prescribe rules governing access to public utility rights of way:

Whenever the commission, after a hearing had upon its own motion or upon complaint of public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms or conditions or compensation therefore, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use.¹¹

⁹ 47 U.S.C. § 224(c).

¹⁰ *Wireline Deployment NPRM*, at ¶ 4, and fn. 9, citing *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5542 (WCB 2010), available at https://transition.fcc.gov/eb/Public_Notices/DA-10-893A1.html.

¹¹ California Public Utilities Code § 767.

California Public Utilities Code Sections 451, 701, 767.5, 767.7, and 1702, among others, provide further authority for the CPUC to establish reasonable rates, terms, and conditions for joint use of utility poles, ducts, conduits, and rights-of-way (together, “utility right-of-way” or “ROW”).

In 1998, the CPUC issued Decision (“D.”) 98-10-058, known as the “ROW Rules” decision. In that decision, the CPUC exercised its option to regulate pole attachment rates, terms, and conditions under state law by issuing a detailed set of pole attachment and right-of-way rules. It adopted rules to provide facilities-based ILECs, CLECs, and cable television (“CATV”) corporations with nondiscriminatory access to any utility ROW that is owned or controlled by large and midsized incumbent LECs, CLECs, or one of California’s three major electric utilities, Pacific Gas & Electric, Southern California Edison, and San Diego Gas & Electric.¹² Decision 98-10-058 also addressed network safety and reliability (while making electric utilities responsible for safety enforcement),¹³ pole and duct capacity issues (reserved space, total volume, etc.), and the role of joint pole associations, among other things.

More recently, through D.16-01-046, the CPUC revised its ROW Rules, as well as the safety rules in CPUC General Order 95, in order to provide wireless carriers with nondiscriminatory access to utility poles and rights of way (the “Revised ROW Rules” and G.O. 95 Amendments). With the exception of certain attachment rates, the Revised

¹² *Re Competition for Local Exchange Service*, 82 CPUC 2d 510, 528, 1998 Cal. PUC LEXIS 879, at *1. The CPUC’s ROW Rules, formally titled “Rules Governing Access to Rights-of-Way and Support Structures of Incumbent Telephone and Electric Utilities,” are found as Appendix A to this decision.

¹³ *Id.* at 559, 1998 Cal. PUC LEXIS at ** 114-115.

ROW Rules provide wireless carriers with the same access to utility ROW as CLECs and cable television corporations.

And in 2015 and 2016, the CPUC engaged in a large-scale investigation of competition in the California telecommunications market. It reported its findings in D.16-12-025. In that decision, the CPUC found that poles and conduit have acted as a competitive bottleneck, possibly creating barriers to entry. The CPUC determined to open a subsequent rulemaking “to examine telecommunications access to poles, conduit, and rights of way.”¹⁴ The CPUC is currently preparing that rulemaking (the “Pole & Conduit Rulemaking”).

In addition to the planned rulemaking, the CPUC currently has three “pole and conduit” proceedings open:

- Rulemaking (“R.”) 17-03-009 was initiated at the behest of the Wireless Infrastructure Association to explore rules that would allow competitive local carriers to universally attach antennas and supporting equipment structures, in addition to the fiber backhaul which they attach to poles;
- R.16-12-001, instituted on the CPUC’s own motion, will consider specified amendments to Rule 18 of General Order (“G.O”) 95 that will tighten the time periods utilities have to correct G.O. 95 violations relating to poles, pole attachments, and overhead conduit; and
- Petition (“P.”) 17-03-004, brought by the CPUC’s Safety and Enforcement Division, seeks further amendments to G.O. 95 relating to the safety of pole-top attachments, among other things.

¹⁴ *Decision Analyzing the California Telecommunications Market*, Ordering Paragraph 5, 2016 Cal. PUC LEXIS 683, at *306.

Taken together, these proceedings demonstrate that California remains active in exercising its authority pursuant to Section 224's reverse-preemption, and is doing so consistently and reasonably.¹⁵

2. California agrees with the FCC's goal of fast, non-discriminatory access to utility poles.

In its ongoing and planned pole and conduit proceedings, the CPUC will continue to address strategies for increasing non-discriminatory, competitive access to poles and conduit. In this regard, the CPUC hopes to be informed by the comments submitted in response to these proposals in the area of pole and conduit access. The following proposals deserve particular attention:

- reasonable timelines for pole owners to respond to attachment requests (*Wireline Deployment NPRM*, ¶¶ 6-9);
- means for expediting pole surveys and cost estimates which precede a final attachment order, including the implementation of databases or other data platforms shared between stakeholders, including ways to “incentivize utilities to establish online databases, maps, or other public information sources regarding pole rates, locations, and availability” (*Wireline Deployment NPRM*, ¶¶ 10, 27);¹⁶
- different strategies for streamlining the make-ready process, including but not limited to the use of utility-approved contractors to perform make-ready work, and other processes that

¹⁵ The CPUC also exercises jurisdiction over electric distribution facilities, and has authority to oversee reliability of those facilities, including utility poles. California retains authority “over facilities used for local distribution for local distribution of energy,” which cannot be diminished by FCC action. *See* 16 U.S.C. §§ 824(a), (b)(1).

¹⁶ On March 17, 2017, the CPUC held a pole & conduit database workshop. The parties' submissions, as well as video from the workshop, are available on the CPUC website at <http://www.cpuc.ca.gov/General.aspx?id=6442453019>.

- come under the rubric of one-touch make-ready and right-touch make-ready (*Wireline Deployment NPRM*, ¶¶ 11, 14-19, 21-26);
- reasonableness of make-ready costs (*Wireline Deployment NPRM*, ¶¶ 32-36);
 - shortening post make-ready timelines (*Wireline Deployment NPRM*, ¶ 20);
 - improved access to conduits and conduit data (*Wireline Deployment NPRM*, ¶ 31);
 - more expeditious resolution of pole attachment disputes (*Wireline Deployment NPRM*, ¶¶ 47-51); and
 - reciprocal access to poles owned by competitive carriers (although, practically speaking, the majority of poles are owned by incumbent carriers and/or energy utilities) (*Wireline Deployment NPRM*, ¶¶ 52-55).]

In considering these issues, the CPUC will seek to encompass the priorities of safety and competition. The CPUC may additionally consider topics that are not mentioned in the *Wireline Deployment NPRM*, including possible or alleged “squatting” on pole attachment rights (failure to deploy within a time certain), and the rights of broadband Internet access service providers to obtain full attachment rights consistent with the FCC’s determination in its *Open Internet Order* that broadband internet access service is a telecommunications service.

B. While California disfavors state and local laws that inhibit broadband deployment, state and local laws that promote safety are within the states’ police powers and should not be disturbed, even if they have an incidental effect on broadband deployment.

The Commission asks for “comment on our authority under Section 253 to adopt rules that prospectively prohibit the enforcement of local laws that would otherwise prevent or hinder the provision of telecommunications service.”¹⁷ California supports the Commission’s goal of promoting rapid broadband deployment. As shown above, since 1998, California has adopted numerous rules that promote competitive access to poles, conduit, and rights of way. And California disfavors laws that inhibit broadband deployment.¹⁸ That’s not to say, however, that California supports the FCC’s proposed preemption here.

1. Section 253(d) only authorizes the Commission to preempt state and local rules through adjudication, not rulemaking.

First, in the CPUC’s view, the FCC is reading its authority more broadly than the statutory language warrants. The CPUC recognizes that the FCC “has very broad discretion to decide whether to proceed by adjudication or rulemaking.”¹⁹ “This maxim of administrative law permits an agency to develop a body of regulatory law and policy

¹⁷ *Wireline Deployment NPRM*, ¶ 109; *see also* ¶¶ 100-112; and *Wireless Deployment NPRM*, ¶ 88.

¹⁸ *See, e.g.*, California Public Utilities Code §§ 709 (“policies for telecommunications in California” include encouraging “the development and deployment of new technologies, ... [and] remov[ing] the barriers to open and competitive markets”); 709.5(e) (same standards for local exchange carriers and cable providers re intraexchange telecommunications interconnection, unbundling, and service quality); 882 (“encourage the timely and economic development of an advanced public communications infrastructure” to “provide all citizens and businesses with access to the widest possible array of advanced communications services [and] to ensure cost-effective deployment of technology”).

¹⁹ *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013) (citations omitted).

either through case-by-case decisionmaking (a quasi-adjudicative process) or through rulemaking (a quasi-legislative process).”²⁰ At the same time, as is true for any administrative agency, where Congress has directed the FCC to proceed in a certain way, the FCC may not disregard that direction.

The plain language of Section 253(d) does not give the FCC the power to promulgate rules to preempt state and local regulations. Section 253(d) provides: “[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement” that has the effect of prohibiting service, that is not competitively neutral, or that violates the universal service rules, “the Commission shall preempt the *enforcement* of such statute, regulation, or legal requirement *to the extent necessary to correct such violation or inconsistency.*” That language obliges the FCC to examine the specific state or local requirement at issue, to determine whether *its enforcement*—not the requirement writ large—is inconsistent with Section 253, and if the FCC makes such a determination, it must craft relief that is narrowly tailored to fix the problem.

That process is unsuited to rulemaking, which “involve[s] broad applications of more general principles” instead of the “case-specific individual determinations” at issue here.²¹ The CPUC notes, for example, that multiple federal courts, relying on the FCC’s own precedent, have held that Section 253 preemption requires an affirmative showing of

²⁰ Am. Tel. & Tel. Co. v. FCC, 978 F.2d 727, 731 (D.C. Cir. 1992).

²¹ Neustar, Inc. v. FCC, No. 15-1080, slip op. at 11 (D.C. Cir. May 26, 2017).

actual or *effective* prohibition “rather than the mere possibility of prohibition.”²² It is hard to see how the FCC could, in any prospective rulemaking examining multiple state and local rules, show more than a “mere possibility of prohibition”: any facially-neutral ordinance could be enforced in a manner that effectively prohibited service, but to determine if an effective prohibition existed would require looking at the facts of a specific case. And even should the FCC somehow vault that hurdle, it is equally hard to see how the FCC could preempt state and local rules wholesale, yet do so only “to the extent necessary” to remedy the perceived problem. The statute calls for fine lines, and a broad brush cannot draw fine lines.

California does not believe that Section 253(d) necessarily precludes the FCC from adopting rules that would interpret Subsections (a)-(c). For example, a rulemaking could properly produce a rule mandating that, all else being equal, access to local rights-of-way must be on a first-come-first-served basis.²³ But the FCC could not, on a prospective basis, preempt the enforcement of specific state or local laws, regulations, or legal requirements, consistent with Section 253(d).

²² *Level 3 Commc’ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007) (citing *Cal. Payphone Ass’n Petition*, 12 FCC Rcd 14191 (1997)); *accord* *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577-79 (9th Cir. 2008).

²³ *Cf. Neustar*, *supra* note 21, at 11 (“A rulemaking under § 251(e) would more properly encompass an action such as adoption of a rule stating that toll free numbers shall be made available on a first-come, first-served basis unless otherwise directed by the Commission.”) (internal quotation marks omitted).

2. The preemption language in the two NPRMs is vague, and could be read to preempt state and local laws that the FCC has previously upheld.

Second, assuming for the sake of argument that, consistent with Section 253, the FCC may preempt state law on a prospective basis, the Commission has not made clear exactly what it intends to preempt.

Section 253(a) speaks of preempting those state and local rules that “prohibit or have the effect of prohibiting” service. And the FCC has interpreted that language to preempt a state or local law that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”²⁴ The statutory language has an accepted meaning.

Yet the FCC now suggests that it might preempt state or local laws that merely “hinder” service.²⁵ The Commission offers no definition of the word “hinder.” Taken to its logical conclusion, this language implies that the FCC could seek to preempt all state or local laws relating to the safety of utility poles, attachments, conduit, and use of rights-of-way. For example, a law mandating that a pole not hold more than a certain number or weight of attachments could “hinder the provision of telecommunications service,” even if it applied on a competitively-neutral, first-come-first-served basis. State and local agencies seek to enforce pole safety for many important reasons—which we outline in detail in Section II.B.3 and in Appendix A. The states and the utilities have obligations under various state and local laws and regulation to protect public safety and

²⁴ *Cal. Payphone Ass’n Petition*, 12 FCC Rcd 14191, ¶ 31.

²⁵ *Wireline Deployment NPRM*, ¶ 109.

natural resources. But they also have an obligation to protect key infrastructure. In the case of wooden poles, overloading and lack of control of attachments is often a threat not only to lives and property, but also to the critical infrastructure and to service itself.

Indeed, reading the “hindrance” language broadly would likely require the FCC to preempt ordinances it had previously upheld. For example, in *California Payphone Association*, the CPUC considered an ordinance from the City of Huntington Park, California. For public safety reasons, the ordinance prohibited all payphones placed outdoors on private property in the City’s central business district.²⁶ But all competitors could bid to place payphones in the business district, either indoors or on public rights-of-way.²⁷ The question was whether the ordinance drew “any impermissible legal or practical distinctions that allow only Pacific Bell and not others to enter the market for payphone services”²⁸ not whether the ordinance “hindered” the provision of payphone service—plainly it did, since not all providers could put payphones where they wanted. Yet the Commission upheld the ordinance.²⁹

We assume that the FCC does not intend, by these *NPRMs*, to disavow its previous interpretation of Section 253. Nevertheless, the *NPRMs* are susceptible to that impression.

²⁶ *Cal. Payphone Ass’n Petition*, ¶ 45.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Id.* at ¶ 46.

3. The scope of preemption contemplated in the two NPRMs would arrogate to the federal government matters that are best regulated at the state and local levels.

As a starting point, it would be improper to preempt state or local laws relating to pole, conduit, or rights-of-way issues where the state had reverse-preempted under Section 224—as California has. And, as we noted above, in addition to the Telecommunications Act there are other grants of federal power to the states to regulate pole safety, with which the FCC’s proposed preemption might interfere.³⁰

But beyond that, the police power—the sovereign’s right to establish and enforce laws protecting the health, safety, and general welfare—has long resided with the states.³¹ And the states may wield that power in areas that the federal government might also conceivably regulate.³² The FCC should not lightly try to preempt state and local health and safety laws, even if it perceives those laws as “burdensome,” given that those laws protect the public, utility workers, and competitive fairness. To do so would offend not

³⁰ See *supra* note 15.

³¹ See, e.g., *Bond v. United States*, __ U.S. __, __, 134 S. Ct. 2077, 2086 (2014) (“The States have broad authority to enact legislation for the public good — what [is] often called a ‘police power.’”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (recognizing “the historic primacy of state regulation of matters of health and safety”).

³² See, e.g., *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 588 (2011) (explaining that, even though the federal government “unquestionably” has the power to regulate immigration, the states may regulate the employment of unauthorized aliens); *United States v. Lopez*, 514 U.S. 549, 565-66 (1995) (holding that the Commerce Clause does not authorize the federal government to regulate every aspect of local education).

just the “cooperative federalism” on which the 1996 Telecommunications Act is specifically premised,³³ but traditional notions of federal-state comity as well.

As a general matter, the CPUC does not believe that reasonable state or local safety review of planned telecommunications construction would “prohibit or have the effect of prohibiting” new entrants into the wireline or wireless markets. But if the CPUC were presented with evidence of state or local safety laws that did cause “excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services,” and if the CPUC had jurisdiction to address the problem through its recently-amended ROW Rules, we would do so. In some cases, the CPUC already is doing so. For example, the CPUC currently is slated to look at whether undergrounding rules might frustrate or “prohibit . . . service by causing suitable sites for wireless antennas to become scarce,” thus discriminating against wireless entry.³⁴ California takes these matters seriously.

Finally, the wholesale preemption of state and local safety laws would create problems that the FCC perhaps has not considered, but that become clear at the local level. One example will suffice to prove the point. The FCC asks whether it should adopt an “irrebuttable presumption” that the shot clock deadlines (90 days for “collocations,” e.g., pole attachments; 150 days for other applications) are reasonable,

³³ T-Mobile South, LLC v. City of Roswell, ___ U.S. ___, ___, 135 S. Ct. 808, 816 (2015).

³⁴ *Wireless Deployment NPRM*, ¶ 98.

and whether it should divest cities of any authority to act after the shot clock period.³⁵

The CPUC is concerned that adopting such an irrebuttable presumption could be used to divest cities of authority over public safety and welfare.

California has special geographic and demographic concerns, in that large populations live close to desert scrubland and mountainous terrain with often tinder-dry trees and other vegetation. For much of the last ten years, California has suffered from a severe drought. And although last winter's rains brought short-term relief, we expect that dry is the new normal.³⁶ During that ten-year period, utility poles overloaded with unauthorized attachments, as well as poorly-maintained telecommunications and electrical supply lines, have led to serious service outages, including E9-1-1 service outages. Worse, they set off wildfires that have burned hundreds of square miles of state land and killed at least ten people. Some of those people were electrocuted when the poles came down. The others burned to death.³⁷

Ensuring the safety of pole attachments is vital—sometimes literally. As a rule, however, the CPUC does no *ex ante* safety review of planned wireline and wireless deployment projects. Its review is typically limited to determining that the project

³⁵ *Wireless NPRM*, ¶¶ 10-16.

³⁶ See Ian Lovett, *California Braces for Unending Drought*, N.Y. TIMES, May 9, 2016, available at <https://www.nytimes.com/2016/05/10/us/california-drought-water-restrictions-permanent.html>.

³⁷ Appendix A to these comments sets forth a more complete listing and description of pole-related fatalities. R.16-12-001 and P.17-03-004, described above, are a partial response to California's state-specific safety concerns.

is exempt from the California Environmental Quality Act.³⁸ Because the respective roles of the State and local governments are complementary, federal preemption of some or all of relevant rules could have a deleterious effect on that dynamic, and on safety enforcement.

Safety is not an accident. The potential consequences of these rules could force poorly reviewed projects through truncated coordination with safety agencies (fire, forestry, flood protection, highway agencies, etc.), resulting in more downed poles, more fires, more property destruction, and more deaths.

The CPUC hopes “to work with states and localities to remove the barriers to broadband deployment,” particularly concerning the development of model codes for local permitting processes.³⁹ The CPUC, however, does not believe that the preemption of state and local safety rules would be either good policy or good law. At a bare minimum, if the FCC moves down this path, the CPUC suggests that the Commission expressly define what sorts of laws would “prevent or hinder” deployment.

³⁸ Cal. Pub. Res. Code §§ 21000-21189 (“CEQA”). The CEQA statute and its interpretive Guidelines are available at http://resources.ca.gov/ceqa/docs/2014_CEQA_Statutes_and_Guidelines.pdf. The staff of the CPUC’s Energy Division reviews projects for CEQA compliance, which usually means determining that the projects fit within one of CEQA’s exemptions. When that happens (as it does for all but the largest projects), safety *per se* is not a factor considered in the CEQA analysis. The assigned CEQA staff person informally estimates that he processed approximately 180 notices of proposed telecommunications construction each year, with an average of 60-70 antennas on those (the majority) that relate to small cell or DAS antenna construction.

³⁹ *Wireline Deployment NPRM*, ¶¶ 111-112.

III. Issues unique to the Wireline Deployment NPRM

The FCC seeks “comment on revisiting [its] copper retirement and notice of network change requirements to reduce regulatory barriers to the deployment of next-generation networks.”⁴⁰ In our comments in advance of the *2015 Technology Transitions Order*, the CPUC spoke extensively to these issues, and those comments remain relevant today. The CPUC will first set forth some general remarks, and will then respond to some of the specific issues raised in the *Wireline Deployment NPRM*.

The *2015 Technology Transitions Order* recognized that “the success of the technology transitions is dependent, among other things, on clear and certain direction from the Commission that preserves the historic values that Congress has incorporated in the Communications Act”⁴¹ As the *2015 Order* put it, those historic values are “competition, consumer protection, universal service, and public safety.”⁴² California’s Public Utilities Code embodies similar values: the CPUC’s core mission is to ensure that public utilities “furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”⁴³ The CPUC appreciated the opportunity to comment on the

⁴⁰ *Id.* at ¶ 57.

⁴¹ *2015 Technology Transitions Order*, 30 FCC Rcd 9372, ¶ 3.

⁴² *Id.* at ¶ 1.

⁴³ Cal. Pub. Util. Code § 451. California Public Utilities Code Section 709 sets forth California’s telecommunications policy goals, which balance our commitment to universal service with our goals of deploying new technologies, bridging the digital divide for all Californians, and maintaining reasonable service quality standards.

2015 Technology Transitions Order, because we believed—and still do—that the rules comprising that *Order* advanced values we shared with the FCC.

The *Wireline Deployment NPRM*, released not even two years after extensive comment on these very rules, seeks to eliminate those values in favor of the carriers’ operational efficiency: the FCC’s goal now is to “accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.”⁴⁴ The *Wireline Deployment NPRM* would remove existing regulatory backstops for the provision of wholesale services and a discontinuance application process that considers the totality of the service, would put the burden of establishing an alternative service on the customer, and would eliminate the notice requirements that tell customers that a change is coming.

A. The FCC’s Assumption that Copper Has Outlived Its Usefulness Is Overstated

The copper retirement portion of the *Wireline Deployment NPRM* seems to assume that speeding copper retirement will “facilitate more rapid deployment of next-generation networks. As the *2015 Technology Transitions Order* recognized, however, there are “two distinct but related kinds of technology transitions: (1) changes in network *facilities*, and in particular, retirement of copper facilities; and (2) changes that involve the discontinuance, impairment, or reduction of legacy *services*, irrespective of the network facility used to deliver those services.”⁴⁵ An all-IP multi-media network can use

⁴⁴ *Wireline Deployment NPRM*, ¶ 1.

⁴⁵ *2015 Technology Transitions Order*, 30 FCC Rcd 9372, ¶ 4.

copper as its physical infrastructure⁴⁶ just as TDM circuit-switched voice services can run over fiber.⁴⁷

Copper technology is not inherently obsolete. Copper was originally used for telecommunications because it could serve as the backbone of a universal voice network: it was cheap to install, easy to use, and readily available. When the voice network expanded to provide broadband capability, new copper technologies were invented to provide data services and the internet to homes and businesses, using the existing architecture and infrastructure.⁴⁸ Meanwhile, telecommunications carriers have gradually pushed fiber technologies further out from the core (where its capacity was well-suited to the big traffic requirements of interoffice communications), but fiber-to-the-home is not yet ubiquitous. Many carriers—especially those without a wireless affiliate—provide high-speed service to the home using either fiber *or* copper.⁴⁹ For example, advances in the G.fast protocol have led to carrier strategies for serving multi-dwelling units using the existing copper loops.⁵⁰ And some services—certain credit card readers, alarm systems, closed captioning, and emergency services, for example—still rely on copper technology.

⁴⁶ See *id.* at ¶ 8.

⁴⁷ For example, many carriers around the globe use a fiber-to-the-home technology, BPON, based on the G. 983 specification, that uses a TDM technology, AAL5.

⁴⁸ For example, T1/PRI for business, DSL for telco loops, and PacketCable for cable customers.

⁴⁹ For example, Frontier states: “We own fiber optic and copper cable, which have been deployed in our networks and are the primary transport technologies between our host and remote central offices and interconnection points with other incumbent carriers.” Frontier Communications Corp., Form 10-K and Annual Report, at 7 (Dec. 31, 2015) available at <http://investor.frontier.com/annual-proxy.cfm>.

⁵⁰ See, e.g., Sean Buckley, *Frontier taps Nokia for initial G. fast rollout*, FIERCE TELECOM, May 25, 2017, at <http://www.fiercetelecom.com/telecom/frontier-taps-nokia-for-initial-g-fast-roll-out>.

In a transitional technical environment like this one, all of these technologies—copper, fiber, wireless—should be used to their fullest. The FCC’s conflation of “fiber facilities” with “next-generation services” masks the difficulties that may arise if copper retirement is approached hastily.

California has enthusiastically embraced new technologies. For example, California has been a leader in experimenting with next-generation 9-1-1 services that use both VoIP and wireless technology, and is rolling these services out statewide.⁵¹ California fully supports both technology transitions: the facilities transition, from copper to fiber, and the services transition, from voice-only to voice-plus services. We seek to ensure that everyone—competitive LECs, business and residential customers, emergency services providers, critical infrastructure utilities, and state commissions like the CPUC—is fully informed when an incumbent LEC seeks to change its facilities or services, so that they can adequately plan for the change and that they have a chance to voice any concerns they might have. The *Wireline Deployment NPRM* would prevent that result; accordingly, we cannot support it.

1. The FCC had authority to promulgate the expanded notice requirements in the 2015 *Technology Transitions Order*.

The Commission asks for comment on its “authority to impose the copper retirement notice requirements in the *2015 Technology Transitions Order*.”⁵² California

⁵¹ California Governor’s Office of Emergency Services, Next Generation 9-1-1 (NG9-1-1) in California, <http://www.caloes.ca.gov/cal-oes-divisions/public-safety-communications/ca-9-1-1-emergency-communications-branch/ca-9-1-1-technology>.

⁵² *Wireline Deployment NPRM*, ¶ 57.

is puzzled by this request. To the best of our knowledge, no one has previously suggested that the FCC lacked such authority. Even USTelecom, which challenged the *2015 Technology Transitions Order* in court, did not make that argument.⁵³

To the contrary, Section 251(c)(5), which requires “reasonable public notice” of network changes, when married to the FCC’s ancillary jurisdiction, provided authority to impose the notice requirements in the *2015 Technology Transitions Order*.⁵⁴ To invoke its ancillary jurisdiction, “the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act,” and “the subject of the regulation must be reasonably ancillary to the effective performance of the Commission's various responsibilities.”⁵⁵ The notice requirements are reasonably ancillary to several statutory grants of authority, including Section 251(c)(5) and Section 151, which require the FCC “to promote the safety of life and property through the use of wire and radio communications.” Because, as described further below, improperly-noticed copper retirements could hamper emergency services, these notices are a safety measure.

⁵³ See Brief for Petitioner USTelecom at 1-2, *U.S. Telecom Ass’n v. FCC*, No. 15-1414 (D.C. Cir. June 14, 2016) (“[T]he FCC updated its rules that require carriers to give notice before they retire their legacy copper network facilities USTelecom is not challenging the changes to that notice-based regime.”).

⁵⁴ See *American Library Ass’n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005).

⁵⁵ *Id.* at 692-93 (internal quotation marks omitted).

2. The FCC should not eliminate or reduce the expanded notice requirements.

The FCC seeks comment on whether to repeal or modify Section 51.332, thereby reducing the number of people who receive direct notice of copper retirements and reducing the notice period for those who would still get it.

First, the FCC asks whether it should repeal Section 51.332, and limit direct notice of planned copper retirements only to “each telephone exchange service provider that directly interconnects with the incumbent LEC’s network.”⁵⁶ The CPUC disagrees with this suggested change.

Many entities benefit from both notice and, potentially, protests of planned copper retirements. The *2015 Technology Transitions Order* properly required incumbent LECs to notice “each entity within the affected service area that directly interconnects with the incumbent LECs network” before retiring copper facilities.⁵⁷ The FCC found that such notice would “ensure that all competitive LECs and other interconnecting entities that could be affected by the planned copper retirement receive information that would assist them in preparing to accommodate the planned network change.”⁵⁸ The Commission also specifically found that the incumbent LECs had not established that this notice would impose an “onerous and unnecessary administrative burden on them” because they

⁵⁶ *Wireline Deployment NPRM*, ¶ 61 (internal quotation marks omitted).

⁵⁷ *2015 Technology Transitions Order*, 30 FCC Rcd 9372, ¶¶ 20-23.

⁵⁸ *Id.* at ¶ 22.

relied “solely on conclusory allegations.”⁵⁹ And, the FCC found, any burden would be “outweighed by the need to ensure that interconnecting carriers receive sufficient notice to allow them to accommodate the transition without disruption of service to their customers”⁶⁰ The new notice rules have not been in place long enough to disturb those conclusions; any evidence to the contrary would be largely anecdotal.

The *2015 Technology Transitions Order* also required notice to the Secretary of Defense, state commissions, Governors, and Tribal entities.⁶¹ The CPUC urges the FCC to retain this requirement. The CPUC views both types of technology transitions—the facilities transition, from copper to fiber, and the services transition, from voice-only to voice-plus services—through the lens of the carrier of last resort (“COLR”) and basic service requirements. All COLRs in California must maintain a minimum level of service, available to everyone in California, at a reasonable rate.⁶² And all telephone corporations that offer basic residential telephone service must offer California’s low-income telephone program, called California LifeLine.⁶³

The CPUC issues several types of operating authority to utilities within its jurisdiction. One type is called the certificate of public convenience and necessity

⁵⁹ *Ibid.* (internal quotation marks omitted).

⁶⁰ *Ibid.*

⁶¹ *Id.* at ¶ 70.

⁶² *See* Cal. Pub. Util. Code § 451.

⁶³ Cal. Pub. Util. Code § 876.

(“CPCN”).⁶⁴ All facilities-based telephone corporations that hold California CPCNs and that provide residential service must also provide basic service, as the CPUC has defined it, on an unbundled basis. In 2012, the CPUC adopted a definition of basic service that is technology-neutral, giving carriers the flexibility to meet the requirements using the technology of their choice.⁶⁵ The nine elements of basic service are:

1. The ability to place and receive voice-grade calls over all distances using the public switched telephone network or its successor network;
2. Free access to 9-1-1/Enhanced 9-1-1 service;
3. Flat rate options for unlimited incoming and outgoing calls, and California LifeLine rates and charges for eligible customers;
4. Access to directory assistance within the customer’s local community, the option to be listed or unlisted in the directory, and the option to receive a free copy of the White Pages;
5. Access to 800 and 8YY toll-free services;
6. Access to telephone relay service under Cal. Pub. Util. Code § 2881;
7. Access to customer service information about Universal Lifeline Telephone Service, bill inquiries, and information about service activation, termination, and repair;
8. One-time free blocking for information services and one-time billing adjustments for charges incurred inadvertently, mistakenly, or without authorization; and
9. Access to operator services.

⁶⁴ Cal. Pub. Util. Code § 1001.

⁶⁵ CPUC Decision 12-12-038, *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M039/K603/39603602.PDF>.

Thus, copper retirement affects basic service in California. Customers being switched from copper might find themselves without free access to 9-1-1, or service functionality or coverage, or access to relay service, in violation of California’s basic service rules. Under the current rules, the CPUC would receive notice before that happened and could plan for the transition, which affords a protection that the FCC should not remove.

Next, the FCC asks whether it should eliminate “all differences between copper retirement and other network change notice requirements”⁶⁶ The CPUC disagrees with this proposal because copper retirement is not the same as any other network change. We have explained our basic service obligations above; copper retirement affects those in a way that other network changes do not. Moreover, some services, such as closed captioning and alarm systems, currently depend on copper wire. And unlike copper, fiber does not carry line power; all customers switching from copper to fiber will need to ensure that they have backup power and that it works. The existing notice rules correctly recognize that copper retirement affects many different entities, all of whom should be notified before a facilities change.

Having proposed to limit direct notice only to interconnecting carriers, the FCC also proposes to reduce the notice periods, from ninety days to ten days.⁶⁷ It suggests that a reduced notice period is acceptable because interconnecting carriers know that “copper

⁶⁶ *Wireline Deployment NPRM*, ¶ 62.

⁶⁷ *Ibid.*

retirements are inevitable.”⁶⁸ While copper retirement may be inevitable, the FCC’s current rules provide a path for carriers who have copper infrastructure to notify their wholesale customers before withdrawing the service. Information—i.e., notice—is the foundation of a competitive marketplace.⁶⁹ CLECs generally do not build their networks from the ground up, and thus are dependent on the incumbent LECs for wholesale inputs, including proper information about those inputs. The FCC should support measures that promote competition, including policies that encourage well-informed market participants.

The FCC is proposing other changes that would hurt the wholesale market. It “specifically propose[s] eliminating Section 51.325(c) . . . which prohibits incumbent LECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.”⁷⁰ In essence, the FCC is considering eliminating or reducing notice periods to consumers, businesses, and wholesale customers. At the same time, the Commission’s elimination of this rule,

⁶⁸ *Ibid.*

⁶⁹ See, e.g., *In re Consumer Information and Disclosure, Truth-in-Billing and Billing Format*, 24 FCC Rcd 11380, ¶ 5 (2009) (“access to accurate information plays a central role in maintaining a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services”); *In re Modernizing the Form 477 Data Program*, 28 FCC Rcd 9887, ¶ 82 (2013) (“We find that dissemination of deployment data promotes a more informed, efficient market”); *In re Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd 7507, ¶ 106, note 160 (1990) (“The efficient market hypothesis holds that all available and relevant information about a company [and its services] is incorporated into the market price of that company”); see generally Friedrich Hayek, “Economics and Knowledge” (1937), “The Use of Knowledge in Society” (1945); and the “Meaning of Competition” (1946), available at <https://mises.org/library/meaning-competition> (“Competition is essentially a process of the formation of opinion: by spreading information, it creates that unity and coherence of the economic system which we presuppose when we think of it as one market”).

⁷⁰ *Wireline Deployment NPRM*, ¶ 67.

Section 51.325(c), would allow affiliates to take advantage of these network changes. Under the proposed rules, nothing would prohibit an incumbent LEC from planning to retire copper, notifying an affiliate that provides business services in time to allow the affiliate to lay fiber in an area where a competing carrier has a wholesale agreement, and putting that competitor out of business. If competition in the telecommunications market is a balance between the incumbents and their competitors, by these rules the Commission could stifle competition, rather than enabling it. Effective competition depends in part on the flow of information.

The Commission finally asks whether, instead of eliminating Section 51.332, it should amend Section 51.332 “to streamline the process, provide greater flexibility, and reduce burdensome requirements for incumbent LEC copper retirements.”⁷¹ As a preliminary note, this is question-begging: while the *2015 Technology Transitions Order* specifically found that the current rules *would not* be burdensome,⁷² and elsewhere, the *Wireline Deployment NPRM* seeks comment on whether they have *proven* burdensome,⁷³ but in posing this question about Section 51.332, the FCC presupposes that the rules *are* burdensome. The premise states the conclusion. If the Commission means for the *Wireline NPRM* to be an investigation into the propriety of the current rules, it should not, in the same breath, frame the argument against them.

⁷¹ *Id.* at ¶ 63.

⁷² *2015 Technology Transitions Order*, 30 FCC Rcd 9372, ¶ 21 (rejecting the assertion that the notice requirements “would impose onerous and unnecessary administrative burdens”).

⁷³ *Wireline Deployment NPRM*, ¶ 58 (asking whether the revised rules have “hindered next-generation network investment” or whether they have “been effective in protecting competition and consumers”).

That said: the FCC sets forth four bulleted proposals to modify Section 51.332.⁷⁴ The CPUC cannot support the first two bullets. The rules should include an objection period that is sufficiently long for affected parties to explain the effect to the FCC, so that the FCC can determine if there is a problem. The third bullet seeks comment on “[p]roviding greater flexibility regarding the time in which an incumbent LEC must file the requisite certification.”⁷⁵ The CPUC does not, per se, object to “providing greater flexibility” to the timing requirements, but also cannot support a measure this vague; “greater flexibility” is undefined. Finally, the fourth bullet seeks comment on “[r]educing the waiting period to 30 days [from 90 days] where the copper facilities being retired are no longer being used to serve any customers in the affected service area.”⁷⁶ The CPUC could support this measure, if it were accompanied by some assurance that customers in the service area were not forced off their copper-based service through inadequate notice; or because a California-based COLR did not submit a required notice to provide basic service using an alternative technology.

California has evidence that at least one carrier—AT&T—may seek or has sought to forcibly migrate its customers from copper to other technologies. AT&T recently added the following language to its California Residential Service Agreement in a bill insert:

⁷⁴ *Id.* at ¶ 63.

⁷⁵ *Id.*

⁷⁶ *Id.*; the current 90-day requirement is found in 47 C.F.R § 51.332(e)(2).

We're writing to let you know that we're making some changes to the Residential Service Agreement (RSA) that covers your local and/or long-distance service. . . .

Please read the terms of the amendments carefully. If you agree with them, you don't have to do anything. . . . If you don't agree with the terms of the amendments, call us at 800.288.2020 to cancel your service. If you don't cancel your service, it means you accept the terms of these amendments. . . .

AT&T reserves the right at any time to temporarily suspend or interrupt Services to make necessary changes in how we provide Services over our network and facilities to your premises. We will provide advance notice of these network changes to the extent required by this Agreement, applicable law and regulation. In some cases, such changes in how we provide Services may require a technician to be dispatched to your home to install new network equipment at your premises and transfer your service to the new network equipment in order to ensure you continue to receive such Services. The network equipment we install at your home may require the use of your electrical power for the operation of our facilities. Where a technician is required, **if you do not allow AT&T to install the new network equipment at your premises, your telephone service may be disconnected . . .**⁷⁷

In other words, AT&T seems to be saying, "we can change your facilities any time we want, and if you don't like it, you can cancel your service." Under the circumstances, California is concerned that reducing the waiting period in the manner that the fourth bullet contemplates could further incentivize carriers to forcibly migrate customers from copper. That is, by using an adhesion contract buried in fine print, the carrier could move all of the customers in a service area off copper, and then seek a hasty discontinuance. And that we cannot support.

⁷⁷ A copy of this notice is available in Appendix B to these comments.

In California, and across the country, many emergency services providers, government entities, critical infrastructure providers, and vulnerable consumers rely on copper infrastructure. It is vital that these entities have an adequate timeframe in which to protest the potential retirement of copper facilities and plan for alternative services that do not require copper. The *2015 Technology Transitions Order* correctly recognized this. The expanded notice requirements should stay.

3. The rules should protect vulnerable customers, including disabled people and senior citizens.

The current rules oblige incumbent LECs to provide direct notice of planned copper retirements to retail customers. The FCC seeks comment on eliminating that direct notice. The CPUC disagrees with eliminating that notice.

As the FCC correctly recognizes, eliminating that direct notice would likely have a deleterious effect on disabled customers and senior citizens.⁷⁸ Many of those vulnerable customers rely on specialized CPE to communicate effectively over the public telecommunications network. It is critically important that those customers be able to communicate just as effectively after the transition to newer technologies. For example, if a Section 214 applicant is transitioning its service in an affected community to a similar IP-based service, the applicants' disabled subscribers should not be forced to switch CPE or to switch to an alternative voice provider just to keep receiving the same accessibility, usability, and compatibility with assistive technologies. Further, some services provided using analog technology, such as TTYs, cannot be duplicated with IP.

⁷⁸ *Wireline Deployment NPRM*, ¶ 64.

Forcing vulnerable customers to switch CPE to maintain comparable service would be especially disruptive to a population that depends on consistency and stability. And because disabled customers and senior citizens often have lower incomes than other groups, being forced to switch CPE or to an alternative provider could prove unreasonably costly.

To protect vulnerable consumers, the CPUC urges the FCC to require service providers to do one of the following:

1. Ensure that the new service works with the equipment or device of the disabled subscriber; or
2. If the customer's assistive technologies are not compatible with the provider's new facilities, the provider should offer the customer, free of charge, new equipment that is compatible with the provider's new facilities; or
3. The provider should give the subscriber information on where the subscriber can purchase compatible equipment, along with financial assistance to help them buy that equipment.

The FCC further seeks comment on eliminating or modifying Section 68.110(b), which requires that, if changes to a wireline provider's facilities, equipment, operations, or procedures "can be reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service." The Commission asks how a carrier could know whether "any"

terminal equipment would be affected, and asks to what extent people with disabilities “still rely on TTYs or other specialized devices or services in an analog environment.”⁷⁹

To answer the first question: a carrier might not know *a priori* whether changing its facilities could affect any customer’s CPE. We respectfully submit, however, that a carrier like AT&T is in a better position to make that determination than an elderly blind person.

As to the second question: California has the largest specialized telecommunications equipment distribution program in the country, and the CPUC oversees that program. TTY customers have been declining in the Deaf and Disabled Telecommunications Program and, over time, the number of users will continue to decrease.⁸⁰ The rub, though, is that the remaining TTY customers have been using TTY the longest and are the least able to adapt to real-time text technology.⁸¹

Through its oversight of California’s equipment distribution program, the CPUC has received anecdotal evidence that the equipment distributed by that program is not compatible with current IP technology. Based on the customers’ experiences, however, it has been hard to identify the problem. The CPUC therefore recommends that the FCC conduct a trial to determine the nature and extent of the problem: Is it limited to

⁷⁹ *Wireline Deployment NPRM*, ¶ 70.

⁸⁰ For example, in 2016, TTY devices accounted for 1,189,840 calls and 1,423,254 minutes of use in California. Since 2014, the number of calls is down 10% and the minutes of use is down 17%.

⁸¹ See CPUC’s Comments, *In the Matter of Transition from TTY to Real-Time Text Technology*, filed August 5, 2016.

California, or do other states experience the same thing? Would the problem be simple and cheap to fix, or complex and costly? Armed with answers to those questions, consumers, carriers, the states, and the FCC should work together to develop migration strategies. Depending on the trial results, the FCC may want to consider imposing additional conditions on service discontinuance. The trial might also serve to highlight both technical and adoption-related issues that would need to be addressed in the IP transition.

The CPUC generally favors not fewer protections for vulnerable consumers but more. We urge the FCC to consider a process for ensuring the availability of IP text compatible equipment, perhaps at the expense of the transitioning provider. The FCC should also consider requiring the provider to offer the disabled subscriber the training and support necessary to ensure that the subscriber knows how to use the new equipment, and that it works properly.

B. The Section 214(a) discontinuance process

The FCC proposes to eliminate many of the protections in the existing discontinuance process. The updated Section 214(a) notice process adopted in the *2015 Technology Transitions Order* should remain so that affected users can provide information on the effects a planned discontinuance will have on the totality of the service.

The CPUC preliminarily notes that, again, the FCC has improperly conflated “fiber” with “IP,” and “copper” with “not-IP.” The FCC writes that facilitating “carriers’

abilities to retire legacy network infrastructure . . . will accelerate the transition to next generation IP-based networks.”⁸² But many technologies carry IP traffic over copper networks now: DSL and xDSL; T1; PRI; cable MSO technology for DOCSIS 1, 2, and 3; and G.fast, to name a few. Conflating copper with “old technology” takes a narrow view of the available copper facilities.⁸³ This misunderstanding runs throughout the discussion.

1. The FCC should not adopt its proposed “grandfathering” rules.

The FCC’s “grandfathering” proposals broadly proceed in two steps. First, the FCC suggests easing the requirements to grandfather “low-speed TDM services at lower-than-DS1 speeds (below 1.544 Mbps)”⁸⁴ Second, the FCC would speed the process to discontinue those grandfathered services.⁸⁵ The CPUC does not support these proposals.

Under CPUC General Order 133, we require carriers to report various service and performance measures to us on a monthly or quarterly basis. According to the reports we received for 2016, about 6 million wireline customers in California use 64 kbps voice services. But the FCC’s proposed rules would allow carriers to essentially declare those services obsolete and discontinue them on an accelerated basis. That puts those 6 million

⁸² *Wireline Deployment NPRM*, ¶ 72.

⁸³ See Buckley, *supra* note 50 (discussing Frontier’s rollout of G.fast technology).

⁸⁴ *Wireline Deployment NPRM*, ¶ 79.

⁸⁵ *Id.* at ¶¶ 85-89.

customers—including 9-1-1 circuits, business users, consumers with disabilities, and critical infrastructure connections—at risk of losing service without adequate notice.

Implementing these rules might, for example, allow a carrier to quickly grandfather and discontinue vital services that California’s 9-1-1 network uses to deliver calls from end users to emergency responders. The California 9-1-1 system has 450 Public Safety Answering Points with approximately 3,000 Centralized Automated Message Accounting trunks and 388 Frame Relay circuits delivering over 28 million 9-1-1 calls every year. As described in more detail above, California is moving as quickly as possible toward IP-enabled E9-1-1 services, but low-speed services remain foundational to the California 9-1-1 system, and that is likely to be the case for some time.

In 2016, the FCC specifically addressed the interplay of Section 214 discontinuances and 9-1-1 services, and properly determined that Section 214 discontinuances should not impair 9-1-1 services.⁸⁶ The CPUC fears that these proposed rules would cut against that determination. Further, discontinuance of wireline access to 9-1-1 service could impair 9-1-1 service itself.

2. The 2015 Technology Transitions Order correctly clarified the end users that a carrier must consider when applying for a Section 214 discontinuance.

Section 214(a) provides:

No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first

⁸⁶ 2016 *Technology Transitions Order*, 31 FCC Rcd 8283, ¶¶ 134, 135.

have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby

The *2015 Technology Transitions Order* explained that “a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier’s actions will discontinue, reduce, or impair service to end users, including a carrier-customer’s retail end users.”⁸⁷ In so stating, the FCC properly clarified that a carrier cannot narrowly define “community” as just its own retail customers.

To get there, the FCC cited two precedents, *Western Union*⁸⁸ and *BellSouth*.⁸⁹ In the first case, Western Union asked the Commission to force AT&T and its Bell System subsidiaries to keep letting Western Union use AT&T’s group bandwidth facilities.⁹⁰ Western Union asserted that AT&T’s refusal to let Western Union use these facilities was costing Western Union both operational flexibility and money.⁹¹ The FCC denied the petition because, even if Western Union had shown some harm to itself, it had not shown any reduction in service to its end users.⁹² Indeed, Western Union admitted that it could

⁸⁷ *2015 Technology Transitions Order*, 30 FCC Rcd 9372, ¶ 102.

⁸⁸ *Western Union Telegraph Company Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, 74 FCC 2d 293 (1979).

⁸⁹ *BellSouth Telephone Companies Revisions to Tariff FCC No. 4*, Transmittal No. 432, Memorandum Opinion and Order, 7 FCC Rcd 6322 (1992).

⁹⁰ *Western Union*, 74 FCC 2d at 293, ¶ 1.

⁹¹ *Id.* at 293, ¶ 2.

⁹² *Id.* at 297, ¶ 9 (“Even if it were true that WU’s flexibility . . . is decreased . . . WU has not shown how this results in any loss or impairment of service to the customers it serves.”).

continue to serve its customers.⁹³ As the Commission explained, in determining whether a carrier needs Section 214(a) authority to discontinue a service, “the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public.”⁹⁴ The Commission was clear that where “a change to a carrier’s service offerings to another carrier will result in an actual discontinuance, reduction or impairment to the latter carrier’s customers” the Commission “would then need to determine whether it violated Section 214(a).”⁹⁵

The second case was much the same. Throughout its service territory, BellSouth had offered a service called Calling Party Number (“CPN”), which its carrier customers then used to offer caller ID service to their end users.⁹⁶ It sought to withdraw the service in North Carolina.⁹⁷ AT&T, one of BellSouth’s carrier customers, opposed BellSouth’s request, on the grounds that, if BellSouth withdrew its CPN service, AT&T would no longer be able to provide caller ID services to its end-user customers.⁹⁸ The FCC agreed with AT&T. It explained that if “a discontinuance, reduction, or impairment of service to the carrier-customer ultimately discontinues service to an end user, the Commission has found that § 214(a) requires the Commission to authorize such a discontinuance.”⁹⁹ If

⁹³ *Ibid.*

⁹⁴ *Id.* at 296, ¶ 7.

⁹⁵ *Ibid.*

⁹⁶ *BellSouth*, 7 FCC Rcd 6322, ¶ 1, note 1.

⁹⁷ *Id.* at ¶ 1.

⁹⁸ *Id.* at ¶¶ 4-5.

⁹⁹ *Id.* at ¶ 5.

BellSouth withdrew CPN service from its carrier-customers, those carrier-customers would necessarily have to withdraw CPN service from its end-user customers. The FCC therefore concluded that a § 214(a) evaluation was “necessary to determine if the impairment of service to these end users will adversely affect the present or future public convenience or necessity.”¹⁰⁰

These cases were correctly decided, and the FCC correctly interpreted them in the *2015 Technology Transitions Order*. Yet the Commission now proposes “to require a carrier to take into account *only* its own retail end users”—not the retail end users of its carrier customers—when evaluating whether Section 214(a) applies.¹⁰¹ The FCC’s proposal cannot be squared with its own precedent.

The Commission further suggests that Section 251(c)(5) of the Act, which requires incumbent LECs to “provide reasonable public notice” when the incumbent makes changes that would impair a competing carrier’s service, also relieves the incumbent from having to obtain Section 214(a) authority.¹⁰² The CPUC does not believe that to be a reasonable interpretation of Section 251(c)(5). A fair reading of the statutory language leads to the conclusion that an incumbent LEC must both provide public notice under 251 *and* seek the FCC’s approval under 214. Yet here, the FCC suggests that the incumbent need not comply with both.

¹⁰⁰ *Ibid.*

¹⁰¹ *Wireline Deployment NPRM*, ¶ 90.

¹⁰² *Id.* at ¶ 93.

IV. Conclusion

The CPUC appreciates this opportunity to provide comments to the FCC on the *Wireline Deployment NPRM* and the *Wireless Deployment NPRM*.

Respectfully submitted,

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APPENDIX A

Property Damage, Injury and Death Caused by Pole & Conduit Failure in California, over the Last Ten Years

Inadequate maintenance of poles and/or pole attachments has led to a number of instances where overloaded poles and/or insufficiently maintained attachments have caused fires and other accidents, resulting in millions of dollars of property damage and human dislocation, and in multiple cases directly or indirectly causing fatalities. Here are some instances of this damage and death.

In October 2007, strong Santa Ana winds swept across Southern California and caused dozens of wildfires. Several of the worst wildfires were reportedly ignited by downed power lines or other pole attachment failures.¹ These fires burned 334 square miles, disrupted transportation, and destroyed portions of the electric supply and communications networks, as well as some community water sources.² Perhaps the most disastrous was the Guejito Fire, caused by inadequate clearance between communication and power lines, and more immediately (by some reports) a loose cable lashing wire that came into contact with an electric supply line. The Guejito Fire then merged with the Witch Fire (also caused by contact with a power line),³ killing two people, injuring 40 firefighters, and destroying approximately 1,141 homes, 509 outbuildings, and 239 vehicles.⁴

¹ R.15-05-006, *Rulemaking into Fire Threat Maps, Safety Regulations*, slip op. at 2. These included the Grass Valley Fire (1,247 acres); the Malibu Canyon Fire (4,521 acres); the Rice Fire (9,472 acres); the Sedgewick Fire (710 acres); and the Witch and Guejito Fires (197,990 acres). *Id.*; see also CalFire Reports page, available at http://www.calfire.ca.gov/fire_protection/fire_protection_firereports.

² R.15-05-006, at 2; see also CalFire report, Summary of Witch Fire, and Narrative of Guejito Fire, on CalFire Reports page, *supra*.

³ CalFire Reports, *supra*, “Summary” of Witch Fire.

⁴ I.08-11-007, slip op. at 2 (“Cox lashing wire made contact with an SDG&E 12 kV overhead conductor on October 22, 2007, between SDG&E poles P196387 and P196394”), and Attachment 2, CPSD Report on Guejito, Witch, and Rice Fires, at 1, *passim*; see also March 24, 2017 Opening Brief of the Office of Ratepayer Advocates, at 9 (quoting CalFire report suggesting Witch Fire was started by an independent SDG&E line failure) and 39 (quoting SDG&E witness about possibility that clearance violation set up the situation that caused the Guejito Fire), as well as other briefs in A.15-09-010 re Wildfire Expense Memorandum Account.

The Malibu fire, which occurred about 100 miles north of the Guejito and Witch Fires, is a harrowing example of what can go wrong when pole owners are unaware of the condition of their poles and what is on the poles, and when pole attachers act with disregard for public safety. An overloaded pole failed, and the resulting fire burned over 4500 acres, destroyed \$15 million in property, and cost over \$5 million to fight. NextG (a competitive carrier specializing in providing supporting infrastructure to wireless companies, now a subsidiary of Crown Castle), admitted: (1) it placed attachments on a pole in Malibu Canyon, even though SCE had denied NextG's attachment request on the grounds that the weight of all the attachments would overload the pole in violation of GO 95's safety standards; and (2) it then failed to adequately communicate with the pole owner, SCE, about what was on the pole.⁵ Edison, for its part, admitted: (1) the pole did not meet GO 95 safety standards; (2) it failed to prevent NextG from overloading the pole; and (3) it failed to provide accurate documentation (true and correct field notes) and to preserve physical evidence.⁶

In 2011, an electric wire conductor on Acacia Avenue in SCE's San Bernardino service area fell to the ground, resulting in the electrocution of a man, and his wife and stepson when they tried to come to his aid.⁷ The line failure occurred when two overhead conductors "came into contact or near contact with each other and caused [a third] conductor to break [and] fall to the ground."⁸ Why those two conductors came into contact or near contact remained something of a mystery, compounded by a similar, near-simultaneous conductor failure on the same circuit only a quarter mile away, which

⁵ D.13-09-026, at Appendix A, A-4 to A-6, available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K318/77318242.PDF>.

⁶ D.13-09-028, at 9-11, available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K305/77305250.PDF>.

⁷ See I.14-03-004, *Investigation into Southern California Edison [SCE] re Acacia Avenue Triple Electrocution Incident and the Windstorm of 2011*, slip op. at 2; see also D.14-08-009, approving \$24.5 million settlement.

⁸ SED (then CPSD) Preliminary Incident Investigation Report, at 1 *ff*, attached as Attachment 1 to I.14-03-004.

also caused a live electric line to fall to the ground.² In a windstorm that swept through SCE's territory several months later, almost 250 poles were damaged or destroyed, a number of which were found to be infected with termite damage, dry rot, and/or fungal decay both below and above the surface.¹⁰ Staff concluded that SCE and joint pole owners and/or attaching communication providers (AT&T, Champion Broadband, Charter, Sunesys, Time Warner Cable, TW Telecom and Verizon) had all violated GO 95 safety factor requirements.¹¹

SED reported two additional pole related fatalities, and other injuries (including injury to a utility employee), in 2011-12 incidents.¹² Recently (in 2017), SED issued citations related to a fire started by tree-powerline contact in PG&E's Butte County territory, which resulted in two further deaths.¹³

² *Id.*

¹⁰ January 11, 2013 CPSD Final Report, "Investigation of SCE Outages of November 30 and December 1, 2011," found as Attachment 2 to I.14-03-004, at 2. 440,168 customers to lose power (some up to a week). *Id.* at 4-10.

¹¹ *Id.* at 1 (finding that "[a]t least 21 poles and 17 guy wires did not meet the safety factor requirements codified in GO 95, Rule 44.1").

¹² One person was electrocuted when a power line broke due to a tree growing between the primary lines in SCE's Los Angeles/Whittier service area, and an additional fatality and further damage were also reported in 2011-2012. See Resolution SED-3, *Establishing Citation Procedures for Safety Enforcement*, 2016 Cal. PUC LEXIS 647, at *17-18 and fn. 13 (2016). Other examples of pole-related accidents set forth in Resolution SED-3 include:

- A 2012 San Mateo incident in PG&E's Peninsula Division in which an overhead conductor failed due to animal contact or other reasons, resulting in an electrocution fatality.
- The 2011 North Fork incident in PG&E's Yosemite Division in which two PG&E overhead conductors came into contact because of inadequate clearance, injuring a PG&E employee who was working on them; and
- The 2012 Ridgecrest incident in SCE's service area in which a bird caused an overhead conductor to fail, resulting in a child suffering burns.

¹³ SED Citation and Incident Investigation Report re Butte Fire, available at <http://www.cpuc.ca.gov/General.aspx?id=1965>. While the earlier wildfires were driven by high winds, the 2015 Butte Fire ignited in light 4-5 mile per hour wind conditions; in addition to the fatalities, the fire burned 71,000 acres and destroyed hundreds of homes in Amador and Calaveras Counties. D.16-05-036, citing Cal Fire's Investigation Report on the Butte Fire, Case No. 15CAAEU024918 (April 25, 2016), at page 29, available at http://www.calfire.ca.gov/fire_protection/fire_protection_firereports/ (2015 Fire Reports, Butte Fire).

Underground facilities present similar but distinct safety considerations. Underground vaults, duct and conduit flood, causing prolonged disruption of emergency services. During the winter storms of 2010-2011 in Los Angeles, there were widespread and persistent outages of the telephone network, including E911 services, reportedly because of water intrusion and lack of maintenance in underground vaults and conduit, among other reasons.¹⁴ Underground facilities can themselves be the source of fires, injury and death.¹⁵

¹⁴ R.11-12-001, Slip Op. at 2-3; *see also* May 7, 2015 letter, Attachment 1 to May 12, 2015 Notice of Ex Parte Communication (by Public Interest Parties), filed in R.11-12-001, at 4-5; Senate Energy, Utilities and Communication Committee's February 4, 2011 hearing on Telephone Service Outages and Infrastructure Needs, available (along with audio and "Background" narrative) at <http://seuc.senate.ca.gov/informationalhearings>. Hurricane Sandy caused similar flooding of underground facilities in New York. *See* Kwasinski, "Hurricane Sandy Effects on Communications Systems," at 3 and 5, available at <http://users.ece.utexas.edu/~kwasinski/preliminary%20telecom%20report%20v3%20comp.pdf>; *see also* D.98-10-058, at section VII(A)(2) (electric utility underground facilities pose particular safety hazards).

¹⁵ *See, e.g.*, AP, "Firefighter dies, one injured in manhole blast," LA Daily News, March 26, 2008, available at <http://www.dailynews.com/article/zz/20080326/NEWS/803269869> ("It appears to be related to what was occurring with the electrical vaults underneath the street, but as I stated, the cause of the explosion is unknown at this point").

APPENDIX B



We've made some changes to your residential service agreement

Hello,

We're writing to let you know that we're making some changes to the Residential Service Agreement (RSA) that covers your local and/or long-distance service. The changes, described below, will happen 30 days after you receive this notice, or July 1, 2017, whichever is later.

Don't worry. These are the only changes we're making to the Agreement. The prices, service descriptions, and other terms and conditions of your service will remain the same. Tariffs with certain basic terms and conditions, like bill payment, will still be on file with your state commissions.

What do you need to do?

Please read the terms of the amendments carefully. If you agree with them, you don't have to do anything. The amendments will automatically begin 30 days after

receiving this notice, or on July 1, whichever is later. If you don't agree with the terms of the amendments, call us at 800.288.2020 to cancel your service. If you don't cancel your service, it means you accept the terms of these amendments.

Want more info?

You can find the RSA and our guidebooks/service guides, with the prices and service descriptions for RSA services at att.com/servicepublications. Or, call us at 800.288.2020 to learn more about the RSA.

Thanks for choosing us,

AT&T

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BI-1660 CS 5/17

Amendments

For all residential customers

By adding paragraph 4.e

Consent to Contact. You expressly authorize, and specifically consent to allowing, AT&T and/or its outside collection agencies, outside counsel, or any other agents acting by or on behalf of AT&T to contact you with informational messages regarding your account, including but not limited to contact in connection with any and all matters relating to unpaid past due charges billed by AT&T to you. You agree that such contact may be made to any mailing address, telephone number, cellular phone number, e-mail address, or any other electronic address that you have provided, or may in the future provide, to AT&T and to any and all telephone numbers billed on your account. You expressly consent and agree that such contact may be made using, among other methods, pre-recorded or artificial voice messages delivered by an automatic telephone dialing system, text messages delivered by an automated system, pre-set e-mail messages delivered by an automatic e-mailing system, or any other pre-set electronic messages delivered by any other automatic electronic messaging system. You agree to provide true, accurate, current, and complete contact information to

It's not consent by blackmail

under duress - feasible restriction, constraint, void

AT&T and its authorized agents and to promptly update your contact information to keep it true, accurate and complete.

By Changing Section 5 to: **5. MODIFYING, SUSPENDING AND/OR CANCELING SERVICES** and adding paragraph 5d:

d. Network Changes.

AT&T reserves the right at any time to temporarily suspend or interrupt Services to make necessary changes in how we provide Services over our network and facilities to your premises. We will provide advance notice of these network changes to the extent required by this Agreement, applicable law and regulation. In some cases, such changes in how we provide Services may require a technician to be dispatched to your home to install new network equipment at your premises and transfer your service to the new network equipment in order to ensure you continue to receive such Services. The network equipment we install at your home may require the use of your electrical power for the operation of our facilities. Where a technician visit is required, **if you do not allow AT&T to install the new network equipment at your premises, your telephone service may be disconnected in compliance with subsection (b) above.**

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Service - subject for the network I was not to have any...