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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Emergency Disaster Relief Program.	Rulemaking 18-03-011

ORDER MODIFYING DECISION (D.) 19-08-025, AND DENYING REHEARING OF DECISION, AS MODIFIED

I. INTRODUCTION AND BACKGROUND

Today's decision disposes of three Applications for Rehearing of Decision (D.) 19-08-025[1] (or "Decision") filed separately by (1) AT&T California and AT&T Corp. ("AT&T"); (2) AT&T, Charter Communications Inc.,[2] Comcast Phone of California, LLC, Cox California Telecom, LLC, the California Cable and Telecommunications Association, and Frontier[3] (collectively "VoIP Coalition"); and (3) CTIA and AT&T Mobility (collectively "CTIA").

Decision (D.) 19-08-025 establishes a state-wide approach to provide customers with essential communications service functions in the face of a range of potential threats and emergencies. Through the Decision's permanent Emergency Disaster Relief Program, communications customers experiencing disaster-related

[1] All citations to Commission decisions are to the official pdf versions which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

[2] Charter Communications, Inc., included its affiliates: Charter Fiberlink CA-CCO, LLC (U-6878-C); Time Warner Cable Information Services (California), LLC (U-6874-C); Bright House Networks Information Services (California), LLC; Spectrum Mobile, LLC (U-4522-C); Spectrum Advanced Services, LLC and Spectrum Pacific West, LLC.

[3] Citizens Telecommunications Company of California, Inc. d/b/a Frontier Communications of California (U-1024-C), Frontier Communications of the Southwest, Inc. (U-1026-C), and Frontier California, Inc. (U-1002-C) are collectively referred to as "Frontier."

housing or financial crisis will be able to keep vital communications services and receive support during a disaster. Upon a declared state of emergency by California's Governor or the United States President, this program mandates traditional landline, Voice over Internet Protocol (VoIP) landline, and wireless public utility telephone corporations to provide certain, basic customer protections that many had already been implementing on a voluntary basis ("Telephone Requirements").[4]

These Telephone Requirements are enumerated in the Decision's Ordering Paragraphs (OP) 3-5 and apply when a declared state of emergency has resulted in loss or degradation of service to customers living in the areas the emergency affected. The following Telephone Requirements are at issue:

- *Traditional landline and VoIP landline telephone requirements*: waivers of the fees for the following services: (a) activation fee for remote call forwarding, remote access to call forwarding, call forwarding features and messaging services; (b) monthly rate for one month for remote call forwarding, remote access to call forwarding, call forwarding, call forwarding features, and messaging services; (c) the service charge for installation of service at a temporary or new permanent location and when customer moves back to premises; (d) the fee for one jack and associated wiring at a temporary location regardless of whether customer has inside wiring plan; (e) fee for up to five free jacks and associated wiring for inside wiring plan customers upon return to permanent location; and (f) fee for one jack and associated wiring for non-Plan customers upon return to permanent location.[5]
- *Wireless telephone requirements*: (a) deploy mobile equipment to areas that need additional capacity to ensure access to 9-1-1/E9-1-1 service (e.g., Cells on Wheels [COWS] and Cells on Light Trucks [COLTS]); (b) provide device charging stations in areas where impacted wireless customers seek refuge from fires; (c) provide WiFi access in areas where impacted wireless customers

[4] See Decision, *Slip*. *Op*., at 66-68 (OP 3-5).

[5] See Decision, at 66-67 (OP 3-4).

> seek refuge from fires; and (d) provide loaner mobile phones for customers seeking shelter from a disaster to use temporarily at a county or city shelter.[6]

As background, the Decision builds on and carriers over the emergency consumer protection measures the Commission first adopted in 2017 in Resolutions M-4833 and M-4835.[7] These resolutions applied to the electric, gas, water, and telecommunications industries and were limited in scope to responding to the effects of California's devastating 2017 wildfires. As to telecommunications providers, these resolutions applied only to Carriers of Last Resort (COLR), such as AT&T, and required them to waive the same fees and charges as those listed in the Decision's Telephone Requirements.[8]

With wildfires and other natural disasters and emergencies becoming more destructive and recurring more frequently, the Commission opened the underlying Rulemaking, R.18-03-011, to consider "whether the Commission should adopt permanent rules requiring all energy, telecommunications, and water utilities under this Commission's jurisdiction to make available comparable post-disaster consumer protection measures to Californians in the event that certain types of emergency disaster declarations are pronounced."[9] Based on the Commission's experience with Resolutions

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[6] *Id*., at 67-68 (OP 5).

[7] The Commission had issued Resolutions M-4833 and M-4835 in response to the devasting 2017 wildfires in Northern and Southern California. The resolutions required the electric, gas, communications service providers, and water utilities to take reasonable steps to help Californians affected by these devastating wildfires. The protections adopted in the resolutions were emergency ones, intended to only address the effects of the 2017 wildfires.

[8] Resolutions M-4833 and M-4835 had provided the following customer protections for residential communications customers of Carriers of Last Resort: waivers of charges for call forwarding, messaging, installation, jacks and inside wiring services. Decision, at 50-51 (FOF 4); see also D.18-08-004, at 7-9 citing Res. M-4833, at 10-16 and M-4835, at 8-13; see also Res. M-4833 (11/13/17), at 19 (Finding of Facts [FOF] 6 and 7) and Res. M-4833, at 14 (FOF 6 and 7). No party filed an Application for Rehearing of Res. M-4833 and M-4835; they became final Commission orders.

[9] Scoping Memo, at 1-2.

M-4833 and M-4835, the Commission found it necessary for all electric, gas, water, and communications customers to have consumer protections that could be implemented "expeditiously by utilities following a triggering event rather than needing to prepare and adopt a resolution after each event."[10]

To avoid gaps in consumer protection during the Commission's consideration of the issues in R.18-03-011, prior to D.19-08-025, the Commission issued Interim Decision, D.18-08-004. The Interim Decision made the protections adopted in Resolutions M-4833 and M-4835 controlling, interim authority until the Commission concluded the Rulemaking.[11] The Interim Decision aimed "to provide continuity and support to customers during times of crisis by establishing interim, minimum disaster relief emergency protocols and protections to assist customers with recovery from indiscriminate harm."[12] The Interim Decision had affirmed "that the emergency customer protections adopted in Resolutions M-4833 and M-4835 to support residential and small business customers of utilities affected by disasters and which affect utility service shall go into effect in the event of a state of emergency declared by the Governor of California."[13]

The Interim Decision maintained the underlying resolutions' landline customer protections and applied them to residential service providers who provide access to 911/E911 in the residence, facilities-based providers of VoIP service, LifeLine providers and carriers of last resort.[14] The Interim Decision also established the following requirements applicable to wireless providers: (1) the deployment of mobile equipment, including Cells on Wheels and Cells on Light Trucks, to supplement service

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[10] Order Instituting Rulemaking Regarding Emergency Disaster Relief Program [OIR], at 5.
[11] D.18-08-004, at 2.
[12] D.18-08-004, at 3-4.
[13] *Id*., at 2.
[14] D.18-08-004, at 23 (OP 5).

in areas that need additional capacity to ensure access to 9-1-1/E9-1-1 service; (2) the provision of device charging stations in areas where impacted wireless customers seek refuge from fires; (3) the provision of WiFi access in areas where impacted wireless customers seek refuge from fires; and (4) the provision of "loaner" mobile phones to impacted customers whose mobile phones are not accessible due to the emergency. In addition, the Commission urged wireless carriers to allow customers to defer or phase payment for coverage charges for data, talk, and text for defined periods of time; and the Commission urged wireless carriers to extend payment dates for service for defined periods of time for impacted customers.[15]

After issuing the Interim Decision, the Commission further developed the record in this proceeding through extensive stakeholder participation and multiple, all-party public workshops that the Commission hosted in partnership with the Governor's Office of Emergency Services ("CalOES"). The Commission explained in the Decision that, "Stakeholder and public discussion focused on the implementation of the customer protections adopted in Resolutions M-4833 and M-4835; the communications service providers' emergency response and coordinated emergency response between industry and local, state, and federal first responders; as well as a reflection on insights and lessons learned from recent wildfires."[16]

The Commission noted in the Decision that "[c]ontinuity of services and sustaining essential functions are shared responsibilities of the Commission, its counterparts across State government, and entities the Commission regulates."[17] On that point, the Decision explains the Governor's power to proclaim the existence of a disaster, which are "often caused by conditions such as air pollution, fire, flood, storm, sudden and

[15] Decision, at 51 (Finding of Fact [FOF] 5); see also D.18-08-004, at 23 (OP 5 and 6).
[16] Decision, at 9.
[17] Decision, at 18.

severe energy shortage, earthquake, volcanic eruption, or other similar conditions."[18] And, "by reason of their magnitude, these conditions are or are likely to be beyond the capabilities of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of the government to provide relief."[19] For the Commission's part, the Decision states that "the Commission has the responsibility to ensure that public utilities provide safe and reliable service, which includes mitigating the effects of a natural or man-made emergency that result from the degradation or disruption of utility service in times of disaster."[20]

In analyzing the record, the Commission found in the Decision that "[i]t is critical to sustain or restore essential communications functions, deliver critical communications services, and supply communications to customers and emergency officials following a declared state of emergency."[21] The Commission also found that "2-1-1 service plays a critical role in providing information and support in times of disaster, such as evacuations, shelter, food, medical and recovery information and provides public officials with feedback from callers about changing conditions."[22] And, "[d]uring the October 2017 wildfires, approximately 80 percent of all 9-1-1 calls came from cellular devices."[23]

Accordingly, in the Decision, the Commission exercised its broad constitutional and statutory authority over public utility telephone corporations (e.g., Cal. Const., Art. XII, §§ 1-6; Pub. Util. Code §§ 216, 234, 451, 701, 761-2, 1001, 7901), and adopted on a permanent basis, narrowly-tailored disaster relief consumer protections for

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[18] *Ibid*.

[19] *Ibid*.

[20] *Ibid*.

[21] Decision, at 52 (FOF 10).

[22] *Id*., at 52 (FOF 11).

[23] *Id*., at 52 (FOF 12).

customers of traditional landline, VoIP landline, and wireless service providers. "As with the Commission's requirements for the provision of basic telephone service, this customer relief program sets forth the basic requirements necessary for customers to maintain access to the communications network during declared emergencies."[24]

The Decision summarized the need for permanent disaster relief rules, stating: "A permanent disaster relief program ensures predictability and consistency and will direct carriers to establish the systems and procedures necessary to provide swift and substantive assistance to affected customers."[25]

Parties AT&T, VoIP Coalition, and CTIA each timely filed separate Applications for Rehearing of D.19-08-025. Each of the three Rehearing Applications alleges that various state (e.g., Emergency Services Act and Pub. Util. Code Section 710[26]) and federal laws (e.g., Federal Communications Act and Federal Communications Commission (FCC) policies) preempt the Commission's exercise of its traditional state regulatory authority to order the same consumer protection measures that traditional landline, VoIP landline, and wireless service providers had voluntary taken in response to the 2017 CA wildfires and subsequent disasters.

AT&T's and CTIA's Rehearing Applications also both claim that several of the Decision's Telephone Requirements as applied to their industries constitute an unjust taking in violation of the United States Constitution. VoIP Coalition's Rehearing Application also challenges on procedural and substantive grounds the Commission's Conclusion of Law 17 (COL), which states that VoIP providers fall within the definition of a telephone corporation, as defined in Section 234.

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[24] Decision, at 24.

[25] *Id*., at 7.

[26] All section references are to the Pub. Util. Code unless otherwise stated.

On October 8, 2019, Joint Consumers filed a Response opposing all three Rehearing Applications.[27] VoIP Coalition also filed a Response supporting the AT&T and CTIA Rehearing Applications, and stated that it was incorporating some of the arguments from those applications into VoIP Coalition's Rehearing Application.[28]

We have reviewed each and every allegation raised in the three Applications for Rehearing and are of the opinion that good cause has not been shown to grant rehearing. Each Application for Rehearing is addressed separately below. Each fails to demonstrate legal error.

Non-substantive modifications to the Decision will be made to (1) add a finding of fact setting forth the definition of VoIP service, as defined in Section 239, to clarify the Decision's Conclusion of Law 17 and (2) correct typographical errors to be consistent with the text of the Decision. With these modifications, rehearing is denied for all three Applications for Rehearing.

II. DISCUSSION

A. AT&T's Rehearing Application Fails to Demonstrate Legal Error with the Traditional Landline Telephone Requirements.

AT&T, in its capacity as a traditional landline service provider, alleges that all of the traditional landline requirements (OP 3) are unlawful on two grounds: (1) they conflict with the California Emergency Services Act ("ESA") and (2) they constitute an unjust taking in violation of the Constitution.[29] AT&T also alleges that (1) the two requirements related to messaging services are federally preempted because messaging

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[27] Joint Consumers consists of The Public Advocates Office, The Utility Reform Network, Center for Accessible Technology, and National Consumer Law Center.

[28] Allegations that are not raised in an Application for Rehearing are untimely and cannot be incorporated by reference in a Response. See CPUC Rules of Practice and Procedure, Rule 16.1(c) ("Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.")

[29] AT&T Rhg. App., at 12-14.

services are information services; (2) requirements (c) through (e) related to inside wiring and jacks are unlawful because inside wiring is competitive and deregulated, and the Decision offers no reason for re-regulating it; and (3) the 12-month timeframe or period specified by CalOES that applies to the Telephone Requirements are not supported by the record or legal authority cited. None of these claims have merit, as discussed below.

1. No conflict exists between the Commission's traditional landline telephone requirements and the California Emergency Services Act.

AT&T claims that the "requirements imposed on landline communications providers exceed the Commission's authority because they conflict with and infringe on the authority the Legislature gave to the Governor and CalOES under the ESA."[30] The ESA[31] establishes the Office of Emergency Services (OES) and confers certain emergency powers upon the Governor and other state governing bodies.[32] The ESA provides for emergency preparedness and response, and provides for coordination and collaboration with other state and local agencies, including requesting mutual relief. The ESA does not provide for consumer protection for utility customers during and after an emergency.

To support its contention, AT&T strings together general provisions in the ESA that set forth some of the Governor's and CalOES's emergency powers, such as the Governor's ability to declare a state of emergency and CalOES's responsibility "for the state's emergency and disaster response services for natural, technological, or manmade disasters and emergencies…."[33] AT&T's Rehearing Application, however, never specifies how the traditional landline protections above, or any of the other Telephone

[30] *Id*., at 2.

[31] Gov. Code § 8550 et seq.

[32] ESA, Article 1, § 8550(a).

[33] AT&T Rhg. App., at 6.

Requirements, interfere with or impede those emergency powers.[34] AT&T's claim fails because the landline requirements are consumer protection measures that fall squarely within the Commission's traditional regulatory authority over public utilities. They are not part of the particular emergency responses the ESA delegates to the Governor or CalOES. The landline requirements, as part of the Commission's overall Emergency Disaster Relief Program for communications customers, fulfill a critical need not covered by any specific ESA provision, and therefore no express or implied conflict exists.

AT&T concedes that "Section 451 or other provisions may give the Commission broad authority" over public utilities, but then claims a conflict with the ESA exists. AT&T argues that the ESA overrides and "takes precedence over the general authority regarding public utilities granted by Section 451."[35] In AT&T's view, the Legislature vested all authority "over public utilities' response to emergencies" in the Governor and CalOES and "under the ESA, the Commission does not have the authority to impose requirements relating to a state of emergency unless and until the Governor's office expressly authorizes it to do so," and the Governor "has not assigned the Commission any blanket authority to impose requirements on telephone corporations regarding all declared states of emergency."[36] Nothing in the ESA supports this view.[37]

The Commission has plenary authority over public utilities, during emergencies and all other times, derived from the California Constitution and the Public Utilities Code. None of AT&T's citations to general ESA provisions, "planning

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[34] *Id*., at 5-6.

[35] AT&T Rhg. App., at 9.

[36] *Id*., at 4, 6, 9.

[37] AT&T's reliance on general statements in the ESA related to the Governor's and CalOES's "emergency powers" as preempting the Commission from adopting consumer protection measures narrowly-tailored after providers' own voluntary disaster relief efforts is unavailing. While the ESA does authorize the Governor "to make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter," the Governor has not done so, as AT&T argues.

documents," or Commission decisions impede the Commission's authority to adopt consumer protection rules triggered by a state of emergency.

Neither the Governor's Office nor CalOES, who coordinated with the Commission in holding workshops in this proceeding to specifically address the Telephone Requirements and other emergency measures, have informed the Commission that the actions in this rulemaking infringe upon any of their ESA authority or constitute an exclusive ESA activity reserved to them or other agencies. Indeed, CalOES has supported the Commission's efforts to provide relief for utility customers affected by a state of emergency.[38]

A proper reading of the two Commission decisions that AT&T cites also belies its ESA claim. For example, the Commission explained in D.13-07-019 that the "Commission's authority to regulate telephone corporations derives from both the California Constitution, and various sections of the [Pub. Util.] Code" and the "C*ommission's broad duties under Code §§ 451 and 701 extend to the telecommunications customers*…."[39] Notably, the ESA was not at issue in D.13-07-019, nor was it a barrier to Commission action to address the serious call delivery problems of 9-1-1 calls originating from Multi-Line Telephone System (MLTS)[40] users in California.

The Commission's objective in that underlying rulemaking was "to improve public safety in California by improving the access to the Enhanced 9-1-1 Multi-

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[38] See e.g., November 2018 Disaster Relief Communications Workshop Tr. 23:11-16 (Mark Ghilarducci, Director of CalOES).

[39] D.13-07-019, *Slip. Op.*, at 27 (citations omitted and emphasis added); see also *id.*, at 78 (Finding of Fact 25, "Code § 701 gives the Commission broad authority to regulate utilities in all respects, including with respect to consumer protection matters.").

[40] See D.13-07-019, *Slip. Op.*, at 4, fn. 5 ("The National Emergency Number Association (NENA) defines MLTS as: '…a system comprised of common control unit(s), telephone sets, and control hardware and software. This includes network and premises-based systems, i.e., Centrex and private branch exchanges (PBX), Hybrid, and Key Telephone Systems owned or leased by governmental agencies and nonprofit entities, as well as for profit businesses. *See* Industry Common Mechanisms for Enhanced 9-1-1 Caller Location Discovery and Reporting Technical Information Documents, NENA 06-502, Version 1 at 6 (October 25, 2008).'")

line Telephone System, a critical public safety communication tool in California."[41] There the Commission recognized that "primary responsibility for the operation and maintenance of the 9-1-1 system may rest with other state agency(ies) such as the California Technology Agency, not the Commission," but it was "nonetheless compelled to action" in order to address "this critical and unmet public safety need in California."[42]

Similarly, the Telephone Requirements are necessary here to address a critical public safety need for telephone corporations to provide basic service that allows their customers access to the communications network at all times for their "safety, health, comfort, and convenience," as Sections 451 and 2896 dictate. As the Decision states, "[t]his decision authorizes a narrow scope of billing and customer relief in the aftermath of a disaster, such as a wildfire, when the governor or president has declared a state of emergency. The customer relief measures we adopt here are intended to protect the health and safety of California residents and businesses."[43] The ESA, however, does not specifically address similar matters. Therefore, the ESA does not preclude the Commission from exercising its existing authority to adopt the Telephone Requirements.[44]

In D.86192, the Commission did "refrain from attempting to exercise jurisdiction" to require electrical utilities to provide its customers public evacuation instructions and other steps to take in the event of a nuclear power plant incident, but that

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[41] D.13-07-019, *Slip. Op.*, at 1.

[42] *Id.*, at 47-48.

[43] Decision, at 33. The Commission recognized in the Decision that it needed to have certain, predictable rules in place before the next disaster strikes because adopting rules via the resolution process would take too long: "Experience shows us that using the resolution process for each disaster is not responsive or timely enough given the unexpected occurrence and critical nature of such disasters." *Id.*, at 4. That was why the Commission adopted interim consumer protection rules in D.18-08-004 after it issued the underlying Resolutions M-4833 and M-4835.

[44] See e.g., D.13-07-019, *Slip. Op.*, at 78, (FOF 25: "Code § 701 gives the Commission broad authority to regulate utilities in all respects, including with respect to consumer protection matters.").

decision was based on distinguishable facts. There the Commission found that specific provisions in the ESA and the State of California Nuclear Power Plant Emergency Response Plan covered the same matter at issue in that proceeding – the dissemination of public information concerning nuclear power plants.[45] The Commission concluded that the ESA vested "primary and specific responsibility to coordinate, develop, and disseminate public information to the extent deemed desirable with regard to nuclear power plant disaster response plans" and thus the Commission would exceed its jurisdiction by injecting itself into this sensitive and highly technical area.[46]

In contrast to the nuclear power plant issue in D.86192, here the Decision's Telephone Requirements are not addressed by specific provisions in the ESA or the planning documents AT&T cites, as discussed above. Thus, the ESA does not limit the Commission's authority.

What D.86192 makes clear is that it is well within the Commission's authority to regulate the relationship between the utility and its customers to ensure utilities provide safe and reliable service:

> It is now well-established that the Constitution and the Legislature have established a comprehensive scheme for the general supervision and regulation of the public utilities in this State by this Commission. *That scheme embraces broad general power to regulate the relationship of a utility to the consumer in service and rate matters, as well as specific power to regulate the manner in which the utility provides -- the latter in order to safeguard the ability of the utility to serve safely, efficiently, and economically*.[47]

Accordingly, here, general ESA provisions do not take precedence over the Commission's "specific power to regulate the manner in which the utility provides"

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[45] See D.86192, Opinion and Order Denying Petition on Jurisdictional Grounds, 1976 Cal. PUC LEXIS 492, at 8-17.

[46] *Id*., at 18 (Conclusion of Law 1 & 2).

[47] D.86192, *supra*, at 7, emphasis added.

service that is consistent with the "comprehensive scheme" for public utility regulation that the Legislature set forth in the Public Utilities Code.[48]

The ESA also calls for the "rendering of mutual aid by the state government and all its departments and agencies and by the political subdivisions of this state" and wide coordination at all levels ("all emergency services functions of this state be coordinated as far as possible"). This indicates a statutory scheme where all state agencies work together in their respective areas of expertise to respond to emergencies, as opposed to AT&T's contention that the Governor's and CalOES's emergency powers automatically preempt other agencies' existing authority, leaving those agencies with no role to pay during a declared state of emergency.[49] AT&T's attempt to evade Commission oversight by invoking ESA would in fact undermine public safety.[50]

Even if other state agencies play "leading agency" roles in The State of California Emergency Plan (dated 2017) and the Commission's Internal Emergency Response Plan and Protocols (dated October 2015) for certain areas, as AT&T asserts, this does not equate to preemption. To the contrary, Commission decisions and state planning documents envision a sharing of jurisdiction and duties when public health and

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[48] See e.g., 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 are necessary to promote the safety, health, comfort and convenience of its patrons, employees, and the public."), 701 ("The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction"), and 2896 ("The Commission shall require telephone corporations to provide customer service to telecommunications customers that includes, but is not limited to,…(c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.").

[49] See Gov. Code §§ 8550 (d) and (e).

[50] AT&T's interpretation creates a major gap in public utility oversight by having CalOES fulfill the Commission's statutory duties with each gubernatorial or Presidential declaration of emergency. See AT&T Rhg. App., at 8 (claiming "emergency-response rules on telecommunications carriers here" constitutes "regulating in an area reserved by CalOES.").

welfare are in the balance.[51] It does not negate the Commission's general authority over public utilities. As the Decision states, "[t]o be sure, a state or federal emergency declaration signals a shared understanding of needs, capabilities, and large-scale coordinated action between the Commission, CalOES, CalFIRE, local entities and communications service providers. It establishes a greater sense of empowerment and integration of resources."[52]

The record shows that the Commission and utilities need to be prepared with specific consumer protection measures before disasters, catastrophes, and emergencies strike. The Decision's Telephone Requirements are vital disaster relief protections for communications customers, which complement, rather than conflict, with the Governor's and CalOES' ESA emergency responses. The ESA does not specifically address "the relationship of a utility to the consumer in service and rate matters," which the Legislature expressly reserved to the Commission. Thus, AT&T's ESA claim fails.

2. The traditional landline requirements do not constitute an unjust taking.

AT&T next attacks all six landline telephone requirements on another general claim – that they constitute an unconstitutional taking in violation of the United States Constitution's Fifth and Fourteenth Amendments.[53] This claim lacks merit.

AT&T argues that the Telephone Requirements "obligate landline carriers to waive fees for unregulated products or services for which customers would otherwise

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[51] See, e.g., D.86192, *supra*, at 7-8 (sometimes the Commission shares its jurisdiction with other agencies, as in the air pollution field, and in some aspects of the health and safety fields).

[52] Decision, at 24.

[53] AT&T's Rehearing Application makes no specific reference to particular clauses in the Fifth or Fourteenth Amendments that the Telephone Requirements purportedly violate or exactly what is required to be protected under these Amendments. As a result, AT&T fails to satisfy Rule 16.1 (c) of the Commission's Rules of Practice and Procedure. (Rule 16.1(c) ["Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision to be unlawful or erroneous, and must make specific references to the record or the law."])

have to pay. In other words, they require landline carriers to provide something for nothing."[54] AT&T acknowledges that "landline carriers can and do voluntarily provide such benefits to customers during emergencies and disasters," but then argues that "forcing them to do so at the compulsion of the state is an unconstitutional taking."[55] AT&T supports its takings claim by comparing the Decision's Telephone Requirements to "requiring Apple to provide free repair service to all iPhone users during a state of emergency, regardless of whether the user purchased an Apple Care plan, or requiring Best Buy to repair or replace computers and televisions for no charge regardless of whether the customer had purchased a product replacement plan."[56] This comparison fails to support AT&T's takings claim.

Apple and Best Buy are not similarly situated to landline carriers; they are not public utilities regulated by the Commission. Unlike Apple and Best Buy, landline carriers are public utility telephone corporations subject to the Public Utilities Code and Commission orders implementing its provisions, including consumer protection matters not applicable to non-utility service providers such as Apple and Best Buy. The Decision addressed this difference, stating that "D.16-08-021 holds that the duty to furnish and maintain safe equipment and facilities that provide just and reasonable service falls squarely on telephone corporations operating in California. There is no regulatory taking where the regulations merely maintain the status quo."[57]

What this means is that telephone corporations, such as AT&T, are subject to providing consumer protection measures as part of their obligations to operate in California, in compliance with Sections 451 and 2896, among other provisions applicable to public utility telephone corporations. A regulated industry is not entitled, as a matter

[54] AT&T Rhg. App., at 12.

[55] *Ibid*.

[56] *Id*., at 13.

[57] Decision, at 58 (COL 29).

of right, to realize a particular rate of return or a profit, and thus any taking claim based solely on loss of profit should fail.[58]

"Takings" claims are often made in CPUC and other regulatory proceedings, but it well established that necessary government regulation is not a taking. The Commission recently issued D.19-08-040, restating these principles and laying out the three significant factors for a takings claim, stating:

> The Fifth Amendment prohibits the government from taking private property for public use without just compensation.[59] As a general rule, the government is not required to pay for the incidental effects of its laws and regulations. (*Pa. Coal Co. v. Mahon* ("*Mahon*") (1922) 260 U.S. 393, 413.) "To require compensation in all such circumstances would effectively compel the government to regulate by ***purchase***." (*Andrus v. Allard* ("*Andrus*") (1979) 444 U.S. 51, 65 [emphasis in original.].) "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." (*Ibid*. quoting *Mahon,* at p. 413.) However, when a governmental regulation goes too far, the government must compensate those it harms. (*Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1014.) How far is too far depends on the facts and circumstances of each case. (*Ibid*.) In determining whether a governmental regulation constitutes a "taking" under the Fifth Amendment, the Commission applies the test articulated in *Penn Central Transportation Co. v. City of N.Y.* ("*Penn Central*") (1978) 438 U.S. 104.[60] In *Penn Central*, the United States Supreme Court acknowledged that there is no "set formula" for determining whether a governmental regulation constitutes a "taking."

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[58] D.97-04-090, 1997 Cal. PUC LEXIS 363 at p. 33 ("a regulated entity neither has a constitutional right to a profit nor a constitutional right against a loss," quoting *20th Century Ins. V. Garamendi*, 8 Cal. 4th at 293).

[59] U.S. Const., 5th Amend.; Cal. Const., art. I, § 19; see also *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (1897) 166 U.S. 226, 234 (the federal takings clause applies to the states via the Fourteenth Amendment to the federal Constitution.)

[60] *Bottini v. City of San Diego* (2018) 27 Cal.App.5th 281, 312 ("the *Penn Central* test…applies to regulatory takings causes of action arising under the California Constitution.")

> (*Id.* at p. 124.) The Court explained that the inquiry into whether a taking has occurred is essentially an "ad hoc, factual inquir[y]." (*Ibid*.) The Court, however, identified three factors of significance: (1) the "economic impact" of the regulation on the claimant; (2) the extent to which the regulation has interfered with the claimant's reasonable investment-backed expectations of confidentiality; and (3) the character of the governmental action. (*Ibid*.) The Commission may dispose of a takings claim on the basis of one or two of these factors….[61] [62]

Applying the *Penn Central* factors to this case, AT&T's takings claim does not demonstrate any of the three factors. AT&T's Rehearing Application does not make any allegations regarding the second factor (reasonable, investment-backed expectation of confidentiality), as trade secrets were not at issue in the Decision. As to the first and third factors, AT&T provides little by way of facts or law to prove them. Nonetheless, based on what AT&T's Rehearing Application proffers, neither remaining factors are established.

When considering the first factor, economic impact of a regulation, the Commission asks whether the regulation "'unreasonably impair[s] the value or use of [the] property' in view of the owners' general use of their property."[63] In *Penn Central*, the Court framed the question by asking "whether the interference with [the] property is

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[61] *Allegretti & Co. v. County of Imperial* ("*Allegretti*") (2006) 138 Cal.App.4th 1261, 1277, citing *Bronco Wine Co. v. Jolly* ("*Bronco*") (2005) 129 Cal.App.4th 988, 1035 (where the nature of the governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations); *Monsanto, supra,* 467 U.S. at p. 1005 (disposing of trade secret takings claim based upon the absence of reasonable investment-backed expectations in confidentiality of the disputed data.)

[62] D.19-08-040, In re Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online Enabled Transportation Services, *Order Modifying Decision 16-01-014 and Denying Rehearing of the Decision, as Modified*, *Slip. Op*., at 30-31.

[63] *Allegretti, supra*, 138 Cal.App.4th, at 1278, quoting *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, 83.

of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'"[64] This may be measured in several different ways, including looking to: (1) the possibility for other economic uses of the property;[65] (2) whether the regulation makes it "commercially impracticable" to operate the business;[66] or (3) the impact of the regulation on the market value of the property.[67]

AT&T's flawed comparison to Apple and Best Buy fails to show an "economic impact" of the Telephone Requirements sufficient to establish a taking. As the Decision's Conclusion of Law 29 reflects, providing consumer protection is the cost of doing business as a public utility, i.e., the "status quo."[68] In the Decision, the Commission adopted baseline consumer protection measures for communications customers based on what carriers were already doing, discussed further below.

Moreover, as telephone corporations, landline carriers receive other significant benefits for providing an essential utility service in California. For instance, Section 7901 provides them the right to interconnect with other service providers and the right to access the public-rights-of-way to build or install facilities to provide their services, thereby conferring on landline carriers significant benefits in return for meeting their statutory consumer protection obligations as telephone corporations. AT&T also admits that, prior to the Decision, landline carriers could and did voluntarily provide the waivers that the Telephone Requirements mandate during a state of emergency, and thus their business models already accounted for providing these consumer protections.[69] As

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[64] *Penn Central, supra*, 438 U.S. at 136, quoting *Mahon, supra,* 260 U.S., at 413.

[65] *Andrus, supra,* 444 U.S., at 66.

[66] *Keystone Bituminous Coal Assn. v. DeBenedictis* ("*Keystone*") (1987) 480 U.S. 470, 495-496.

[67] *Monsanto, supra*, 467 U.S., at 1014.

[68] The Commission, as part of utility regulation, can and often does mandate consumer protection measures applicable to telephone corporations. See e.g., CPUC General Order 168, Market Rules to Empower Telecommunications Consumers and to Prevent Fraud. Consumer protections could also generate goodwill for businesses.

[69] AT&T Rhg. App., at 12, 14.

AT&T cannot demonstrate the first *Penn Central* "economic impact" factor, its takings claim fails.

The third *Penn Central* factor, the "character of the governmental action," likewise defeats AT&T's takings claim.[70] With respect to this factor, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[71] The Telephone Requirements fall into the latter category, as there is no physical invasion of AT&T's property. Additionally, the Decision explains in ample detail how the Telephone Requirements will promote the common good by enhancing public safety and ensuring continued access to vital communications services.[72] For these reasons, the third *Penn Central* factor does not support a takings finding.

Accordingly, where none of the *Penn Central* factors weigh in AT&T's favor, the Telephone Requirements do not constitute a taking under the Fifth Amendment.

3. The waiver requirements for call forwarding and messaging services are not preempted by federal policy.

AT&T argues that the waiver of the one-time activation fee for call forwarding and messaging services and a one month waiver of charges for those services (OP 3, requirements (a) & (b))[73] constitute state regulation of "information services" that is "contrary to the established national policy against such regulation of information

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[70] *Penn Central, supra*, 438 U.S., at 124.

[71] *Ibid.*; see also *Mugler v. Kan.* (1887) 123 U.S. 623, 668-669 ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking….").

[72] Decision, at 3-35.

[73] The messaging services at issue are the following: remote call forwarding, remote access to call forwarding, call forwarding features and messaging services. Decision, at 66 (OP 3(a)).

services, and … are therefore preempted."[74] AT&T characterizes these consumer protection rules as "economic common-carrier-type regulation" in order to argue that "state commissions are preempted from subjecting information services to economic or common-carrier-type regulation" because the FCC has declined to regulate information services as a policy matter, in conjunction with the policy set forth in Section 230 of the federal Communications Act of 1996.[75] AT&T further contends, citing an 8th Circuit Court of Appeals decision, that "'any state regulation of an information service conflicts with the federal policy of nonregulation.'"[76] Even assuming that the services at issue are information services, AT&T's preemption argument is unpersuasive, in light of the recent District of Columbia Court of Appeals decision in *Mozilla v. FCC*.[77]

On October 1, 2019, in *Mozilla v. FCC*, the District of Columbia Court of Appeals issued its decision concerning challenges to the FCC's 2018 *Restoring Internet Freedom Order*.[78] This FCC 2018 Order had reclassified broadband Internet access service (BIAS) as an information service and abolished rules to protect the open Internet, (a.k.a., Net Neutrality Rules[79]) which was a reversal from the FCC's 2015 *Open Internet Order*.[80] Relevant here, the *Mozilla* Court rejected the FCC's attempt in the 2018 Order

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[74] AT&T Rhg. App., at 17.

[75] See *id*., at 16-17 (AT&T argues that "Section 230 demonstrates that "'federal authority [is] preeminent in the area of information services' and that information services 'should remain free from regulation.'").

[76] *Id*., at 16, citing *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

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

[78] *Restoring Internet Freedom Order*, 33 FCC Rcd. 311 (2018).

[79] Net Neutrality Rules are intended to compel broadband providers to treat all Internet traffic the same regardless of source, and places limits on the ability of BIAS providers to interfere with their customers' free and open access to the Internet.

[80] *See* Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015). These rules were affirmed in their entirety in *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). The Court then denied a petition for rehearing of that decision *en banc*. *See United States Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

to expressly preempt "any state or local measures that would effectively impose rules or requirements" that the order repealed, or rules that would otherwise be "inconsistent with the federal deregulatory approach" taken in the order ("Preemption Directive").[81]

The Court vacated this express Preemption Directive, finding that the FCC failed to ground the clause in a lawful source of statutory authority.[82] The Court noted that the FCC may preempt state law "only when and if it is acting within the scope of its congressionally delegated authority."[83] The FCC's *2018 Order* cited two sources of authority: the federal policy of nonregulation, and the impossibility exception, which allows the agency to regulate intrastate communications where it is impossible to separate the intrastate and interstate components of a service.[84] The Court found that neither of these doctrines constitutes an affirmative grant of authority to which the express preemption provision could be tethered. The Court reasoned that "[i]n any area where the [FCC] lacks the authority to regulate, it equally lacks the power to preempt state law."[85]

The Court found that the FCC had neither express nor ancillary authority to issue the Preemption Directive.[86] The FCC's regulatory jurisdiction falls into two categories: (1) express authority as contained in Title II (common carrier services), Title III (radio transmissions, including broadcast television, radio, and cellular telephony), and Title VI (cable services), and (2) ancillary authority, which derives from a provision in Title I that empowers the FCC to "perform any and all acts, make such rules and

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[81] *Mozilla v. FCC*, *supra*, at 74, citing *Restoring Internet Freedom Order*, ¶ 194.
[82] *Mozilla v. FCC*, *supra*, at 74.
[83] *Id*., at 74-75.
[84] *Id*., at 76. The impossibility exception is not at issue here.
[85] *Id*., at 75.
[86] *Mozilla v. FCC*, *supra*, at 75.

regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[87]

By reclassifying BIAS as an information service, the FCC placed broadband outside its Title II jurisdiction.[88] And, since BIAS is neither a radio transmission under Title III, nor a cable service under Title VI, the FCC is left with no express authority to regulate, and thus no authority to preempt state action in this field.[89] As the Court explained, Title I is not an independent source of regulatory authority, so the FCC could not house the Preemption Directive in its ancillary authority (ancillary authority must hinge upon statutorily mandated responsibilities in Title II, III, or VI).[90]

Turning to what the FCC called the "federal policy of nonregulation for information services," the Court found that this federal policy could not sustain the Preemption Directive either. "First, as a matter of both basic agency law and federalism, the power to preempt the States' laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy."[91] Second, the Court was equally unconvinced with the FCC's attempt to house its preemption authority in 47 U.S.C. § 230(b)(2), similar to what AT&T attempts to argue here. Rejecting this argument, the Court stated: "No dice. As the [FCC] Commission has itself acknowledged, this is a 'statement[] of policy,' not a delegation of authority…. Nor do policy statements convey 'statutorily mandated responsibilities' that the Commission may use to support an exercise of ancillary authority."[92]

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[87] *Ibid*.

[88] *Mozilla v. FCC*, *supra*, at 75-76.

[89] *Ibid*.

[90] *Id*., at 76.

[91] *Mozilla v. FCC*, *supra*, at 78.

[92] *Id*., at 78-79.

The Court also rejected as a valid basis for the Preemption Directive, the FCC's citation to the definition of a "telecommunications carrier" found in 47 U.S.C. § 153(51), which AT&T also cites here. As the Court explained, "Section 153(51) is a definitional provision in Title I, and so is 'not an independent source of regulatory authority.' *People of State of Cal.*, 905 F.2d at 1240 n.35. Quite the opposite. As the parties agree, that provision is a *limitation* on the [FCC] Commission's authority."[93]

While the Court left open the possibility that the FCC could challenge state laws on a case-by-case basis on conflict preemption grounds,[94] no conflict preemption exists here and AT&T's Rehearing Application does not make that allegation. As with the FCC's failed Preemption Directive in *Mozilla*, AT&T's sweeping preemption claim here is based on federal policy of nonregulation, rather than on a showing of an actual conflict between the CPUC's consumer protection waiver requirements (for call forwarding and messaging services) and an actual FCC rule.[95] Accordingly, AT&T's preemption claim fails.

AT&T's reliance on an 8th Circuit decision, *Minnesota Pub. Util. Comm'n v. FCC*, does not save its preemption claim. The Commission is not bound by that decision, and the 8th Circuit's reliance on the federal policy of nonregulation of information services as the basis for preempting state regulation of VoIP services is questionable. Indeed, in the Supreme Court's recent denial of a petition for *certiorari* in that case, Justice Thomas' concurring opinion throws doubt on that argument, consistent

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[93] *Mozilla v. FCC*, *supra*, at 79, emphasis in original.

[94] On this point, the *Mozilla* Court explained: "Because a conflict-preemption analysis involves fact- intensive inquiries, it mandates deferral of review until an actual preemption of a specific state regulation occurs. Without the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the 2018 Order." *Mozilla*, *supra*, at 136.

[95] See e.g., *id*., at 85 ("[i]f the [FCC] can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption.").

with the *Mozilla* Court's holding. As Justice Thomas stated: "It is doubtful whether a federal policy—let alone a policy of nonregulation—is 'Law' for purposes of the Supremacy Clause."[96] The Supremacy Clause, according to Justice Thomas, only confers preemptive effect to "those federal standards and policies that are set forth in, or necessarily follow from, statutory text."[97]

Based on the above reasons, we find the Decision's landline waiver requirements for call forwarding and messaging services are not federally preempted.

4. The waiver requirements for inside wiring and jack services do not exceed the Commission's authority.

Targeting the last three landline telephone requirements set forth in OP 3, subparts (d)-(f), AT&T argues that the Commission exceeded its jurisdiction in ordering the waiver requirements concerning: (d) installing one jack at a customer's temporary location, (e) up to five jacks upon a customer's return to his or her permanent location, and (f) one jack for Non-plan customers upon their return to their permanent location.[98] To support this claim, AT&T argues that "[s]tates have recognized that, once inside wire plans are deregulated due to competition, state commissions have no authority to re-regulate them and set or control rates," pointing to Michigan and North Carolina.[99] That is an erroneous argument.[100]

First, we are not bound by decisions from other state commissions. Second, AT&T simply misses the point of these and the other landline waiver requirements. The Commission is not regulating or controlling the rates of the services

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[96] *Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (2019).

[97] *Id*., at 7.

[98] AT&T Rhg. App., at 17.

[99] *Id*., at 18.

[100] Even in instances where the Commission has found that competition will keep rates and service "just and reasonable," that does not mean that the Commission has abdicated its authority to ensure that rates and service *remain* "just and reasonable," as AT&T suggests.

subject to these waiver requirements. To the contrary, as the Decision explains, these waiver requirements are an exercise of the Commission's consumer protection authority to require telephone corporations to provide just and reasonable service during a declared emergency, the dire circumstances of which require additional consumer protections.

The record demonstrates that the carriers' own voluntary measures during emergencies, such as waiving these very charges for inside wiring and jacks that AT&T challenges, are the types of mitigating action by utilities needed to ensure that customers maintain access to the communications network during those times.[101] The Decision explained this, stating that the "decision authorizes a narrow scope of billing and customer relief in the aftermath of a disaster, such as a wildfire, when the governor or president has declared a state of emergency. The customer relief measures we adopt here are intended to protect the health and safety of California residents and businesses."[102]

We reject AT&T's assertion that the Commission lacks authority to adopt these waiver requirements. As explained, the Commission has plenary authority over public utilities to "supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction," among other statutory authority.[103] All of the Telephone Requirements are matters that fall squarely within the Commission's authority over public utility telephone corporations to ensure that they provide safe and reliable service, which includes consumer protection matters.[104] Therefore, the Commission properly exercised its authority to order the waiver requirements.

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[101] See Decision, at 23-24; see also AT&T Rhg. App., at 1.

[102] *Id*., at 33.

[103] Pub. Util. Code § 701.

[104] Pub. Util. Code § 451.

5. The 12-month or CalOES-determined period applicable to the Telephone Requirements is supported by the record.

AT&T takes issue with the requirement that landline providers comply with the Telephone Requirements for 12 months after a state of emergency is declared or for a period determined by CalOES.[105] AT&T claims that the record does not support either duration. AT&T is wrong. This proposal was part of the Scoping Memo and parties were directed to consider it through formal comments pursuant to the rulings of the Assigned Administrative Law Judge. The Commission specifically asked parties to comment on the period of implementation: "Shall the emergency customer protections commence upon a state of emergency and conclude no sooner than twelve (12) months from the date of commencement or as appropriately determined by CAlOES?"[106] Parties, including AT&T, filed comments in response to this ruling, thereby providing the Commission a sufficient record upon which to adopt the proposed period of implementation.

The Decision also sets forth the reasons why setting a 12-month period or a duration determined by CalOES for when the Decision's Emergency Disaster Relief Program applies is reasonable. The Decision explains that "[a] permanent disaster relief program ensures *predictability and consistency* and will direct carriers to establish the systems and procedures necessary to provide swift and substantive assistance to affected customers."[107] Insights and lessons learned from the 2017 and 2018 wildfires support a 12-month time frame, as recovery from these devastating emergencies takes a significant

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[105] AT&T Rhg. App., at 19.

[106] See Decision, at 16, citing Scoping Memo; see also *id*., at 19, referencing Assigned ALJ rulings.

[107] Decision, at 7, emphasis added.

amount of time, especially when lives are lost and property has been damaged beyond repair.[108]

For instance, the Decision discusses the tragic fall 2018 Camp Fire, which alone killed over 85 people, burned 150,000 acres that leveled entire towns, destroying over 18,000 structures – including homes, churches, and stores, all of which show that extensive work is required to repair lives and rebuild homes and businesses, and sometimes even entire towns. AT&T's own customer protection responses to disasters further demonstrates the significant efforts it takes to adequately respond to emergencies, which in turn, require significant time to implement and work.[109] With these facts, a 12-month implementation period is a reasonable time frame "to help stabilize communities in the wake of a disaster that affects utility customers, ensure the restoration of basic services, assist with restoring community functionality, and support access."[110]

Moreover, AT&T's attack on CAlOES' ability to determine a duration for the Telephone Requirements to apply is at odds with its assertion in its ESA claim that the Governor and CalOES have comprehensive authority over all declared states of emergency. AT&T had even gone so far in its ESA claim to argue that during a declared state of emergency CAlOES' ESA powers would take precedence over the Commission's Section 451 authority.[111] For this argument, however, AT&T reverses course in questioning CalOES' ability to ascertain how long the Commission's Emergency Disaster

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[108] See e.g., Decision, pp. 8-9 (2017 wildfire season lasted at least two weeks, killed dozens of people, and damaged more than 200,000 acres of land including property damage; 2018 wildfire season with more than 8,000 fires burning close to 2,000,000 acres throughout the state, killing numerous people and causing billions in dollars of damage.)

[109] AT&T Rhg. App., at 1 ("AT&T makes significant voluntary efforts to ensure the welfare of its customers during such events, including the types of measures listed in the Decision and others, and devotes significant human resources, equipment, and support as part of its commitment to its customers and the State of California.").

[110] Decision, at 18.

[111] See AT&T Rhg., App., at 9; *see also* discussion on AT&T's ESA claim, *supra*.

Relief Program would be needed for a particular declared emergency.[112] This argument lacks merit.

Based on CalOES' authority and expertise to respond to emergencies, discussed above, it is reasonable for the Commission to apply a time frame determined by CalOES as the period applicable to the Decision's Emergency Disaster Relief Program. As AT&T's Rehearing Application ignores the record and makes inconsistent arguments concerning CalOES' emergency response authority, it fails to demonstrate error with the Decision's adopted implementation period for the Telephone Requirements.

B. VoIP Coalition's Application for Rehearing Challenging the VoIP Landline Telephone Requirements Fails to Demonstrate Legal Error.

VoIP Coalition, comprised of VoIP service providers, alleges that extending the landline requirements to VoIP service (OP 3) constitutes legal error on four jurisdictional grounds: (1) the Decision errs in finding providers of VoIP service are telephone corporations; (2) the Decision errs by relying on Pub. Util. Code §§ 451 and 701 and its "police power" as bases for jurisdiction over VoIP service; (3) federal law precludes the Commission's extension of public utility rate regulations to VoIP service; and (4) Pub. Util. Code § 710 forecloses the extension of the landline rules to VoIP service. VoIP Coalition also alleges that the extension of the rules to wireless service is preempted by federal law. The Decision addressed all of these jurisdictional arguments, and as discussed below, VoIP Coalition fails to demonstrate legal error with any of them.[113] The wireless preemption argument will be discussed further below in the response to CTIA's Rehearing Application.

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[112] AT&T Rhg. App., at 8.
[113] See Decision, at 9-15.

1. The Decision correctly concluded that VoIP landline providers are "telephone corporations" within the meaning of Sections 233 and 234.

VoIP Coalition alleges that the Decision's Conclusion of Law (COL) 17, which states that "VoIP providers clearly fit within the plain language of the definition of a public utility 'telephone corporation'" was not part of the scope of this proceeding and substantively wrong.[114] VoIP Coalition is wrong on both counts.

VoIP Coalition argues that there was no opportunity for public comment on the issue of whether VoIP providers are "telephone corporations" on the basis that COL 17 was not in the original July 16, 2019 Proposed Decision (PD), but added to the Decision two days before the Commission adopted it.[115] To support its purported due process claim, VoIP Coalition states that issues identified in the Scoping Memo "all relate to relief provided to customers impacted by emergencies, and do not relate to the much broader issue of the Commission concluding that it has authority to regulate 'VoIP providers.'"[116] This is faulty logic. The Commission must, in the first instance, necessarily determine whether it has any authority over an entity *before* it can order an entity to provide relief to customers impacted by emergencies.

Whether VoIP providers are subject to the Commission's jurisdiction was raised in the Prehearing Conference Ruling and Scoping Memo. The Prehearing Conference Ruling asked: "Whether some ***or*** all of the post-disaster consumer protections that the Commission adopted in Resolutions M-4833 and M-4835 (including establishment of memorandum accounts) *should be adopted for use by all utilities subject to the Commission's jurisdiction?*" The Scoping Memo also asked, for instance: "Should the Commission require the residential communications companies to file a Tier II advice

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[114] VoIP Coalition Rhg. App., at 6-7.

[115] VoIP Coalition Rhg. App., at 7.

[116] *Id*., at 6-7.

letter to demonstrate compliance with activation of customer protections, or should another method be used to demonstrate compliance?"[117] Comments from VoIP Coalition's members throughout this proceeding, as well as VoIP Coalition's separate Application for Rehearing of the preceding Interim Decision, D.18-08-011, which this Decision superseded, demonstrates that VoIP Coalition had several opportunities to comment on this threshold jurisdictional issue.[118]

Having raised various jurisdictional arguments concerning the Commission's authority over VoIP providers and VoIP service throughout this proceeding, VoIP Coalition members had ample opportunity prior to the Decision's adoption of this conclusion of law to comment on the substance of COL 17. Conclusion of Law 17 raised no new substantive issue that had not already been commented on by parties, including VoIP Coalition.[119]

The Decision properly included COL 17 to make clear the Commission's position, which was already set forth in the text of the July 16, 2019 Proposed Decision (PD).[120] That "VoIP providers clearly fit within the plain language of the definition of a public utility 'telephone corporation,'" was the only conclusion that could follow from the PD's original legal analysis of Sections 216 (defines "public utility"), 233 (defines "telephone line"), and 234 (defines "telephone corporation").[121] The PD's extensive

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[117] See Administrative Law Judge's Ruling Setting Prehearing Conference Expedited Track 1 (4/17/18), at 2, emphasis added; see also Assigned Commissioner's Scoping Memo and Ruling (6/29/18), at 6; see also *id*, at 3, 5-7.

[118] See e.g., CCTA Opening Comments on July 16, 2019 PD, at 10; AT&T Opening Comments on July 16, 2019 PD, at 6; see also VoIP Coalition Rhg. App. on D.18-08-004 [Interim Decision] (9/19/2018), at 4, 6-10.

[119] VoIP Coalition suggests that the Commission needs another proceeding to fully vet the "legal, technical, and public policy issues related to the regulatory classification of VoIP," in order to conclude that VoIP providers are telephone corporations. That is unnecessary. This is a threshold jurisdictional question of law.

[120] See July 16, 2019 Proposed Decision, at 8-10.

[121] Other statements in the PD also noticed the Commission's intent to consider this issue. See e.g., *id*., at 3 ("The California Public Utilities Commission (Commission) established

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analysis of Section 710 (prohibits regulation of VoIP service with certain exceptions until January 1, 2020) further put parties on notice of this jurisdictional issue.[122] With statements such as these in the PD supporting COL 17, as well as VoIP Coalition's comments in this proceeding on the same substantive issue, VoIP Coalition had notice of this jurisdictional issue.

VoIP Coalition's substantive arguments challenging COL 17 are also unpersuasive. VoIP Coalition attacks the Decision's extensive discussion setting forth the basis for concluding that VoIP providers are "telephone corporations," as defined in Section 234, with the argument that "VoIP is not a service provided over a 'telephone line' [§ 233] and instead requires a 'broadband connection.'"[123] VoIP Coalition's either/or logic is belied by the definition of "telephone line" which is broad:

> "Telephone line" includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication

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Rulemaking (R.) 18-03-011 to adopt an emergency disaster customer relief program for entities under this Commission's jurisdiction.").

[122] See e.g., i*d*., at 9-10.

[123] VoIP Coalition Rhg. App., at 8, citing Pub. Util. Code § 239(a) [defines VoIP service]. Pub. Util. Code § 239(a) defines VoIP as:

(1) "Voice over Internet Protocol" or "VoIP" means voice communications service that does all of the following:

> (A) Uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from, or terminates at, the user's location in Internet Protocol or a successor protocol.
>
> (B) Requires a broadband connection from the user's location.
>
> (C) Permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

(2) A service that uses ordinary customer premises equipment with no enhanced functionality that originates and terminates on the public switched telephone network, undergoes no net protocol conversion, and provides no enhanced functionality to end users due to the provider's

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> by telephone, whether such communication is had with or without the use of transmission wires.[124]

VoIP Coalition does not deny that telephony moves over broadband connections, nor does it provide any discernable analysis of a "telephone line," as defined in Section 233. Instead, it couches its argument in terms of legislative intent. It contends that because the Legislature enacted Section 239 contemporaneously with Section 710 (repealed by its terms on January 1, 2020), which is over 60 years later than when it enacted Section 233, "[t]his fact underscores the Legislature's intent to distinguish VoIP from traditional "communication by telephone' via a 'telephone line.'"[125] No such distinction exists in the plain language of any of these sections for purposes of Sections 233 or 234, nor does VoIP Coalition offer any legal authority or reasoned analysis to support this contention. VoIP Coalition's argument has no merit.

The Decision's analysis of the plain language meaning of Sections 216, 233, and 234 is consistent with Court and Commission precedent interpreting these sections. For example, in the context of considering whether NextG, a reseller of telecommunications services,[126] was a "telephone corporation" within the meaning of Section 234, the Fourth District Court of Appeals in *City of Huntington Beach v. Pub. Util. Comm'n* confirmed Next G's status as a telephone corporation on the basis that the

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use of Internet Protocol technology is not a VoIP service.

[124] Pub. Util. Code § 233.

[125] VoIP Coalition Rhg. App., at 8.

[126] The Court describes NextG's service as follows: "NextG builds and owns fiber optic networks. However, NextG does not directly serve individual customers whose calls are carried over NextG's networks. Instead, NextG sells capacity on its network to other companies, who use the capacity to serve their end-use customers. NextG is thus a 'carrier's carrier.'" (*City of Huntington Beach v. Pub. Util. Comm'n*, *supra*, at 570.) The project at issue in this case was the completion of a distributed antenna system within the City of Huntington Beach, where the communications network was intended to transmit wireless voice and data communications to clients in the city. (*Ibid*.)

Commission had issued it a CPCN, and in reselling telecommunications service, NextG was operating a "telephone line," as defined in Section 233.[127]

In reaching this conclusion, the Court examined the language in Sections 233 and 234, as well as legislative intent:

> We begin with an examination of the relevant statutory provisions. "'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.'" (*§ 234, subd. (a)*.) "'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed *in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires*.'" (*§ 233*, italics added.) "The word 'telephone' is not defined in the" Public Utilities Code, but "telephony" is generally understood as a "'two-way communication by speaking as well as by listening'" at a distance. (*Coml. Communications v. Public Util. Com. (1958) 50 Cal.2d 512, 522 [327 P.2d 513]*.) The plain language of *sections 233* and *234, subdivision (a)*, suggests that the Legislature intended to define the term "telephone corporation" broadly, without regard to the particular manner by which users of telephones are put into communication. (See *Coml. Communications v. Public Util. Com., supra, 50 Cal.2d at pp. 520-523* [in holding that "mobile communication systems" using radio technology to communicate with individuals in vehicles were *§ 233* telephone lines, observed that "[t]he exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected is not prescribed by law"].)[128]

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[127] *City of Huntington Beach v. Pub. Util. Comm'n*, 214 Cal. App.4th 566, 584-590 (2013).

[128] *City of Huntington Beach*, supra, at 585-586.

The Court's analysis above disposes of VoIP Coalition's argument that in order to be a telephone corporation, an entity must provide traditional telephone service, "i.e., telephone service provided over the public switch telephone network."[129]

As the Court's analysis demonstrates, the phrase "to facilitate communication by telephone" encompasses services beyond traditional landline service if the service facilitates "two-way communication by speaking as well as by listening," regardless of the "[t]he exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected."[130] Wireless service and VoIP service both facilitate two-way communication by speaking as well as by listening.

Also relevant here is the Court's rejection of the City's legislative intent argument, which claimed that the Legislature's later enactment of a definitional provision, Section 224.4 (d) [defines "mobile telephony service"], meant that the Legislature intended to exclude companies providing mobile telephony service from Section 234's telephone corporation definition. Just the opposite is true. In the Court's words, "all this statute does is define a type of service [mobile telephony service]."[131] Pointing to the exclusion provisions in Section 234(b),[132] the Court explained that "[t]hese textual exclusions within *section 234* illustrate that the Legislature (despite its demonstrated capability) has not seen fit to explicitly exclude companies providing 'mobile' or 'wireless' telephone service from the definition of 'telephone

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[129] VoIP Coalition Rhg. App., at 8-9.

[130] *City of Huntington Beach v. Pub. Util. Comm'n*, *supra*, at 585-586.

[131] *City of Huntington Beach v. Pub. Util. Comm'n*, *supra*, at 586.

[132] Pub. Util. Code § 234 (b) states: "(b) 'Telephone corporation' does not include any of the following: (1) Any hospital, hotel, motel, or similar place of temporary accommodation owning or operating message switching or billing equipment solely for the purpose of reselling services provided by a telephone corporation to its patients or guests. (2) Any one-way paging service utilizing facilities that are licensed by the Federal Communications Commission…."

corporation.'"[133] Accordingly, the Court found that Section 224.4 did not establish or define any new type of entity, and the Public Utilities Code contemplates that telephone corporations may provide mobile telephony service.[134]

Similarly, the Public Utilities Code contemplates that telephone corporations may also provide VoIP service because "the Legislature intended to define the term 'telephone corporation' broadly, without regard to the particular manner by which users of telephones are put into communication."[135] VoIP Coalition's attempt to exclude companies who provide VoIP service from Section 234 by citing to the definition of VoIP service in Section 239, fails for the same reasons the City of Huntington Beach failed in proving that wireless providers were excluded from Section 234's "telephone corporation" definition. As with Section 224.4, Section 239 simply defines VoIP service, without establishing or defining a new type of *entity* (that is not a telephone corporation).

By its very terms, Section 239 demonstrates that VoIP service constitutes a service that is provided over a "telephone line" because it "facilitates communication by telephone, whether such communication is had with or without the use of transmission wires."[136] Section 239 defines VoIP service as "voice communications service" that "enable[s] real-time, two way voice communication that originates from, or terminates, at the user's location" (§239(1)(A)), "[r]equires a broadband connection from the user's location" (§239(1)(B)), and "[p]ermits a user generally to receive a call that originates on the public switched network and to terminate a call to the public switched network" (§ 239 (1)(C).[137] Applying the *City of Huntington Beach* Court's analysis of Sections 233 and 234, as the Commission is required to do, leads to the same conclusion the

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[133] *City of Huntington Beach v. Pub. Util. Comm'n*, *supra*, at 586.

[134] *Ibid*.

[135] *City of Huntington Beach v. Pub. Util. Comm'n*, *supra*, at 585.

[136] Pub. Util. Code § 233.

[137] Pub. Util. Code § 239(1)(A)-(C).

Commission reached in the challenged Decision's COL 17 – "VoIP providers clearly fit within the plain language of the definition of a public utility 'telephone corporation.'"[138]

Of significance is the *City of Huntington Beach* Court's finding that the Commission supported its conclusion that NextG was a telephone corporation thusly - "NextG 'builds and owns fiber optic networks, on which NextG sells capacity for telecommunications services provided by other carriers that serve end-use customers."[139] It was not necessary for the Commission to fully vet this issue beyond making that one finding. The same applies to this proceeding.

Contrary to VoIP Coalition's contention, the fact that VoIP service requires a broadband connection is immaterial to the analysis here; utilizing a broadband connection does not exclude a service from being provided over a "telephone line" as defined in Section 233. *City of Huntington Beach* makes clear that the term "telephone"[140] is not consequential in the analysis of whether an entity is a "telephone corporation," nor is the manner by which the communication is transmitted.[141] As the Decision states, "[i]t follows then, that the means by which a telephone corporation provides service – analog, wireless technology or Internet protocol (IP) technology – does not affect whether the provider is a public utility telephone corporation."[142]

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[138] Decision, at 55 (COL 17); see also *id*., at 12-13 ("In addition, both before and after Section 710 was enacted, the Commission routinely granted applications for CPCNs requested by VoIP providers, if the provider was otherwise eligible for a CPCN.[] The Commission only has the authority [to] grant a CPCN if the provider is a public utility telephone corporation. (*See, e.g*., Pub. Util. Code § 1001.)").

[139] *City of Huntington Beach v. Pub. Util. Comm'n*, *supra*, at 588.

[140] VoIP Coalition's Rehearing Application does not state what device, if not a telephone, customers use when they utilize VoIP service to communicate. If a mobile phone is a "telephone" for purposes of Section 233, then based on the *City of Huntington Beach* Court's analysis, a VoIP telephone would also be one.

[141] *City of Huntington Beach v. Pub. Util. Com.*, *supra*, at 585-586, *citing Coml. Communications v. Pub. Util. Com*. (1958) 50 Cal.2d 512, 520-523.

[142] Decision, at 10.

VoIP Coalition's citations to partial statements in Commission decisions, D.14-01-036 and D.09-08-029 are also unpersuasive. Neither decision declares that VoIP providers are not telephone corporations or explicitly state that the Commission lacks authority over them,[143] as VoIP Coalition suggests.[144] Nor was this jurisdictional issue under consideration in those proceedings.

This Decision is not the first time in which the Commission has analyzed whether VoIP providers are telephone corporations. In 2004, the Commission tentatively concluded that "[v]iewing VoIP functionally from the end-user's perspective, and consistent with the definitions of the Public Utilities Code, those who provide VOIP service interconnected with the PSTN are public utilities offering a telephone service subject to our regulatory authority."[145] Notably, when the Commission reached that tentative conclusion, it similarly analyzed Sections 216, 233, and 234.[146]

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[143] In the context of reviewing eligible entities for the Lifeline program, the Commission stated in D.14-01-036 that "[b]ecause the Commission has not deemed VoIP providers to be "telephone corporations" under the Public Utilities Code, VoIP service is not presently eligible and VoIP providers cannot receive Lifeline subsidies." (*Order Instituting Rulemaking Regarding Revisions to the California Universal Telephone Service (LifeLine) Program* [D.14-01-036], *Slip. Op.*, at 20.) In D.09-08-029, the Commission was responding to arguments by AT&T that the decision was unjustifiably discriminatory, stating "Moreover, the fact that there may be other unregulated companies, such as Voice Over Internet Providers or VOIPs, that may operate under different safety regulations than telephone utilities, is not a sufficient basis for changing our approach to market-based rates." (*Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities* [D.09-08-029] (2009), *Slip. Op.*, at 44.)

[144] VoIP Coalition Rhg. App., at 9.

[145] *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice Over Internet Protocol should be Exempted from Regulatory Requirements* ("OII") [I.04-02-007](2004), at 3-5, *citing Coml. Communications v. Pub. Util. Com.*, *supra*, at 512. In 2006, the Commission closed the proceeding without adjudicating any issues raised in the OII, finding that it need not establish a regulatory framework for VoIP telephony at that time because the FCC had declared that it, and not the states, would be determining the regulations that apply to IP-enabled services such as Vonage Holding Corporation's VoIP service. But, states would retain a vital role in certain areas such as consumer protection. (See D.06-06-010, at 2, *citing In the Matter of Vonage Holdings Corporation's Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 FCC Rcd 22404, ¶ 1.) That FCC decision, however, was the subject of the aforementioned 8th Circuit Decision in *Minnesota Pub. Util.*

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Also, the Decision explained that in applications where VoIP providers seek a CPCN from the Commission, by issuing the CPCN, the CPUC acknowledges that the VoIP provider meets the definition of a "telephone corporation" embodied in Public Utilities Code Section 234, and thus is bound by CPUC rules governing telephone corporations.[147]

Given the PD's extensive discussion in response to VoIP Coalition's continuous challenges to the Commission's jurisdiction over VoIP providers and VoIP service, it was proper for the Commission to add COL 17 to reflect the Decision's substantive discussion of jurisdiction over VoIP providers as telephone corporations, on which the VoIP providers already commented. To further clarify our jurisdictional arguments concerning VoIP providers, which VoIP Coalition submits hinges on the definition of VoIP service pursuant to Section 239, we will add a finding to the Decision that recites Section 239's definition of VoIP service.

2. The California Constitution and the Public Utilities Code, including Sections 451 and 701, grant the Commission state police power to adopt consumer protections applicable to VoIP telephone corporations in furtherance of public utility regulation and public safety.

VoIP Coalition claims that the Decision errs by relying on Sections 451 and 701 and "police power" as bases for jurisdiction to impose the landline telephone requirements on VoIP providers.[148] As demonstrated above, the Decision was correct in

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Comm'n v. FCC, which, as discussed above, is not binding on the Commission. Further, the FCC's reliance on the federal policy of nonregulation to preempt Minnesota from regulating VoIP service is in doubt. See Discussion section A.3., *supra*.

[146] Compare OII [I.04-02-007], at 3-5 with Decision, at 9-12.

[147] See Decision, at 13, fn. 24.

[148] VoIP Coalition Rhg. App., at 10-11.

concluding that VoIP providers are public utility telephone corporations, within the meaning of Sections 216 and 234.[149] Public utilities are subject to the Commission's authority, as provided in the California Constitution and Public Utilities Code.

The term "police power" covers a broad range of authority conferred upon state and local governments. It has not been defined specifically by the courts.[150] Nearly all of the ultimate purposes for which governments exist come within this power. It has been said that it includes all the ends of government, as all are, in theory, designed to secure the common safety, and to provide for the general welfare.[151] "Police power" may also refer more narrowly to the state's power to deal with "the health, safety, and morals of the people."[152]

Article XII, section 3, of the California Constitution confers authority upon the state legislature to vest "police powers" in the Commission.[153] Such powers have been so vested by various provisions of the Public Utilities Code (e.g., Sections 451, 584, 701, 761, 768, and 1001).[154] Thus, the basis of the Commission's authority is derived, in the first instance, from the California Constitution and state statutes, as interpreted by the courts.

The Commission has broad jurisdiction over questions of public health and safety associated with utility operations.[155] Section 451 requires "[e]very public utility"

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[149] Pub. Util. Code § 216.

[150] *Pacific Tel. and Tel. Co. v. Eshleman* (1913) 166 Cal. 640, 662; *Justesen's Food Stores, Inc. v. City of Tulare* (1938) 12 Cal.2d 324, 332-333.

[151] *People v. Williamson* (1902) 135 Cal. 415, 418.

[152] *Pacific Tel. and Tel. Co. v. City and County of San Francisco* (1961) 197 Cal.App.2d 133, 152, quoting *Dakota Cent. Tel Co. v. South Dakota* (1919) 250 U.S. 163, 186-187.

[153] *So. Cal. Edison Co.* (1970) 1970 Cal. PUC LEXIS 759, *26.

[154] *Ibid*.

[155] *San Diego Gas & Electric Co. v. Superior* Court (1996) 13 Cal.4th 893, 923-924; see also CPUC, Order Instituting Rulemaking [R.08-11-005](11/13/08), at 5-8 (provides a comprehensive discussion of the Commission's jurisdiction over matters of public health and safety relating to public utility operations).

to "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."[156]

Section 701 provides that "[t]he commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."[157]

Section 762 allows the Commission to order public utilities to make repairs or improvements to existing plant, equipment, facilities, or other physical property of any public utility, or to erect new structures, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities.[158]

Section 768 states that the Commission "may require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public."[159] Further, the Commission "may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances."[160]

Accordingly, the Decision was correct in asserting that its authority over VoIP providers is grounded in Sections 451 and 701, among other state police powers conferred upon the Commission in the Public Utilities Code.

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[156] Pub. Util. Code § 451.

[157] Pub. Util. Code § 701.

[158] Pub. Util. Code § 762.

[159] Pub. Util. Code § 768.

[160] *Ibid*.

3. The VoIP landline consumer protection requirements are not preempted by federal policy.

VoIP Coalition argues that the landline requirements as applied to VoIP providers are preempted by the FCC's deregulatory policy for information services, despite acknowledging that *the FCC has not classified VoIP as either an information or telecommunications service*.[161] As explained above in response to AT&T's challenge to the waiver requirements for call forwarding and messaging services, the 8th Circuit's decision in *Minnesota Pub. Util. Comm'n v. FCC*, *supra* – upon which all of the rehearing applicants repeatedly rely – is questionable in its reasoning for state preemption (i.e., upon a federal policy rather than on an actual conflict) and this Commission is not bound by it.

The *Mozilla* Court, as discussed, presents a more reasoned analysis, which preserves state authority over consumer protection matters that the FCC has either no authority to preempt or where no actual conflict exists. *Mozilla* supports the Commission's consumer protection efforts in the Decision. Therefore, VoIP Coalition's preemption argument fails for the same reasons as AT&T's challenge to the landline waiver requirements for call forwarding and messaging services, discussed *supra*.

4. Section 710 does not prohibit the Commission from adopting landline consumer protection requirements that apply to VoIP providers.

VoIP Coalition's reliance on Section 710 as the basis for challenging the extension of the landline telephone requirements to VoIP providers is now moot because Section 710 had sunset on January 1, 2020.[162] Accordingly, Section 710's previous prohibition against the regulation of VoIP service is no longer applicable and the Commission need not address VoIP Coalition's various Section 710 arguments.

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[161] VoIP Coalition Rhg. App., at 12-14, emphasis added.

[162] VoIP Coalition Rhg. App., at 14-16.

C. CTIA's Application for Rehearing Challenging the Wireless Telephone Requirements Fails to Demonstrate Legal Error.

CTIA, a wireless provider association, alleges that the four mandatory wireless requirements (Cells on Wheels ("COW")/Cells on Light Trucks ("COLT") requirement, Charging Station requirement, Hot Spot requirement, and Loaner Phone requirement in OPs 3 and 4) are unlawful because they: (1) constitute market entry regulation prohibited by Title III of the Federal Communications Act ("FCA") of 1934; (2) are subject to field preemption by Federal Communications Commission ("FCC") regulation; (3) constitute an unjust taking; and (4) impermissibly exceed the CPUC's statutory authority, including those derived from Sections 451 and 701. CTIA also attacks the Hot Spot requirement as preempted by the federal policy of nonregulation of internet access service.

We reject all of these claims because they mischaracterize the Decision's requirements in an attempt to implicate federal laws and policy that do not apply. The Decision correctly explained that "[t]he measures we adopt here do not concern the rates wireless providers may charge their customers. Nor do these measures in any way restrict or otherwise regulate the ability of wireless providers to enter the California telecommunications market. Indeed, wireless service providers offer service statewide in California."[163] We elaborate on these positions further below.

1. The wireless requirements do not regulate "market entry" or "rates" of commercial mobile service; they regulate "other terms and conditions" that Section 332 of the Federal Communications Act explicitly reserves to the states.

CTIA and VoIP Coalition[164] argue that the FCA of 1934 prohibits the COW/COLT requirement, Hot Spot requirement, and Loaner Phone requirement because

[163] Decision, at 34.

[164] In VoIP Coalition's Application for Rehearing it raises this legal error claim, but references

(footnote continued on next page)

they constitute prohibited market entry regulation of commercial mobile service (i.e., wireless service) pursuant to 47 U.S.C. § 332(c)(3)(A), in that they regulate the use of radio frequencies or spectrum.[165] CTIA further claims that this provision prohibits the Loaner Phone requirement because it constitutes prohibited rate regulation by requiring "wireless carriers to provide not just wireless phones, but to offer free service on those phones."[166] Neither of these claims have merit.

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CTIA's arguments as its own. This Decision responds to CTIA's arguments in addressing both CTIA's and VoIP Coalition's Rehearing Applications.

[165] CTIA Rhg. App., at 5-10.

[166] *Id*., at 11.

> The FCA, in 47 U.S.C § 332(c)(3)(A), states:
> no State or local government shall have any authority to regulate the entries of or the rates charged by any commercial mobile service or any private mobile service, except this paragraph *shall not prohibit a State from regulating the other terms and conditions of commercial mobile service.*[167]

On its face, 47 U.S.C. § 332(c)(A)(3) preempts only state attempts to prevent new mobile service carriers from entering the market or to regulate rates charged for wireless services; any other state regulation of mobile services providers remain unaffected.[168] Whether a particular regulation falls under the meaning of "market entry," "rates," or "other terms and conditions" is fact-specific, requiring a case-by-case determination.[169] As detailed below, the Decision's Telephone Requirements, including the wireless requirements, are consumer protection and public safety regulations that fall under the "other terms and conditions of commercial mobile service," and therefore, the FCC does not preempt them.

The Commission's recent decision in this proceeding, D.20-07-011, in which the Commission adopted backup power requirements for wireless providers, responded to and rejected similar FCA preemption arguments from wireless carriers. The Commission rejected those arguments and provided the following relevant analysis of 47 U.S.C. § 332(c)(3)(A):

> After Congress enacted the revised § 332, the CPUC issued multiple decisions implementing the change in federal law, and harmonizing those changes with existing Commission oversight of wireless telephony.[] In so doing, the

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[167] 47 U.S.C. § 332(c)(3)(A), italics added.

[168] *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd*., 634 F.3d 17 (1st Cir.), cert. denied 565 U.S. 826 132 S.Ct. 119, 181 Ed. 2d 42 (2011).

[169] *Telesaurus VPC, LLC v Power* (9th Cir., 2010) 623 F.3d 998, 1007 ("the FCC rejected this per se approach, adopting instead a case-by-case analysis for preemption of state tort actions"); *Shroyer v AT&T* ("the FCC rejected this per se [preemption] argument in *In re Wireless Consumers Alliance*, and so do we").

> Commission determined that wireless providers are "telephone corporations" and therefore, "public utilities" under Public Utilities Code §§ 216, 233, and 234. Accordingly, the Commission continues to exercise broad authority over wireless service.[] As discussed above, the rules adopted in today's decision fall under the Commission's police powers pursuant to the Tenth Amendment of the U.S. Constitution and Public Utilities Code §§ 233, 451, 701, et al. [Preemption of state laws, including laws regulating information services, requires "a link to express delegated authority." (*Comcast Corp. v. FCC*, 600 F.3d 642 at 658 DC Cir. 2010.)] Further, the D.C. Circuit recently held that the FCC may preempt state law "only when and if it is acting within the scope of its congressionally delegated authority….[*Mozilla Corp., et al. v. Federal Communications Commission, et al*., 940 F.3d 1 (D.C. Cir. 2019) (citing *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)).][170]

The legislative history of § 332(c)(3)(A) of the Budget Act, as D.20-07-011 explained, indicates what Congress meant by the language "other terms and conditions," and reemphasizes the role Congress saw for the States:

> It is the intent of the Committee that the State still will be able to regulate the terms and conditions of these services [CMRS]. By "terms and conditions" the Committee intends to include such matters as customer billing information and packaging and billing disputes and other such consumer protection matters; **facility siting issues (*e.g.* zoning); transfers of control; bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis and such other matters as fall within the State's lawful authority**. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." [H.R. Rep. No. 103-111, 103d Con. 1st Sess. (1993), at 251,

[170] D.20-07-011, *Slip. Op*., at 23. An Application for Rehearing of D.20-07-011 is currently pending.

> reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).][171]
>
> The FCC has also confirmed the CPUC's jurisdiction over "other terms and conditions" when it stated that it anticipated the CPUC would continue to conduct appropriate complaint proceedings and to monitor the structure, conduct, and performance of CMRS providers. [The FCC stated that the "CPUC retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state." (*See* May 19, 1995 Report and Order *In re Petition of the People of the State of California ... to Retain Regulatory Authority over Intrastate Cellular Service Rates,* 10 FCC Record 7486.) Moreover, the Federal Communications Act contains "savings clauses" which are "fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field . . . there would be nothing . . . to 'save,' and the provision would be mere surplusage." (*Farina v. Nokia Inc*, 625 F.3d 97, 117, 121-22 (3d Cir. 2010)).][172]

Notwithstanding the Commission's authority to regulate "other terms and conditions" of wireless service, CTIA claims that the COW/COLT, Hot Spot, and Loaner Phone requirements constitute market entry regulations because they "impose requirements regarding where and when to operate radio frequency equipment and what services to offer."[173] CTIA also claims the Loaner Phone requirement regulates rates because it requires wireless carriers to offer free service with the loaner phones.[174] Contrary to these claims, the wireless requirements have nothing to do with regulating radio frequencies and spectrum, which are matters that fall under the FCC's licensing authority; nor do these requirements impact rates.[175]

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[171] See D.20-07-011, *Slip. Op.,* at 24.

[172] *Id*., at 22-24.

[173] CTIA Rhg. App., at 7-8.

[174] *Id*., at 11.

[175] See *id*, at 9, citing 47 U.S.C. §§ 301, 303(c), 308(b), and 319(a); see also *id*., at 11.

CTIA presents conflicting positions. On the one hand, when discussing wireless carriers' voluntary disaster relief efforts, upon which the Decision's mandatory wireless requirements were based, CTIA presents these measures as consumer protections, stating that they are part of "wireless carriers' *established practice* of rapidly responding to disasters by restoring their networks and providing wide-ranging relief measures" to aid customers impacted by disasters.[176] In other words, the Decision does not impose new requirements on wireless carriers that they themselves were not already doing for customers as a matter of course in the wake of disasters.

For example, CTIA explains in its Rehearing Application that the wireless industry's "good-faith commitment to disaster relief" was demonstrated by their "significant voluntary measures that *supported and benefited impacted customers*" before, during, and after the 2017 CA wildfires.[177] CTIA goes on to describe these voluntary measures, some of which the Decision adopts as mandatory ones in the Commission's Emergency Disaster Relief Program for communications customers:

> Wireless carriers voluntarily: (a) devoted all resources to necessary to restore wireless service to the impacted areas as quickly as possible; (b) deployed mobile equipment, including cells on wheels ("COWS") and cells on light trucks ("COLTS"), to supplement service in impacted areas (c) deployed trucks outfitted to provide device charging stations, Wi-Fi access, and "loaner" phones as needed, as well as basic supplies like bottled water, food, and respiratory masks; (d) waived overage charges for data, talk, and text during these emergencies; and (e) extended payment dates for service for impacted customers.[178]

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[176] CTIA Rhg. App., at 4.

[177] CTIA Rhg. App., at 1-2, italics added.

[178] *Id*., at 2.

CTIA further explains that wireless carriers "have taken a number of additional, wide-ranging actions to *further public safety*," including the following "network infrastructure responses":

- Constructing resilient networks with redundancy features such as ring configurations and backup power at virtually all critical coverage cell sites;
- Deploying additional wireless facilities such as COWs, COLTs, satellite picocells on trailers, and repeaters on trailers to improve service in areas where coverage from permanent wireless towers may have been impacted by fire, or networks were overburdened by the movement of people seeking refuge;
- Dispatching emergency response teams provisioned with a wide variety of equipment from portable microwave links to 4G network extenders to address a wide variety of network and community challenges in the field;
- Providing wireless charging stations and Wi-Fi access; and
- Providing "loaner" handsets to customers.[179]

Beyond these actions, CTIA states that "wireless carriers also continue to take *significant steps to aid disaster-affected consumers*—including (1) waiving overage charges, (2) extending payment dates, and (3) giving additional data allotments free of charge."[180] In CTIA's own words, "[a]s these examples and as the record more broadly demonstrate*, the wireless industry supports the Commission's goal of ensuring that consumers have access to vital services in the wake of natural disasters.*"[181] Accordingly, the wireless carriers' voluntary efforts, which the Decision adopts as mandatory wireless requirements, serve the same purpose as the Decision– to protect

[179] *Id*., at 2-3, italics added.

[180] *Id*., at 3, italics added.

[181] *Id*., at 3-4, italics added.

wireless customers and ensure public safety. They do not raise licensing, spectrum, or rate issues.

CTIA's reliance on two federal court decisions, *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983 (7th Cir. 2000) and *Telesaurus VPC, LLC v. Power*, 623 F.3d. 998, 1010-11 (9th Cir. 2010), to support its "market entry" preemption argument is misplaced. CTIA cites the Seventh Circuit Court of Appeal's decision in *Bastien* as holding that the " '[Communications A]ct makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure.'"[182] In turn, CTIA notes that the Ninth Circuit's decision in *Telesaurus* "cited *Bastien* with approval, and found that 'determinations of public interest, safety, efficiency, and adequate competition [are] all inquiries specially within the expertise of the FCC.'"[183] Based on its misapplication of these two decisions to the Decision's wireless requirements, CTIA concludes that the "COW/COLT Requirement, Hot Spot Requirement, and Loaner Phone Requirement all usurp 'the control of the United States over all channels of radio transmission,' imposing obligations to transmit radio signals at particular *locations* or to operate transmitters or receivers at *particular times*."[184] Neither *Bastien* nor *Telesaurus* support this argument.

Rejecting *Bastien* as distinguishable from the facts in this proceeding, the Commission stated in D.20-07-011:

> To support their argument for conflict preemption, the wireless carriers also misconstrue one sentence of dicta in a 2000 decision of the Seventh Circuit Court of Appeals, *Bastien v. AT&T Wireless Servs., Inc.*; *Bastien* is inapposite here because the underlying facts are fundamentally different. [*Bastien v. AT&T Wireless Servs., Inc.,* 205 F.3d 983 (7th Cir. 2000).] In *Bastien*, the Seventh Circuit rejected plaintiff's

[182] CTIA Rhg. App., at 7.

[183] *Ibid*.

[184] *Id*., at 8.

consumer class action because the plaintiff explicitly requested that AT&T build out more cell towers, which conflicted with a specific FCC market buildout plan for that area.[185] Here, no such FCC approved plan for California is at issue.

Further, California courts have upheld the Commission's interpretation of Public Utilities Code § 451 as a delegation of police power to the CPUC that is not preempted by § 332 or the dicta from *Bastien.*[186]

In upholding this Commission's *Cingular* decision, the California Court of Appeal addressed *Bastien*, finding that the technical network standards entrusted to the FCC were categorically different from the consumer welfare standards embodied in state law, including Public Utilities Code 451: "The statutes and the Commission order that Cingular was found to have violated are broadly written. The Commission's interpretation of the reach of Sections 451, 702, and 2896, as well as of its own earlier order, must be given presumptive value. (Yamaha *Corp. of America v. State Bd. of Equalization*, supra, 19 Cal.4th at 11.)[]"
The Court in Cingular here dropped a footnote quoting Section 451 in its entirety, including the language cited above relating to the Commission's jurisdiction over utility "instrumentalities, equipment, and facilities … as are necessary for *to promote the safety, health, comfort, and convenience of [the utility's] patrons, employees, and the*

[185] The *Bastien* opinion states: "While [plaintiff's] charges appear more like traditional state law claims, they are all founded on the fact that AT&T Wireless had not built more towers and more fully developed its network at the time Bastien tried to use the system. The reason AT&T Wireless had not more fully developed its network was because it was in compliance with the FCC schedule for building towers and establishing service in the Chicago market. In this complaint, Bastien has repackaged challenges to the FCC-approved plan in a state law wrapper, but the contents of that package remain challenges to the FCC approved plan." (*Id.* at 989.)

[186] *Pacific Bell Wireless (Cingular) v. CPUC UC,* 140 CA4th at 740-741, *cert. den.* 2006 Cal.LEXIS 12549 (Cal., Oct 11, 2006), U.S. Supreme Court *cert. dismissed sub nom AT&T Mobility LLC v Cal. PUC,* 127 S.Ct. 1931 (US April 10, 2007).

> *public."* [*Pacific Bell Wireless (Cingular) v. CPUC,* 140 CA4th at 740-741, italics added.][187]

For these same reasons, *Bastien* does not apply to the challenged Decision's wireless requirements.

Telesaurus is also distinguishable on its facts. In *Telesaurus*, plaintiff mobile radio service provider's state law claims (conversion, unjust enrichment, and intentional interference with prospective advantage) were based on the allegation that the defendant competitor's FCC licensed operation was "wrongful." The Ninth Circuit Court found that these state claims required the court to re-examine the FCC's regulatory determination of the defendant's license, which was a market entry decision that Section 332(c)(3)(A) preempted. The Court explained:

> Licensing has long been recognized as the FCC's core tool in the regulation of market entry.[] Accordingly, section 332 of the FCA outlines the FCC's duty to manage the spectrum available to mobile services through the licensing systems. 47 U.S.C. § 332. Such licensing directly involves agency determinations of public interest, safety, efficiency, and adequate competition, all inquiries specially within the expertise of the FCC. *Id*., § 332(a)(1)-(4); see *id*. § 301 (noting the express purpose of the FCA: "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority….") Accordingly, § 332(c)(3)(A) preempts state tort actions that require a court to "to substitute its judgment for the agency's" with regard to a licensing decision. [Citation]"[188]

CTIA's attempt to transform the consumer protection wireless requirements into a "licensing decision" fails because none of the requirements would require a court, as in

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[187] D.20-07-011, *Slip. Op*., at 29-33.

[188] *Telesaurus*, *supra*, at 1008-1009.

Telesaurus, to determine the validity of a wireless carrier's federal license, including the frequencies used to provide the emergency relief measures at issue.

Further, the Commission could not have substituted its own judgment for the FCC's concerning consumer protection rules applicable when a state of emergency has been declared because neither the FCC nor Congress have promulgated any similar rules in this consumer protection space traditionally reserved to states. And, CTIA cites to none. Thus, CTIA's market entry preemption arguments fail.

CTIA's FCA rate preemption claim also fails. CTIA offers nothing to support this claim beyond stating that "to the extent that the Loaner Phone Requirement requires wireless carriers to provide not just wireless phones, but to offer free service on those phones the Loaner Phone Requirement constitutes prohibited rate regulation of a commercial mobile service."[189] The Decision's Loaner Phone requirement does not infringe on the FCC's area of exclusive authority to regulate the rates applicable to mobile service providers because a court considering this requirement "would not have to engage in a regulatory analysis of the reasonableness of a particular rate or to 'substitute its judgment for the reasonableness of a rate….'"[190] We therefore reject CTIA's FCA claims.

2. The wireless consumer protection requirements are not subject to field preemption by existing FCC regulation.

CTIA next claims that the Hot Spot, COW/COLT, and Loaner Phone requirements are subject to field preemption on the same grounds that they are expressly preempted by the FCA, 47 U.S.C. § 332(c)(3)(A).[191] CTIA's field preemption claim suffers the same legal infirmities as its express or conflict preemption claims *supra*,

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[189] CTIA Rhg. App., at 11.

[190] See *Telesauraus*, *supra*, at 1009-1010 (concluding that damages claims are not expressly preempted as attempts to regulate a rate).

[191] CTIA Rhg. App., at 12.

concerning the same provision. In D.20-07-011, the Commission rejected wireless carriers' substantively similar field preemption arguments, stating:

> The wireless carriers make two different species of preemption arguments, express and implied. In its Comments, AT&T (along with CTIA) first argues that the Commission "is preempted by the *express* prohibition of state law regulating market entry found in 47 U.S.C. § 332 (c)(3)(A)" from imposing its backup power proposal.[192] However, to support an express preemption argument, its proponents must cite an express Congressional intention to prohibit states from regulating wireless carriers where such regulation might be necessary to safeguard the health and safety of their populations.[193] Nowhere has Congress expressly stated or clearly manifested any intention to prohibit all State public safety regulations that apply to wireless carriers.
>
> Many carriers also argue that the Federal Communications Act grants the FCC exclusive control over wireless licensing, thus preempting the States from regulating rates or market entry by wireless service providers.[194] The licensing Congress delegated to the FCC pertains to the allocation of spectrum, where Congress foresaw the FCC administering a unitary national spectrum plan. Nothing in the Proposal relates to spectrum, nor does it bar the door to market entry. Indeed, the now three large facilities-based wireless carriers all already offer service in California, all have a statewide footprint, and all have stated that they already have backup power at a substantial number of their cell sites. Further, the presumption against preemption where the State is exercising traditional health and safety police powers is particularly

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[192] AT&T April 3, 2020 Opening Comments, at 6 (emphasis added); CTIA April 3, 2020 Comments at 14 ("overt preemption")"

[193] *Napier v Atlantic Coast Line,* 272 US 605, 611 (1926) (Justice Brandeis stating: "[t]he intention of Congress to exclude States from exerting their police power must be clearly manifested.")

[194] AT&T Opposition to Motion by Public Advocates, June 19, 2019, at 52.

> strong.[195] It has been applied in cases involving state police power and the health and safety aspects of wireless telecommunications networks, where Courts have pointed out that Congress expressly did *not* occupy the field of wireless regulation.[196] [197] As the Third Circuit noted: "we start[] with the basic assumption that Congress did not intend to displace state law."[198] The U.S. Supreme Court has also asserted that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."[199] [200]

Accordingly, no FCC regulation has preempted the field of wireless consumer protection rules encompassed by the challenged Decision's wireless requirements.

CTIA further states that "[w]ireless carriers will continue to provide Wi-Fi access and loaner phones for displaced customers in emergency situations as they have in the past, and will deploy COWs and COLTs after disasters – but the Commission lacks the authority to *require* wireless carriers to do so."[201] CTIA is incorrect. As the Decision explained, the Commission exercised its police powers grounded in Public Utilities Code Sections 451 and 701, among others, to impose consumer protection and public safety regulations. Those are the "other terms and conditions" Congress intended for the states to continue to regulate. Thus, there are no federal barriers to the Commission's wireless requirements.

While wireless carriers may be willing now to continue with voluntary measures, customers have no guarantee that those same measures would be available for

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[195] *See, e.g.,* Farina *v. Nokia Inc, supra,* 625 F.3d at 121-22.

[196] *See, e.g., Farina v. Nokia Inc, supra,* 625 F.3d at 121-22.

[197] *Ibid*.

[198] *Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)*.

[199] *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996).

[200] D.20-07-011, at 25-26.

[201] CTIA Rhg. App., at 12-13.

the next disaster. Thus, the Commission needed to convert some of wireless carriers' commitments into Commission orders to satisfy telephone corporations' obligations as public utilities to ensure safe and reliable service. The record demonstrates that states of emergency require predictable responses – i.e., "established practices" as CTIA puts it – for customers, as well as for government agencies tasked with emergency response duties.[202] The Decision explained that "[a]s with the Commission's requirements for the provision of basic telephone service, this customer relief program sets forth the basic requirements necessary for customers to maintain access to the communications network during declared emergencies."[203]

The Decision also allows for telephone corporations to do more than provide these basic requirements, stating "service providers maintain the flexibility to implement additional measures to ensure public safety in times of declared emergencies."[204] The record demonstrates that "[n]atural and manmade disasters are becoming more frequent, far-reaching, and their effects more widespread" and certainly CTIA would not dispute that "preserving safety and security in the wake of natural and manmade disasters is paramount."[205] The Commission thus properly exercised its plenary authority to ensure public safety by converting the wireless carriers' voluntary commitments into mandatory ones in the Decision.[206]

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[202] See e.g., Decision, at 23-24; see also CTIA Rhg. App., at 4.

[203] Decision, at 24.

[204] *Ibid*.

[205] Decision, at 23; see also CTIA Rhg. App., at 1-4.

[206] The Decision does not require the wireless carriers to do more than what they have committed to doing (i.e., "good faith commitment"), similar to when the Commission approved the Time-Warner and Charter merger and put into its order the commitments that Charter had made to the Commission as part of the conditions of approval, so that those commitments could be enforced, if necessary. See e.g., *In the matter of Joint Application of Charter Communications, Inc., et al. and Time Warner Cable Inc. et. al for Approval of Transfer of Control to Charter Communications, Inc.*, Order Modifying Decision (D.) 16-12-070, and Denying Rehearing of Decision, as Modified [D. 17-03-028] (2017). Indeed, after the Commission issued its decision approving the merger, Charter disputed the enforceability of its previous commitments made as

(footnote continued on next page)

3. The Hot Spot requirement is not preempted by federal law.

Like AT&T, CTIA relies on the FCC's *Restoring Internet Freedom Order*, discussed *supra*, to argue that the Hot Spot requirement is contrary to the FCC's federal policy of non-regulation of information services.[207] This claim fails for the same reasons as AT&T's challenge to the landline call forwarding and messaging services requirements. As explained above, the FCC's attempt to broadly preempt state regulation over information services based on its federal policy of non-regulation was struck down by the *Mozilla* Court.

Moreover, the Hot Spot requirement is intended to ensure that customers continue to stay connected to the communications network and to receive the services for which they subscribed, which, as discussed, are consumer protection matters falling under states' authority over "other terms and conditions." CTIA fails to demonstrate that a specific federal law preempts the Decision's Hot Spot requirement and therefore we reject this argument.

(footnote continued from previous page)

conditions of the merger approval, based on the Commission's inadvertent omission of these commitments in the decision's ordering paragraphs. The Commission corrected these inadvertent drafting errors on rehearing, over Charter's objections. (See *id*., at 8 ["these seven conditions fell within the scope of the 'promises and assurances' [by Charter] that the Commission intended to 'reformulate' as 'explicit conditions of approval.'"]; see also *id*, at 14, fn. 14 ["To the contrary, [Charter's] claims of not being provided 'meaningful' notice and 'meaningful' opportunity to be heard *on their very own proposals* reflect an attempt to take advantage of the Commission's 'drafting' mistake in inadvertently omitting ordering paragraphs that correspond to the seven ORA/CforAT conditions at issue."].)

[207] CTIA Rhg. App., at 13-14.

4. The wireless requirements do not constitute an unjust taking in violation of the US Constitution.

CTIA asserts that the wireless requirements ordered in OPs 3 and 4 constitute an unjust taking.[208] They do not, for the same reasons articulated in response to AT&T's takings claim concerning the landline requirements. Similar to the landline requirements, the wireless requirements were based on wireless carriers' "established practices" for responding to disasters and emergencies. Therefore, requiring services that wireless providers were already providing in those situations to maintain service for their customers does not constitute a taking.

5. The wireless requirements do not exceed the Commission's state law authority.

CTIA attacks the Commission's state law authority to adopt the wireless requirements from different angles, none of which have merit. First, CTIA claims that the wireless requirements are not functions of telephone corporations.[209] Along the same lines, CTIA also argues that they are not cognate and germane to the regulation of public utilities, even under Pub. Util. Code Section 701. CTIA therefore argues the Commission abused its discretion in adopting them in the Decision.[210] This is unpersuasive, given that CTIA devotes the bulk of its Rehearing Application to argue that the wireless requirements constitute market entry (e.g., issuance of CPCNs) or rate regulations (e.g., general rate cases), which are public utility matters that the Commission could traditionally regulate, but for Section 332 of the FCA.

Second, CTIA claims that the wireless requirements "bear no rational relationship to the events the Commission identifies as triggering them."[211] However, CTIA explains that the wireless carriers activate their voluntary measures when disasters

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[208] CTIA Rhg. App., at 14-16.

[209] CTIA Rhg. App., at 16.

[210] *Id*., at 16-17.

[211] CITA Rhg. App., at 18-19.

or emergencies occur, which are exactly what the Decision adopts as the trigger for the wireless requirements. Thus, the wireless requirements are similarly triggered when disasters or catastrophes are significant enough to necessitate a declaration of emergency.

Finally, CTIA invokes the ESA in the same manner as does AT&T's Rehearing Application and adopts AT&T's ESA arguments as its own, without further analysis. This claim lacks merit for the same reasons as AT&T's ESA claim, discussed above. It is rejected on the same grounds.

D. Non-substantive modifications to the Decision

As discussed above, we modify the Decision to add a finding of fact that reflects the definition of VoIP service, as defined in Section 239. This definition clarifies COL 17 (VoIP providers fit within the meaning of a "telephone corporation"), a threshold jurisdictional issue concerning the Commission's authority over VoIP providers that VoIP Coalition had commented on in its Applications for Rehearing in this proceeding and in prior comments.

We modify the Decision to correct non-substantive typographical errors in COLs 31, 39, 40, 41, 42, 45, 47, 48, 49, 50, 51, and 53, which incorrectly reference COLs 13 or 14 as containing the definitions for landline and wireless providers, respectively, to which the Decision's Telephone Requirements apply. Based on the text of the COLs that incorrectly reference COLs 13 and 14, it is clear that the Commission intended to reference the definitions for landline and wireless providers contained in the discussion of the Decision, at pages 4-5. Those definitions were correctly stated in Ordering Paragraph 1. Therefore, for clarification, we will modify COLs 31, 39, 40, 41, 42, 45, 47, 48, 49, 50, 51, and 53 to strike out the references to COLs 13 or 14, and instead add a reference to the discussion in the Decision that sets forth the applicable definitions for landline carriers and wireless carriers. These modifications do not substantively change the Decision.

III. CONCLUSION

We modify D.19-08-025 for the reasons discussed above. Otherwise, good cause does not exist for the granting of any of the three Applications for Rehearing of D.19-08-025, as modified. Therefore, we deny rehearing of the Decision, as modified.

THEREFORE, IT IS ORDERED that:

1. D.19-08-025 is modified to add the following Finding of Fact 13:

   13. Pub. Util. Code § 239(a) defines VoIP service as:

   "(1) 'Voice over Internet Protocol' or 'VoIP' means voice communications service that does all of the following:

   (A) Uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from, or terminates at, the user's location in Internet Protocol or a successor protocol. (B) Requires a broadband connection from the user's location. (C) Permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

   (2) A service that uses ordinary customer premises equipment with no enhanced functionality that originates and terminates on the public switched telephone network, undergoes no net protocol conversion, and provides no enhanced functionality to end users due to the provider's use of Internet Protocol technology is not a VoIP service."

2. D.19-08-025 is modified as follows:

   a. Conclusion of Law 31 is modified to read as follows:

   31. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to implement the emergency customer protections when the governor of California or the president of the United States declares a state of emergency and where the state of emergency has disrupted the delivery or receipt of utility service and/or

the degradation of the quality of utility service to communications service provider customers.

b. Conclusion of Law 39 is modified to read as follows:

39. It is reasonable to require the category 2A wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to give customers who are in a disaster-affected area under a covered emergency declaration by the governor of California or president of the United States: (a) deployment of mobile equipment, including Cells on Wheels and Cells on Light Trucks, to supplement service in areas that need additional capacity to ensure access to 9-1-1/E9-1-1 service; (b) provide device charging stations in areas where impacted wireless customers seek refuge from fires; (c) provide WiFi access in areas where impacted wireless customers seek refuge from fires; (d) provide mobile phones for customers seeking shelter from a disaster to use temporarily at a county or city designated shelter; (e) to consider allowing customers to defer or phase payment for coverage charges for data, talk, and text for defined periods of time; (f) to consider providing temporary replacement phones for customers who phones were lost or damaged as a result of a disaster or evacuation. The relief measures create a floor of customer protections beyond which the category 2A wireless providers may offer additional relief measures, including those tailored to specific customers' needs; and (g) extending payment dates for service for defined periods of time for impacted customers.

c. Conclusion of Law 40 is modified to read as follows:

40. It is reasonable to require the category 2B wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to provide the following mandated protections to their customers who are in a disaster affected area under a covered emergency declaration by the governor of California or president of the United States: (a) to provide mobile phones for customers seeking shelter from a disaster to use temporarily at a county or city designated

shelter; (b) consider allowing customers to defer or phase payment for coverage charges for data, talk, and text for defined periods time; (c) to consider extending payment dates for service for defined periods of time for impacted customers; and (d) to consider providing temporary replacement phones for customers whose phones were lost or damaged as a result of a disaster or evacuation. The relief measures create a floor of customer protections beyond which the category 2B wireless providers may offer additional relief measures, including those tailored to specific customer needs

d. Conclusion of Law 41 is modified to read as follows:

41. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to file a Tier 1 Advice Letter within 15 days of a declared state of emergency attesting that they have complied with all required actions, designated based on the type of service they provide.

e. Conclusion of Law 42 is modified to read as follows:

42. It is reasonable to require the landline providers, as defined in the decision ~~in Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to file a Tier 1 Advice Letter documenting compliance with the mandates in this decision, twelve months following a qualifying event.

f. Conclusion of Law 45 is modified to read as follows:

45. It is reasonable to give the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, the discretion to apply or implement additional relief efforts that are unique to its customer experience, to the specific type of damage resulting from a disaster, or to apply applicable customer protections for customers

indirectly affected by the disaster when fairness and equity require auxiliary efforts to supplement the rules set forth here.

g. Conclusion of Law 47 is modified to read as follows:

47. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, to work collaboratively with Commission staff and our sister government agencies on measures to instill greater awareness of 2-1-1 services.

h. Conclusion of Law 48 is modified to read as follows:

48. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to conduct the following outreach and awareness to their customers that clearly communicate the customer protections before a disaster occurs and during a disaster: (a) community outreach; (b) webpages; (c) outbound emails; (d) media advisories; (e) social media posts; (f) outbound dialing; (g) customer contact centers to provide customers impacted by the disaster information regarding service interruptions, restoration efforts, along with relief support; (h) community outreach centers; (i) targeted outreach to highly impacted customers; (j) direct mail; (k) newsletters; (l) city/county assistance centers; (m) trained staff at local assistance centers to work in-person with impacted customers; (n) partnering with community-based organizations that serve income-eligible customers to ensure awareness of available customer protections; (o) local governments; (p) radio; and (q) communicate customer protections in accessible formats for customers with disabilities impacting their ability to use standard forms of communications. Providers shall have the flexibility to utilize these communication mediums and outreach measures where and how appropriate.

i. Conclusion of Law 49 is modified to read as follows:

49. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to begin conducting outreach to their customers about these protections upon the effective date of this decision.

j. Conclusion of Law 50 is modified to read as follows:

50. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to have flexibility to create a mix of tactics utilized at strategic times to reach customers and aid them in their understanding of the emergency disaster relief programs.

k. Conclusion of Law 51 is modified to read as follows:

51. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to communicate the timelines of the customer protections clearly to customers.

l. Conclusion of Law 53 is modified to read as follows:

53. It is reasonable to require the landline providers, as defined in the decision ~~Conclusion of Law 13~~, and wireless providers, as defined in the decision ~~Conclusion of Law 14~~, to communicate these emergency disaster relief customer protections in English, Spanish, Chinese (including Cantonese and Mandarin), Tagalog, and Vietnamese as well as Korean and Russian, where these languages are prevalent within the communications service provider service territories. It is reasonable for the customer outreach to be communicated in accessible

formats for customers with disabilities impacting their ability to use standard forms of communication.

3. Rehearing of D.19-08-025, as modified, is hereby denied.
4. Rulemaking (R.) 18-03-011 remains open.

This order is effective today.

Dated September 10, 2020, at San Francisco, California.

MARYBEL BATJER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
Commissioners