BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

REPLY COMMENTS OF THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON PROPOSED DECISION ADOPTING WIRELESS RESILIENCY STRATEGIES

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Pursuant to Rule 14.3(d) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the California Cable & Telecommunications Association ("CCTA") submits these reply comments in response to opening comments filed by other parties on the June 11, 2020 *Proposed Decision Adopting Wireless Resiliency Strategies* ("PD").

1. Wireline Resiliency Issues Are Appropriately Left to a Separate Decision

The PD makes clear that it pertains to "wireless providers only,"[1] and that the Commission will consider possible resiliency requirements for "other telecommunications providers" in a "forthcoming decision."[2] In its Opening Comments on the Assigned Commissioner's Ruling and Proposal ("ACP"), CCTA proposed an alternative framework for wireline communications services providers,[3] which has garnered AT&T's support and a positive review by the California Fire Chiefs Association ("CFCA").[4] CCTA and a host of wireline providers have demonstrated that resiliency strategies for wireline facilities present enormous challenges with respect to safety, permitting, feasibility, cost, community reaction, and environmental impact—which may differ significantly from challenges associated with wireless networks.[5] It is entirely appropriate—and plainly not erroneous—for the Commission to address different services in separate decisions.

Nevertheless, some parties improperly seek to insert wireline issues into this PD. For example, the Public Advocates Office ("PAO") asks the Commission to make a new finding about wireline services lacking any evidentiary basis in the record.[6] In a similar vein, The Utility Reform Network ("TURN") seeks to insert a conclusion of law about wireline services in the wireless decision,[7] improperly bidding the Commission to prejudge the forthcoming wireline decision.[8] TURN also argues that the PD "errs" by not addressing backhaul services.[9] Although CCTA's

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[1] PD at 108.
[2] PD at 3.
[3] *See* CCTA's Opening Comments on ACP at 12-15 (Apr. 3, 2020).
[4] *See* AT&T's Reply Comments on the ACP at 18-21 (April 17, 2020); CFCA Comments at 2.
[5] *See e.g.*, CCTA Comments on ACP (April 3, 2020), Comcast Comments on ACP (April 3, 2020), Charter Comments on ACP (April 3, 2020), and Cox Comments on ACP (April 3, 2020).
[6] *See* PAO Comments at 11 (proposing the addition of this finding: "The number of wireline customers has steadily decreased as consumers begin to rely solely on wireless service. However, wireline service continues to be a necessary lifeline and an essential service to many Californians living in areas where they are not able to access wireless services or to many Californians who are distance learning, teleworking, accessing telehealth, and on-line government programs"). CCTA notes that PAO's requested finding of fact improperly conflates voice and broadband services.
[7] Comments of TURN, Access Humboldt, National Consumer Law Center, Center for Accessible Technology, and Communications Workers of America (collectively, "TURN"), Attachment A at 3.
[8] Similarly, the Commission should reject TURN's request that the Commission embark on a data gathering exercise with the Incumbent Local Exchange Carriers (TURN Comments at 8), as it is procedurally improper.
[9] *See* TURN Comments at 5.

alternate proposed framework provides for backup power to backhaul service, consideration of all wireline issues, including wireline backhaul services, in a forthcoming wireline decision is appropriate and not erroneous. TURN further claims that the PD should adopt requirements that would improve what appears to be ILEC network reliability for customers in high fire threat areas who do not have wireless service.[10] However, TURN's proposal ignores the fact that only 3.3% of Californians rely exclusively on landlines,[11] and the record in this proceeding is not sufficiently developed to include such a provision in this PD. The Commission should therefore reject these requests. The Commission also should reject PAO's proposal that the Commission artificially constrain its decision-making process by including a deadline to issue a proposed decision with wireline backup power mandates by September 1, 2020.[12]

2. The PD Errs by Overstating the Commission's Legal Authority

Several commenters observe that the PD[13] overstates the Commission's authority to adopt network resiliency mandates based on the traditional "police powers" of state governments.[14] CCTA agrees. Article XII of the California Constitution merely grants the Commission authority to "establish rules . . . for all public utilities subject to its jurisdiction," while reserving *for the Legislature* "plenary power . . . to confer additional authority and jurisdiction upon the commission."[15] While the PD cites Pub. Util. Code § 701 as a legislative mandate to do all things "necessary and convenient" in the exercise of its delegated powers, this provision is not an "open-ended grant of authority . . . that would confer upon the Commission powers contrary to other legislative directives."[16] Although state governments (as a general proposition) may traditionally exercise police powers over matters related to public health and safety, the Commission possesses only the specific authority granted to it by the Constitution and the Legislature, neither of which includes a plenary grant of authority over any action it deems necessary to promote public health

[10] TURN Comments at 7.
[11] *See* CCTA Reply Comments on ACP at 4, note 13.
[12] PAO Comments at 8.
[13] PD at 16 (Asserting that "[t]he California Constitution and California statutory law designate the CPUC as the principal body through which the State exercises its police power in the case of essential utility network services.").
[14] *See* CTIA Comments at 4-9; AT&T Comments at 2-3; T-Mobile Comments at 5-7; Verizon Comments at 2.
[15] Cal. Const. Art. XII §§ 5, 6.
[16] *Assembly of the State of Cal. v. Pub. Util. Comm'n*, 12 Cal. 4th 87, 103 (1995); *cf. BNSF Railway Co. v. Pub. Util. Comm'n*, 218 Cal. App. 4th 778, 784 (2013) (observing that any "[a]dditional powers and jurisdiction that the commission exercises . . . must be cognate and germane to the regulation of public utilities") (internal quotation marks omitted).

and safety.[17] Simply invoking "police powers" does not provide it with additional independent powers. It is therefore legal error for the PD to rely on the Commission's asserted police powers to "articulate[] health and safety requirements that apply in whole or in part to wireless networks, and to the wired networks on which wireless networks depend."[18]

Even if the Commission had such broad police powers, states may not exercise these powers in conflict with federal law.[19] Not only are there arguments in the record that the PD conflicts with federal law governing wireless service,[20] it also conflicts with and is preempted by federal law and policy concerning light-touch regulation of information services, including broadband Internet access, especially to the extent it "dictate[s] the design of a provider's network."[21] The PD's invocation of police powers does not save these requirements from preemption and is legal error.[22]

3. The Record Supports the PD's Realistic Approach to Clean Energy

The PD reasonably concludes that in-place generators, including diesel-powered, will be required to comply with a 72-hour backup power mandate and that clean energy generation is not technically feasible or commercially viable at this time for many locations. A few commenters argue in favor of more prescriptive clean energy mandates, but fail to identify any sound basis for those proposals, or any factual, legal, or technical error for the sensible decision on this issue in the PD. Instead, these parties press for aspirational goals,[23] promote their own business interests,[24] and simply ignore a record replete with evidence of insurmountable siting, permitting, and public

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[17] *See Pac. States Box & Basket Co. v. White*, 296 US 176, 185-186 (1935) ("Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. . . . Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature."); *Carmel Valley Fire Protection Dist. v. State*, 25 Cal.4th 287, 300 (2001) ("The powers of public [agencies] are derived from the statutes which create them and define their functions.").

[18] PD at 18.

[19] *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[W]hen federal officials determine . . . that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (internal quotation marks omitted).

[20] *See* CTIA Comments at 7; AT&T Comments at 2-3; T-Mobile Comments at 5.

[21] *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9103 ¶ 36 n.84 (2018); *see also* AT&T Comments at 3 (*citing Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018)); CTIA Comments at 12; T-Mobile Comments at 6.

[22] As CTIA observes, the Commission could largely avoid such conflicts by embracing voluntary industry commitments instead of issuing prescriptive rules for services outside its authority. CTIA Comments at 14-15.

[23] *See* PAO Comments at 7 (arguing that communications providers should submit "timelines by which they will install renewable energy backup at 25%, 50%, 75%, and 100% of their sites").

[24] *See* CHBC Comments at 2 (expressing "disappoint[ment]" that the PD does not "encourage an important route to market for the hydrogen industry").

safety challenges.[25] While the National Fuel Cell Research Center ("NFCRC") asserts that fuel cells "are being widely used by . . . cable companies for extended runtime backup power," and that "planning in the coming months could allow thousands of sites to install . . . fuel cell systems for clean power generation in 2021,"[26] these claims are not grounded in today's reality. CCTA's members have detailed why fuel cells would be impractical, unsafe, and effectively impossible to deploy in curbside cabinets for the more than 50,000 cable system power supplies across California, which explains why they are very sparsely used today to power hybrid fiber-coaxial cable plant.[27] The Commission should continue to reject unsupported claims to the contrary.

4. There Is No Basis for a *Statewide* Backup Power Mandate

Several parties urge the Commission to expand the geographic scope of the backup power requirements.[28] But the PD makes a reasoned determination, based on record evidence, that backup power rules for wireless service should be "narrowly tailored and reasonable" in order "to focus efforts and investments on the communities that are most at risk" and therefore limited to Tier 2 and 3 High Fire Threat Districts ("HFTDs").[29] CFAC's support for focus on critical services in HFTDs reinforces that the PD's approach is appropriate, and consistent with CCTA's proposal to ensuring connectivity to wireless facilities and critical facilities in Tier 2 and 3 HFTDs.[30]

5. The PD Correctly Rejected Requests for GIS Mapping Data

The Commission considered and rejected a proposal to require annual submission of geographic information system ("GIS") location data for critical network facilities and backhaul routes to Commission staff for further analysis and dissemination. TURN now argues that the PD "errs in failing to adopt requirements that would identify where networks are most fragile and where fiber and other infrastructure needs to be reinforced."[31] But it is not error to defer wireline backhaul issues to a separate decision, and serious legal and practical concerns exist with any

[25] *See* PAO Comments at 7 (asserting against the great weight of record evidence that "it is feasible for providers to implement renewable backup generation onsite within a few years").
[26] NFCRC Comments at 3, 6.
[27] *See* CCTA Comments on ACP at 18; Comcast Reply Comments on ACP at 41; Charter Reply Comments on ACP at 9-10; Cox Reply Comments on ACP at 17-18.
[28] PAO Comments at 9 (requesting additional decision that outlines backup power requirements for "all wireless facilities throughout California"); CSAC Comments at 2-3 (urging the PD be expanded to include Tier 1); and RCRC Comments at 7 (advocating for expansion to the geographic territory that is eligible for PSPS mitigation funding and inclusion of wireless facilities that lost power during two or more PSPS events).
[29] *See* PD at 61, 82.
[30] *See* CFAC Comments at 2; CCTA Opening Comments on ACP at 12-15 (Apr. 3, 2020).
[31] TURN Comments at 3.

mandate to share sensitive critical infrastructure information with inadequate protections against disclosure while duplicating other efforts to coordinate directly with emergency responders.[32]

6. Wireless Resellers Should Not Be Considered "Providers"

TURN argues that the PD "errs" by proposing a definition of "provider" that excludes wireless resellers that own network equipment necessary to provide facilities-based wireless service.[33] The Commission was correct to reject this argument, which TURN previously made,[34] because mobile virtual network operators and other resellers of capacity on third-party networks generally do not operate such equipment in their role as resellers or have input on decisions regarding the operation, maintenance, backup power, or resiliency of wireless facilities they do not own or operate.[35]

7. Small Cells Should Not Be Subject to Backup Power Requirements

CCTA agrees with several commenters that the Commission should expressly exempt small cells from the PD's backup power requirements and documentation rules.[36] Providing backup power to small cells is objectively impossible, given their limited size and space constraints of their locations.[37] As the PD correctly recognizes, providers of small cells provide inputs to wireless networks but do not control those networks' quality or level of service.[38]

8. Backup Power at Customer Premises Is Beyond the Proceeding's Scope

TURN argues that "it is imperative that the Commission address power at the customer premises."[39] The scope of Phase 2 of this rulemaking was defined in § 2 of the Jan. 21, 2020 Assigned Commissioner's Amended Phase 2 Scoping Memo and Ruling and includes no issue that can be reasonably construed as encompassing "power at the customer premises." Besides being out of scope, this request fails to identify any legal, technical, or factual error in the PD.

CCTA appreciates the Commission's consideration of the views expressed above.

Respectfully submitted,

By: / s / Jerome F. Candelaria

Dated: July 6, 2020 Jerome F. Candelaria, for CCTA

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[32] *See* Comcast Comments on ACP at 57-58; Charter Comments on ACP at 34-39; Cox Reply Comments on ACP at 19-20.

[33] *See* TURN Comments at 9-10.

[34] *See* TURN Comments, Attachment A at 1.

[35] *See* Comcast Reply Comments on ACP at 11 (citing Charter, Verizon, PAO Opening Comments).

[36] *See* AT&T Comments at 5-7; ExteNet Comments at 2-4; Verizon Comments at 3-5.

[37] *See id.*

[38] ExteNet Comments at 2.

[39] TURN Comments at 13. Notably, TURN acknowledges that it "does not enhance customer safety to keep the network running if customers cannot use their own communication devices." *Id*.