BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
04/03/20
04:59 PM

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

OPENING COMMENTS OF CTIA ON THE ASSIGNED COMMISSIONER'S RULING AND PROPOSAL

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April 3, 2020

CTIA respectfully submits these Opening Comments in response to the Assigned Commissioner's Ruling and Proposal issued March 6, 2020 ("Ruling")[1] in the above-captioned proceeding, as modified by the Assigned Administrative Law Judge's March 25, 2020 E-mail Ruling. After a general introduction, these Opening Comments respond sequentially to the questions posed in the Ruling, consistent with the Assigned Commissioner's direction.[2]

I. INTRODUCTION

The wireless industry strongly supports the goals of ensuring that communications networks are resilient and that California consumers have access to 9-1-1 and emergency information in the event of wildfires, other natural disasters, and public safety power shutoffs. Following Superstorm Sandy's impact on the East Coast in 2012, the wireless industry worked with government leaders to develop a flexible set of principles to encourage wireless providers, who are otherwise competitors, to work together and provide mutual assistance during emergencies, while maintaining incentives for investment and innovation. Since then, the Wireless Network Resiliency Cooperative Framework has proven to be an effective tool guiding wireless providers' response to emergencies.[3]

In California in particular, wireless carriers have made extraordinary efforts in the face of the wildfires, floods, and other disasters that have occurred in recent years to maintain critical communications services in disaster-affected areas. The record in this proceeding is replete with examples of these extraordinary efforts by the wireless industry. CTIA's member companies

[1] Assigned Commissioner's Ruling and Proposal, R.18-03-011 (filed Mar. 6, 2020) ("Ruling"). The Assigned Commissioner Proposals attached to the Ruling as Appendix A are separately referred to herein as the "Proposal."

[2] *See* Ruling at 3 ("parties shall organize and submit their comments in the same order in which the issues and questions are presented" in the Ruling).

[3] *See Wireless Network Resiliency Cooperative Framework*, CTIA, https://www.ctia.org/the-wireless-industry/industry-commitments/wireless-network-resiliency-cooperative-framework (last visited Mar. 23, 2020).

continue to work with the California Governor's Office of Emergency Services ("CalOES") and the California Department of Forestry and Fire Protection to ensure that these agencies are provided the information that they need,[4] and have taken a wide-ranging number of additional actions to further public safety, including:

- Constructing resilient networks with redundancy features such as ring configurations and backup power at virtually all critical coverage cell sites;[5]
- Deploying additional wireless facilities such as cells on wheels ("COWs"), cells on light trucks ("COLTs"), satellite picocells on trailers ("SPOTs"), and repeaters on trailers ("RATs") to improve service in areas where permanent wireless towers may have been damaged by fire, or networks were overburdened by the movement of people seeking refuge;[6]
- 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;[7]
- Providing wireless charging stations and Wi-Fi access;[8] and
- Providing "loaner" handsets to customers.[9]

Beyond their network infrastructure responses, wireless carriers continue to take significant steps to aid disaster-affected consumers. Historically, these have included waiving overage charges, extending payment dates, and giving additional data allotments, free of

[4] *See* Decision Affirming the Provisions of Resolutions M-4833 and M-4835 as Interim Disaster Relief Emergency Customer Protections, R.18-03-011, D.18-08-004, at 5 (issued Aug. 20, 2018).

[5] *See, e.g.*, AT&T's Opposition to Motion by the Public Advocates Office for an Immediate Order Requiring Communications Providers to Complete Calls and Deliver Data Traffic and Provide Other Post-Disaster Consumer Protection Relief, R.18-03-011, at 10-18 (filed June 19, 2019) ("AT&T Opposition"); Verizon June 19 Comments at 1, 4-8.

[6] *See, e.g.*, T-Mobile West LLC, Tier 1 Advice Letter No. 7 at 2 (filed Nov. 26, 2018) ("T-Mobile Advice Letter No. 7"); Verizon June 19 Comments at 4.

[7] *See, e.g.*, AT&T Opposition at 16-17; Verizon June 19 Comments at 4-5.

[8] *See, e.g.*, T-Mobile Advice Letter No. 7 at 2; Verizon June 19 Comments at 2-3.

[9] *See, e.g.*, T-Mobile Advice Letter No. 7 at 2.

charge.[10] Most recently, in the face of the COVID-19 pandemic, wireless carriers have done everything from waiving overage charges and extending payment dates,[11] to expanding data plans at no charge,[12] expanding network capacity,[13] and working to reduce the homework gap as many schools move their classes online.[14]

California's wireless carriers have even demonstrated their support to the community by helping with relief efforts *unrelated* to the provision of wireless service. For example, wireless carriers have provided fire-affected customers with basic support such as water, food, and smoke-protection facemasks.[15]

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[10] *See, e.g.*, T-Mobile West, LLC, Tier 1 Advice Letter No. 8, at 2 (filed Nov. 26, 2018 ("T-Mobile Advice Letter No. 8"); Matt Adams, *How Carriers Are Helping Those Affected by California Wildfires*, ANDROID AUTHORITY (Oct. 12, 2017), https://www.androidauthority.com/california-wildfires-carriers-807137/.

[11] *See, e.g.*, *Coronavirus (COVID-19) Facts*, VERIZON, https://www.verizonwireless.com/support/covid-19-faqs/ (last visited Mar. 23, 2020), *COVID-19: Our Response*, AT&T (Mar. 23, 2020), https://about.att.com/pages/COVID-19.html.

[12] *See, e.g.*, *T-Mobile Update on COVID-19 Response*, T-MOBILE (Mar. 13, 2020), https://www.t-mobile.com/news/t-mobile-update-on-covid-19-response (also noting charitable efforts involving food resources).

[13] *See, e.g.*, *T-Mobile to Increase Network Capacity for Customers*, T-MOBILE (Mar. 14, 2020), https://www.t-mobile.com/news/tmobile-to-increase-network-capacity-and-expand-roaming-for-sprint-customers.

[14] *See, e.g.*, Doug Michelman, *An Open Letter to Participating 1Million Project School Districts*, SPRINT (Mar. 16, 2020), https://newsroom.sprint.com/an-open-letter-to-participating-1million-project-school-districts.htm.

[15] *See, e.g.*, *T-Mobile Responds to California Wildfires*, T-MOBILE (Dec. 7, 2017), https://www.t-mobile.com/news/t-mobile-responds-to-california-wildfires ("Mobile trucks have been deployed in Ventura and LA counties so people can charge devices, access WiFi, use loaner mobile phones as needed, and get supplies like bottled water."); *AT&T to Offer Credits for Unlimited Data, Calls and Texts to Keep Customers Affected by California Wildfires Connected*, AT&T (Oct. 20, 2017), https://about.att.com/inside_connections_blog/california_fires ("AT&T Community Response Teams are at the following shelters today with wifi, charging solutions, phones for use, account support, live news via DirecTV Now, snacks/water: Napa: Napa Valley College, 2277 Napa-Vallejo Hwy; Santa Rosa: Elsie Allen High School, 599 Bellevue Ave; Petaluma: Community Center 320 N McDowell Blvd; Sonoma: Sonoma County Fairgrounds, 1350 Bennet Valley Road; Yuba City: Yuba Sutter Fairgrounds, 442 Franklin Ave"); *see also* Verizon June 19 Comments at 2-3 (describing community donations exceeding $250,000 to fire-affected communities in 2018-19); T-Mobile Advice Letter No. 8 at 2.

As these examples and 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 emergencies and natural disasters. The wireless industry's commitment has meant that during emergencies and disasters, wireless networks generally continue to function, and the portions of wireless networks that do not continue to function are quickly restored. These facts are largely ignored in the Ruling and the Proposal, which do not fairly characterize the record.

At the same time, the wireless industry has learned through experience that preparing for and responding to the next storm or emergency requires robust engagement with key infrastructure, public safety, and government stakeholders. Such efforts are ongoing at the state, local, and federal levels.[16] Even as Americans rely on wireless during emergencies, wireless in turn relies on infrastructure providers to power our networks, antennas, and devices, and on state and local governments to maintain roads, bridges, and tunnels that are necessary to transport equipment and access sites. Cooperative efforts among these interdependent stakeholders are required to prepare for and respond rapidly to disasters. Efforts that lack coordination, no matter how well-intentioned, can lead to bad results. To facilitate better coordination with electric providers, CTIA recently announced a new cross-sector collaboration with the Edison Electric Institute.[17] Enhancing coordination before, during, and after disasters will enhance resiliency and help ensure wireless services are available when Americans need them most.

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[16] *See, e.g., Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; Petition of California Public Utilities Commission and the People of the State of California for Rulemaking on States' Access to the Network Outage Reporting System ("NORS") and a Ruling Granting California Access to NORS,* Second Further Notice of Proposed Rulemaking, FCC 20-20 (rel. March 2, 2020).

[17] *CTIA Statement on Collaboration with Edison Electric Institute*, CTIA (Feb. 27, 2020), https://www.ctia.org/news/statement-on-collaboration-with-edison-electric-institute.

Over many years, wireless carriers have learned that successful resiliency planning requires flexibility and strategic thinking. As the Proposal correctly acknowledges, "[c]ommunications networks are complex and diverse and there may not be a 'one size fits all' approach to ensuring resiliency."[18] For example, "circumstances may exist in which placing a generator is not possible or in the public interest."[19] Other factors also bear on resiliency planning, including local regulations, rights-of-way, and lease agreements.[20]

Although the Proposal states that, because of such factors, it "does not put forward specific requirements for every network component at this time,"[21] the Proposal in fact *would* impose a set of requirements affecting virtually every aspect of wireless networks and operations. As such, the Proposal fails to provide wireless carriers with the flexibility that they need to respond to the specific circumstances that affect resiliency planning in the real world. The specific and extensive nature of the Proposal's mandates is also inappropriate given the inadequacy of the factual record, the complexity of the questions before the Commission, and the ongoing nature of efforts at the federal level to address related issues. In addition to the substantive problems with the specifics of the Proposal, its breadth and scope in many instances exceed the Commission's lawful authority, as discussed in more detail below.

CTIA recognizes that every stakeholder, including wireless carriers, must constantly strive to protect consumers and ensure continuity of communications capabilities. This will require coordinated efforts by communications service providers, power utilities, state emergency personnel, the Commission and its staff, and the public to achieve. The

[18] Proposal at 2.

[19] *Id.*

[20] *See id.*

[21] *Id.*

Commission's goal should be the adoption of rules that constructively pursue these ends within the bounds of its authority. These Opening Comments are offered in that spirit.

II. RESPONSES TO QUESTIONS

(1) <u>Applicability of Requirements</u>: The Proposal states that the requirements shall be applicable to all companies owning, operating, or otherwise responsible for infrastructure that provides or otherwise carries 9-1-1, voice, text messages, or data.

(a) Is this definition of the applicability reasonably tailored to ensure regulatory compliance over all communications service providers? Why or why not?

(b) Which types of providers, if any, should be excluded from these requirements because their services are not essential to reliable access to 9-1-1 and the distribution of essential emergency information?

(2) Alternatively, D.19-08-025 defined communications service providers into the following categories: (1) facilities-based and non-facilities-based landline providers including 9-1-1/E9-1-1 providers, LifeLine providers, providers of Voice Over Internet Protocol [VoIP], Carriers of Last Resort [COLRs], and other landline providers that do not fall into the aforementioned groups; (2) wireless providers include those that provide access to E9-1-1 and/or LifeLine services; (2A) facilities-based wireless providers; and (2B) non-facilities-based wireless providers, including resellers and mobile virtual network operators [MVNOs].

(a) For purposes of Phase II, should the Commission apply the definition from D.19-08-025, instead of the proposed definition in the proposal?

As between the definitions proposed in the Ruling,[22] the second alternative (*i.e.*, the definitions from D.19-08-025) is nominally preferable, because it recognizes the key distinction between facilities-based and non-facilities-based providers, which for purposes of this proceeding is crucial. The definition in the Proposal (referenced in Question 1)[23] should not be adopted because it would apply the Commission's regulations to information services that are outside the Commission's jurisdiction.[24] The Commission should recognize that its jurisdiction

[22] *See id.* at 4.

[23] *See* Ruling at 3.

[24] *See, e.g.*, *Vonage Holdings Corporation Petition for Declaratory Ruling an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22416 ¶ 21 (2004),

to regulate wireless carriers is limited and, while some of the requirements of the Proposal are merely investigatory in nature, the applicability of the requirements should be tailored to match the limits of the Commission's regulatory authority.

> ***3. <u>Definition of Resiliency</u>: The Proposal defines resiliency as the ability to recover from or adjust easily to adversity or change and is achieved by Providers through utilizing a variety of strategies. The proposal lists an array of strategies and provides definitions for each one.***
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> > ***(a) Please provide comments on the definition of resiliency in the context of communications service resiliency strategies and their definitions.***
> >
> > ***(b) Please comment on any recommendations or modifications that should be considered to the proposed resiliency definition and the resiliency strategies. Please provide a complete discussion for any proposed recommendations or modifications.***

Wireless carriers have demonstrated a strong commitment to building and maintaining resilient networks. As discussed above, in the face of the various wildfires, mudslides, other disasters, and mandated commercial power outages to impact California in recent years, wireless networks have provided lifesaving communications in areas where other utility networks did not remain operational. CTIA's objections to the Proposal's definition of resiliency are informed by these successful efforts, and are intended to help inform a workable definition of resiliency.

The Commission's Definition Must Recognize That, Because No Measures Are Failsafe, Recoverability Is the Most Important Feature of Resiliency. There are elements of the Commission's proposed definition that have merit. For instance, the definition recognizes that flexibility and employing multiple strategies are key elements of resiliency.[25] The definition

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aff'd, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling, 33 FCC Rcd 12075, 12101 ¶ 49 (2018); *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 318 ¶ 20 (2018), *aff'd in part, overturned in part*, *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

[25] Proposal at 3.

also recognizes that network recovery is an important element of resiliency.[26] However, while some elements of the Commission's proposed definition have merit, as a whole the proposed definition is flawed, because it seeks to establish an expectation that, irrespective of the circumstances, communications network facilities will "withstand" disasters and "maintain service," and will do so "easily."[27] The reality is that some disasters will harm even the most carefully protected network facilities. For example, there is no way to prevent damage to a cell tower that is engulfed in a firestorm or swept away in a landslide. As a result, an assessment of resiliency must account for both service continuity and speed of restoration. Similarly, there should be no expectation that resiliency can be "easily" achieved.[28] A tremendous amount of work, preparation, and planning goes into maintaining and recovering networks. None of it is easy. The Commission's definition of resiliency should therefore prominently acknowledge that recoverability is the most important aspect of network resiliency, and it should exclude any reference to the process of achieving resiliency being easy.

The Commission has proposed more appropriate definitions of resiliency in its Climate Change Adaptation proceeding (R.18-04-019). There, the Commission defined "resilience" as "the achieved outcome of an adaptation strategy," and "'resilient' as the ability to withstand extreme and incremental events and the ability of utility to recover when a disruption occurs."[29] The Commission also found:

> [T]hat [the term] "strategic" is an important element of our proposed definition as it implies that the utilities will necessarily consider a cost-benefit analysis in planning and building facilities to operate under actual and changing conditions. Given finite

[26] *Id.*

[27] Proposal at 3 ("Definition of Resiliency" and six subsequent bullets).

[28] *Cf. id.*

[29] R.18-04-019, D.19-10-054, at 54 (issued Nov. 1, 2019).

> resources, utilities would be imprudent if they failed to consider costs in their construction and operations planning.[30]

Taking into account all of these factors, CTIA proposes that Resiliency should be defined as follows:

> "Resiliency" is the ability to prepare for anticipated hazards, adapt to changing conditions, and recover rapidly from disruptions in order to provide fundamental services to consumers and first responders before, during, and after emergency situations (*e.g.*, fires, earthquakes, floods, PSPS events, etc.) where it is reasonably possible in consideration of, among other things, strategic use of resources, safety and technological consideration, and the performance of third party vendors and partners.[31]
>
> Key elements of resiliency, several of which involve third parties, include the following: dependable and secure commercial electricity; reliable backhaul; reasonable backup power capabilities; temporary facilities if needed; maintenance of comprehensive and flexible emergency response plans; coordination with CalOES, electric utilities, and other stakeholders; ability of consumers to contact carrier and government agencies; and reasonable cooperation among carriers.

The Commission May Not Mandate Requirements Regarding Wireless Coverage or Facilities. To the extent that the definition of resiliency in the Proposal is intended to establish specific requirements related to wireless carriers' network coverage or facilities, the Commission also must recognize that its regulations must be tailored to the scope of its authority, as discussed in response to Question 4(a), below.

[30] *Id.* at 24.

[31] This definition is consistent with the definition of "resiliency" recently adopted by the Commission in D.19-05-054. *See supra* note 27.

(4) <u>Backup Power Requirement</u>: The Proposal recommends that all Providers have[] on-site emergency backup power to support all essential communications equipment including but not limited to, switching centers, central offices, wire centers, head ends, network nodes, field cabinets, remote terminals, and cellular sites (or their functional equivalents) necessary to maintain service for a minimum of 72 hours immediately following a power outage. Service must be sufficient to maintain access for all customers to 9-1-1 service, to receive emergency notifications, and to access web browsing for emergency notices.

(a) Please provide comments on the proposed backup power requirement.

Wireless carriers recognize the importance to a resilient network of providing backup power. Wireless carriers deploy a range of backup power solutions to the varying types of network facilities they manage, including generators, batteries, solar panels, and other solutions. These are all part of wireless carriers' overall strategies to avoid network downtime and restore service as quickly as possible after any adverse impact to their networks. However, the backup power requirement articulated in the Proposal is overly prescriptive, unmoored from the record, impossible to achieve, and places the burden on wireless carriers to maintain power to their networks regardless of the severity of adverse conditions, such as those that prevent electric utilities from maintaining commercial power.

The Proposal's Backup Power Requirement Is Overly Prescriptive, Without Basis in the Record, and Impossible to Achieve. The Proposal's blanket requirement to provide on-site backup power for 72 hours is not achievable in many instances.[32] Deployment of the diesel generators and fuel tanks necessary to meet such a requirement should not be mandated. Not only is such a mandate beyond the Commission's jurisdiction, but it ignores the many factors that carriers weigh and measure regarding the construction of their networks and the location of their sites. Factors such as the type or amount of backup power to deploy in high fire-risk areas, regulatory constraints, and available leasehold space are crucial considerations that carriers must

[32] *Cf.* Proposal at 3-4.

evaluate in deploying their networks. As the Proposal itself rightly observes, "circumstances may exist in which placing a generator is not possible or in the public interest" due to factors including climate variation, topography, and regulatory compliance conflicts, among other issues.[33] Such issues and others also affect the feasibility of locating backup power "on site."[34] Further, the recent Communications *En Banc* panel on backup power demonstrated that no viable "clean" backup power sources exist that provide 72 hours of power, particularly to high-demand facilities like switching offices or wireless facilities at large macro towers.[35] These same factors apply equally to the proposed "on-site" requirement. Prudent deployment in high fire-risk areas, leasehold space, regulatory constraints, and even weight limits for rooftop sites all must be considered. As the discussion highlights, the one size fits all approach the Commission proposes is inappropriate and unworkable.

The presumption that wireless networks will provide service to 100 percent of customers is without basis.[36] Commercial telecommunications networks generally are designed to provide service to some percentage above "peak hour" traffic, and wireless networks may not provide service in all locations in which a customer may be located. Wireless networks are no different and cell sites have a maximum capacity of traffic they can manage at one time. If more customers attempt to access a site than it has the capacity to manage, or customers attempt to access more data than the site's data capacity, the site will not be able to manage all such traffic.

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[33] Proposal at 2.

[34] *See* Ruling at 3-4; Proposal at 3. This is particularly, but not exclusively, true for small sites.

[35] *See California – California Public Utilities Commission – En Banc*, ADMINMONITOR (Mar.4, 2020), http://www.adminmonitor.com/ca/cpuc/en_banc/20200304/ (Part 2, starting at 1:01, discussing that, in order to make renewable backup power assets cost effective, carriers must have capability to capitalize on multiple use cases—a capability which is not yet available).

[36] *See* Proposal at 3 ("Service must be sufficient to *maintain access for all customers* to 9-1-1 service, to receive emergency notifications and to access web browsing for emergency notices.") (emphasis added).

Because wireless networks are designed with overlapping coverage and enable mobility, these system limitations often are invisible to consumers. Other factors, such as coverage limitations, also may affect wireless carriers' ability to serve customers at some locations. Given all of these factors, the Proposal's requirement to provide "access for all customers" would be inconsistent with any understanding of the way wireless networks are engineered and operate. Such a standard is unworkable in wireless networks under the best of circumstances, and the misalignment is exacerbated with respect to networks that are experiencing a loss of commercial power or a surge in demand due to disasters or emergencies. For all these same reasons, the requirement to provide backup power to maintain access for "all customers" to 9-1-1, receipt of emergency notifications, and web browsing is simply not feasible.

Moreover, the Proposal would impose the 72-hour backup power requirement on "essential facilities," but it is unclear what is encompassed by this definition. Wireless carriers can maintain their coverage footprints even after losing some cell sites, depending on their network configuration. More fundamentally, however, the Commission's approach fails to distinguish between whether a facility is "essential" and whether a 72-hour backup power requirement for that facility is feasible or prudent. For instance, a large wireless tower located in an area at high risk for fires may be an "essential facility," but it may not be a good location to maintain a fuel tank for a backup generator. Similarly, a rooftop site in city or town may be a "critical facility," but having a large fuel tank at such a location may be infeasible both due to rooftop weight limits and restrictions on placement of several hundred-gallon diesel tanks. In each of these examples, the preferred approach to backup power may be to have a connection for a portable generator to be provisioned to the site as needed and if safe to do so. The Commission

should recognize the need to distinguish between whether facilities are "essential" and whether they should have 72 hours of backup power onsite, but the Proposal fails to do so.

The Proposed Backup Power Requirements Are Unreasonable. It is also arbitrary and unreasonable for the Commission to impose more prescriptive and demanding obligations on one set of utilities compared to another. In this proceeding, the Commission is proposing to adopt exacting standards that would require communications providers to remain functional in the absence of commercial power caused by a disaster or PSPS event.[37] The Commission proposes to do so with an inadequate record, and insufficient time for analysis. By contrast, when considering disaster response measures for electric utilities, the Commission has engaged in a longer, more deliberative process, and more reasonably recognized that no network can provide failsafe service in the face of any catastrophe.[38] This inequity is particularly egregious as it pertains to wireless communications networks, which are highly complex.

The Proposed Backup Power Requirements Are Beyond the Scope of the Commission's Authority. The proposed backup power requirement would attempt to regulate wireless carriers' network coverage and as such would inherently conflict with the Federal Communications Commission's ("FCC's") exclusive jurisdiction under Section 332(c)(3)(A) of the Federal Communications Act of 1934, as amended. Section 332(c)(3)(A) provides in pertinent part: "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[39] The FCC

[37] *See* Ruling at 5.

[38] *See generally* R.18-04-019.

[39] 47 U.S.C. § 332(c)(3)(A).

has held that "local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network."[40]

This FCC holding accurately summarizes holdings by U.S. Courts of Appeal, including the Ninth Circuit. The Seventh Circuit held in *Bastien* that Section 332(c)(3)(A) preempted state regulation of wireless carriers' transmitter locations, density, and use of frequencies.[41] The Ninth Circuit has cited *Bastien* with approval, further holding that Section 332(c)(3)(A) preempts a state from "substituting its judgment for the [FCC's] with respect to a market-entry decision."[42] The level or quality of service, such as the Proposal seeks to dictate, constitutes prohibited market-entry regulation.[43]

In addition, aside from the overt preemption articulated in Section 332(c)(3)(A), the type of regulation the Commission seeks to impose would intrude impermissibly on the authority vested in the FCC by Title III of the Communications Act in its entirety.

(b) How should "outage" be defined?

The Commission should recognize that, pursuant to a statutory mandate, an outage definition that CalOES has proposed is an event that "lasts at least 30 minutes, and affects at least 50 percent of a carrier's coverage area in a single ZIP Code."[44] The Commission should adopt this definition both in recognition of the work that CalOES has undertaken to develop and refine this definition and CalOES's legislative mandate to define outages.

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[40] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9104 n. 84 (2018).

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

[42] *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1008 (9th Cir. 2010); *see also Stroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010)) (decisions on "the requisite number of cellular towers to support service" and whether service "is above or below the proper standard for cell phone service" deal with market entry).

[43] *See Stroyer,* 1035, 1040-41.

[44] CalOES, Notice of Modifications to Text of Proposed Regulations (March 16, 2020).

(c) Should the length of the 72 hour backup power requirement be shorter, longer or indefinite? Please provide an analysis to support your recommendation.

As discussed in more detail in response to Question 4(a) above, there is no basis in the record to show that a 72-hour backup power requirement is feasible, or would provide any benefit above a lower standard, or no standard in some instances (for instance, where fire overruns an antenna location), particularly on a blanket basis. Any such requirement also would be beyond the Commission's jurisdiction, as discussed in response to question 4(a).

(d) What other backup power requirements or components should the Commission consider? Please provide an analysis to support your discussion of any additional requirements or components.

Consistent with CTIA's answers to Questions 4(a) through 4(c), above, the Commission should not consider further backup power requirements or components.

(5) Backup Power Plans: The Proposal recommends that Providers file a Backup Power Plan with the Commission six months from the effective date of an adopted Commission decision with an array of requirements that illustrate the Provider's preparedness to ensure 9-1-1 access, ability to receive emergency notifications, and access web browsing for 100 percent of customers in the event of a commercial power outage. Please provide comments and analysis on this compliance requirement.

CTIA raises no objection to a general requirement that communications providers submit backup power plans to the Commission. However, the Commission should not dictate the specific details of those plans. Rather, carriers should develop their plans in a way that is specific to their networks, markets, and capabilities. In any event, the scope and specificity suggested in the list of items that the plans should include[45] is unnecessary and infeasible. In addition, CTIA incorporates by reference its response to Question 4(a), above, regarding backup power requirements generally.

[45] Proposal at 4.

(a) <u>Clean Energy Generation</u>: The Proposal directs Providers to utilize clean energy backup power options (e.g., solar, etc.) as reasonable before using diesel generators to meet the backup power requirement, among other provisions. Please provide comments and analysis on this issue, and specifically address the following: (i) How should "clean energy backup" be defined? (ii) Provide specific information on barriers to procuring specific types of clean energy backup power (e.g., cost, permitting, etc.).

California's wireless carriers are committed to exploring clean energy for their backup power needs, and will consider implementing such when it is economically feasible and will not negatively impact resiliency. However, the proposed regulations do not account for the lack of viable options for clean energy backup power generation, which was demonstrated during the recent panel hosted by the Commission on this topic. At the March 4, 2020 Communications *En Banc*, the Commission was made aware that there currently are very limited options for clean energy backup power, given the cost,[46] scalability, and space[47] requirements of various alternatives. Any backup power requirement must be mindful of this practical reality. Additionally, such regulations are beyond the scope of the Commission's lawful authority.

The Proposal also apparently reflects an expectation that wireless carriers create new technologies. For example, the Proposal directs communications providers to "make clean generation feasible" and to "[i]dentify annual targets for the reduction of fossil fuel generation"[48]—even though there is no evidence in the record that backup power for communications facilities will become more practical or economically feasible over time. This is particularly true with respect to backup power for larger facilities with higher energy demands,

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[46] *See California – California Public Utilities Commission – En Banc*, ADMINMONITOR (Mar.4, 2020), http://www.adminmonitor.com/ca/cpuc/en_banc/20200304/ (Part 2, starting at 1:01, discussing that in order to make renewable backup power assets cost effective, carriers must have capability to capitalize on multiple use cases—a capability which is not yet available).

[47] *See id.* (starting at 1:23, discussing portable microgrids that are 20'x20'x20' in size—and provide only 2 hours of backup power).

[48] Proposal at 4.

such as switching centers and large macro cell sites. It is unreasonable for the Commission to demand that communications providers innovate in an area (power generation) that is outside of the Commission's regulatory purview (communications services) relative to those providers. Such regulations also would not be cognate or germane to the Commission's authority over wireless carriers as communications providers.[49]

The directive that wireless carriers *shall* utilize clean energy backup power options before using diesel generators to meet the backup power requirement also exceeds the Commission's jurisdiction under state law. Specifically, California Health and Safety Code Section 4000 places the "responsibility for control of air pollution from all sources, other than emissions from motor vehicles" under the auspices of local and regional air quality districts.[50] It is the responsibility of these districts, not the Commission, to adopt and enforce rules and regulations to "achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction."[51] Moreover, California's courts have recognized that, despite the Commission's broad jurisdiction over public utilities, jurisdiction over air quality issues, even as such pertain to public utilities, rests with the air quality agency.[52] The California Legislature's adoption of the renewable portfolio standard[53] and resource adequacy requirements[54] has afforded the Commission authority to require investor owned electric utilities to fashion their procurement portfolios in a manner that meet the State's greenhouse gas

[49] The "cognate and germane" standard places a bound around the Commission's broad statutory grants of authority. *See, e.g.*, *Morel v. Railroad Comm'n*, 11 Cal. 2d 488, 492 (1938); *S. Cal. Gas Co. v. Pub. Utils. Comm'n*, 24 Cal. 3d 653, 656 (1979); *Consumers Lobby Against Monopolies v. Pub. Utils. Comm'n*, 25 Cal.3d 897, 905 (1979).

[50] *See* Cal. Health and Safety Code § 4000.

[51] *Id.* § 4001(a).

[52] *See Orange Cty. Air Pollution Control Dist. v. Public Utils. Comm'n*, 4 Cal. 945, 953 (1971).

[53] Cal. Pub. Utils. Code §§ 399.11-399.3 .

[54] *Id.* §§ 380-380.5.

reduction goals. However, these specific grants of authority to the Commission do not extend to dictating that wireless carriers construct their networks in a manner that advances these goals. Indeed, even in the area of electric utility regulation, the Legislature clearly expressed its intent to limit the Commission's jurisdiction over air quality issues by providing that "[t]he amendment made to this subdivision by the Clean Energy and Pollution Reduction Act of 2015 … *does not expand the authority of the commission beyond that provided by other law*."[55]

(b) <u>Waivers</u>: The Proposal directs Providers to submit waivers if they qualify for any of the exemptions enumerated in the Proposal. Please provide comments and analysis on this issue.

As an initial matter, CTIA observes that, to the extent that the Commission has provided *exemptions* for particular types of facilities or services, no waiver is necessary.[56] The meaning of an exemption is that the requirement does not apply; as a result, in such cases, there is nothing to waive. However, to the extent that a list of exemptions is necessary, the list in the Proposal is incomplete. For example, there is no proposed exemption for impossibility or infeasibility.[57]

[55] *Id.* at § 701/1(a)(2) (emphasis added)

[56] The Commission's lack of jurisdiction to require wireless carriers to maintain any level of backup power makes both the exemptions and the waivers unnecessary and unsustainable.

[57] *Cf.* Proposal at 2 (discussing the importance of feasibility concerns); *see also supra* Section I.

(c) <u>Critical Facility Location Information Sharing</u>: The Proposal directs Providers to share critical facility location information to emergency responders to enhance the ability to defend vital facilities against wildfire damage and ensure facility redundancy. Please provide comments and analysis on this issue.

(d) <u>Critical Infrastructure Resiliency, Hardening and Location Information Sharing</u>: The Proposal directs Providers to annually submit geographic information system (GIS) information with the specific location of network facilities and backhaul routes to the Commission. The Proposal directs Commission staff to analyze and process this information, so it is accessible to state and local emergency responders, subject to confidentiality requirements. Please provide comments and analysis on these proposed directives.

First, CTIA objects to the assertion in this question that "communications networks are subject to massive outages as a result of lack of network redundancy and hardening."[58] As discussed above, while all stakeholders are constantly working to improve their readiness, the record in this proceeding actually shows wireless service has often proven to be one of the more resilient options in many emergency situations.[59] Further, because not all cell sites serve the same purpose within a network, the raw number of sites out of service can misrepresent the coverage "picture." The total number of sites operating at a given time does not necessarily provide an accurate picture of restoration status or the level of wireless coverage and service from an end-user perspective.

Second, the Proposal's suggestion that "actions must be taken" by carriers in response to staff's review of "whether there is sufficient physical redundancy and hardening into communications networks"[60] by wireless carriers would be beyond the Commission's authority. State regulations of wireless carriers' network coverage or facilities is preempted by federal law, as discussed in response to Question 4(a), above.

[58] Proposal at 2.

[59] *See, e.g.*, *supra* notes 6-17.

[60] Proposal at 5-6.

Third, the Proposal's apparent suggestion that such analysis and direction would be performed by staff is also unlawful.[61] While ministerial tasks may be delegated, actions that involve the exercise of judgment or discretion is in the nature of a public trust and cannot be delegated to staff without statutory authorization. Delegation that involves a purported assignment of a discretionary task from an agency or decision-maker to a subordinate is unlawful.[62] The distinction between "ministerial" and "discretionary" tasks turns upon the exercise of judgment. A "ministerial act" is "an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's proprietary or impropriety when a given state of facts exists."[63] "Discretion," on the other hand, is "the power conferred on public functionaries to act officially according to the dictates of their own judgment."[64] The Proposal's suggestion that staff would "identify locations in the state where *actions must be taken* to harden communications infrastructure for risks,"[65] including judging the adequacy of carriers' backhaul, hardening, and redundancy, would squarely involve much more than "delegable program administration."

Fourth and finally, the Ruling and Proposal both fail to account for the significant security and confidentiality concerns raised by the requested information. Detailed information

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[61] *Cf. id.* at 6 ("[t]he Communications Division shall analyze …").

[62] *See Cal. School Employees Ass'n v. Personnel Comm'n*, 3 Cal.3d 139, 143-144 (1970) (the dismissal of employees involves the exercise of judgment or discretion and is reserved to the Board of Trustees); *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607 (1931); *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 227 Cal.App.4th 172 (2014) (as modified) ("*S. Cal. Edison Co.*").

[63] *U.S. Ecology, Inc. v. California*, 92 Cal.App.4th 113, 138 (2001).

[64] *Id.; see also s. Cal. Edison Co.*, 227 Cal.App.4th at 196 (observing that the Commission is has distinguished between "delegable program administration" and "nondelegable policy and oversight duty," the former of which involves "little discretion" based on applying "state rules and decisions").

[65] Proposal at 6 (emphasis added).

about the location of communications network facilities would provide a roadmap for terrorists or other bad actors, which could lead to the type of disaster or outage this proceeding seeks to mitigate. Further, given the breadth of the California Public Records Act,[66] and because in the contemplated scenario it is not clear whether Section 583 of the California Public Utilities Code applies,[67] the Commission's power to protect such information (if collected) may be limited. As a result, in the absence of legislation providing for adequate protection for public safety, the level of detailed information the Proposal calls for should not be collected.

It is relevant in this regard that the communications industry is a Critical Infrastructure Sector under federal law.[68] The federal government has addressed the care and handling of information pertaining to Critical Infrastructure Sectors, and codified certain processes and protections for such information.[69] Wireless network information in particular is considered "Critical Infrastructure Information" ("CII"). The Department of Homeland Security defines CII—generally, information that is not customarily in the public domain and is related to the security of critical infrastructure or protected systems—as specifically consisting of records and information concerning any of the following:

> (1) Actual … compromise of, or incapacitation of critical infrastructure or protected systems by … physical … attack … that … harms interstate commerce of the United States, or threatens public health or safety; (2) The ability of any critical infrastructure or protected system to resist such interference, compromise, or incapacitation, including any planned or past assessment,

[66] *See generally* Cal. Gov't Code § 6250 *et seq.*

[67] *See generally* Cal. Pub. Utils. Code § 583.

[68] *See* Presidential Policy Directive 21, https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil (February 12, 2013).

[69] *See* Title II, Subtitle B, of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 131 *et seq.*); 6 C.F.R., Part 29, as amended (Procedures for Handling Protected Critical Infrastructure Information; Final Rule).

> projection, or estimate of the vulnerability of critical infrastructure or a protected system…; and (3) Any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, reconstruction, insurance, or continuity, to the extent it is related to such interference, compromise, or incapacitation.[70]

There is no doubt that the defensibility of wireless carriers' network facilities is CII. Such information is due the highest standard of care, and that standard is not met by the Commission's proposed mandatory sharing of vulnerability information. Wireless carriers are committed to cooperating with the public safety community to ensure the integrity and defense of wireless networks, but the requirement to share information is inappropriate for CII and should be removed.

Finally, the collection of these detailed plans would be unnecessary and repetitive because CalOES is in the process of developing rules to ensure that it receives situational awareness reports—and CalOES is tasked with sharing that information with first responders that need access to it.

> ***(6) Emergency Operations Plans: The Proposal directs Providers to file emergency operations plans with the Commission, discussing how their operations are prepared to respond to emergencies. Please provide comments and analysis on this issue. […]***
>
> ***(7) Current Mitigation Efforts: [I]n response to this ruling, all respondent communications service providers shall provide a discussion of what current mitigation efforts they are undertaking to ensure continuity of service in preparation and in advance of the upcoming 2020 wildfire and grid outage season. […]***

Questions 6 and 7 request carrier-specific information not in CTIA's possession.

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[70] *Protected Critical Infrastructure Information Program Procedures Manual*, DEP'T OF HOMELAND SECURITY, at App. 2 (April 2009), https://www.dhs.gov/sites/default/files/publications/pcii-program-procedures-manual-508.pdf. The information the Commission would have wireless carriers share pertains to all three of the above-described categories.

(8) <u>Other Topics for Commission Consideration</u>: Parties may identify issues in addition to the proposed rules and discussion in the Proposal.

CTIA has no response to this question.

III. CONCLUSION

Since this proceeding's inception in 2018, CTIA has repeatedly demonstrated the good work wireless carriers have undertaken to ensure Californians' safety in times of disaster. Those efforts continue to this day. CTIA also recognizes that every stakeholder, including wireless carriers, must continually strive to protect consumers and ensure continuity of communications capabilities. The Ruling and Proposal, however, contemplate a legally infirm and overly restrictive regulatory regime that would stand in the way of those efforts. CTIA therefore respectfully urges the Commission to act in accordance with the foregoing during the upcoming stages of this proceeding.

Respectfully submitted April 3, 2020, at San Francisco, California.

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