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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

**COMMENTS OF COX CALIFORNIA TELCOM, LLC DBA COX COMMUNICATIONS  
(U-5684-C) ON ASSIGNED COMMISSIONER'S RULING AND PROPOSAL**

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## TABLE OF CONTENTS

	<b>Page</b>
I. Introduction and Executive Summary .....	2
A. The Commission Should Focus on Those Services That Are Most Needed During an Emergency .....	2
B. The Commission Should Defer to the Office of Emergency Services to Avoid Duplicative Reporting.....	4
C. The Commission Should Avoid Issuing Mandates that Conflict with State and Federal Law.....	4
II. Responses to Questions in the Assigned Commissioner Ruling .....	5
A. Cox’s Network Relies on Commercial Power; Increasing Backup Power Capacity to 72 Hours is Not Feasible .....	9
B. Deploying Backup Power During PSPS Events Creates Safety Risks for Our Employees and Communities .....	11
C. Permitting and Regulatory Barriers Also Make the 72-Hour Requirement Impractical .....	12
D. Customers Must Have Power for Customer Premise Equipment to Use Cox Services .....	14
E. There is No Evidence in the Record to Support a 72-Hour Requirement for Every Part of Every Network.....	15
III. Other Topics for Commission Consideration .....	24
A. The Commission Must Ensure Sufficient Time for Implementation of Any Backup Power Requirements.....	24
B. The Commission Should Require a Role for Electric Utilities in Ensuring Network Resiliency.....	25
C. The Commission Must Conduct a Full Environmental Review .....	26
D. The Commission is Obligated to Review Costs, Benefits and Safety Impacts of the Proposed Rules .....	27
E. The Proposal’s Attempt to Assert Regulatory Jurisdiction over Non- Jurisdictional Entities and Services Risks Conflict with Federal Law .....	28

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Cox California Telcom, LLC, dba Cox Communications (U-5684-C), on behalf of itself and its affiliates (“Cox”),<sup>1</sup> hereby provides these comments to the *Assigned Commissioner’s Ruling and Proposal* dated March 6, 2020 (“Ruling,” and its Appendix A, the “Proposal”). Cox urges the Commission to prioritize critical facilities during emergencies as the primary focus in this proceeding. Maintaining power to the mobile telephony network, including through macro tower backhaul provided by wireline providers like Cox, and maintaining telecommunications service for first responders, should take precedence over other proposals. To achieve this, the Commission should allow for wireline providers to adopt individualized approaches that optimize outcomes for their customers, communities, and employees. However, if the Commission ultimately adopts prescriptive network resiliency rules, it should adopt the alternative proposal for network resiliency for wireline providers, set forth in the concurrently filed opening comments of the California Cable and Telecommunications Association. That alternative proposal presents a practical and effective plan for ensuring the resiliency of communications networks.

Additionally, rather than mandate burdensome disclosures of highly sensitive data that would become stale in a short timeframe, the Commission should instead defer to agencies tasked

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<sup>1</sup> The certificated entity, Cox California Telcom, LLC, for the most part does not own, build, or maintain its outside plant facilities. Cox’s parent company, Cox Communications California, LLC, owns facilities throughout California and is responsible for the hardening of Cox’s communications infrastructure.

with overseeing emergency coordination. Trying to resolve the immense challenges raised by the Proposal would take years and would do little to accomplish the Commission's goals.

## **I. INTRODUCTION AND EXECUTIVE SUMMARY**

Cox is committed to providing and maintaining high quality telecommunications service for its customers, as it has done for decades. Cox is dedicated to keeping its services available as long as conditions are safe for our workers and our communities, and over the years Cox has served California through fires, floods, mudslides and earthquakes. With this experience, Cox hopes to offer a practical and effective path forward for the Commission to ensure the availability of key telecommunications services during and after wildfires, public safety power shutoffs ("PSPS"), and other disasters. The major points of Cox's comments are the following.

### **A. The Commission Should Focus on Those Services That Are Most Needed During an Emergency**

As the Commission strives to put measures in place to avoid a repeat of the impact of last October's extended PSPS power outages, focus should first and foremost be on those services that are most needed during emergencies. Maintaining power to the mobile telephony network, including macro tower backhaul provided by wireline providers like Cox, as well as maintaining telecommunications service for first responders, must be the top priorities, while at the same time ensuring maintenance of power does not cause its own safety and environmental risks. Not only is mobile telephony the primary mode of voice communication for nearly all Californians,<sup>2</sup>

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<sup>2</sup> Approximately 90% of voice telecommunications service subscriptions in California are mobile telephony. In December 2018, there were 43.336 million mobile telephony subscriptions and only 5.118 million switched access lines in California. *See* Federal Communications Commission, Voice Telephone Services Report, State-Level Subscriptions, <https://www.fcc.gov/voice-telephone-services-report>. Under federal law, telecommunications service does not include interconnected VoIP service, which has been found to be an information service. *See also Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) ("We conclude that the VoIP technology used by Charter Spectrum is an "information

including for first responders during emergencies, but, as noted by Commissioner Rechtschaffen at the prehearing conference,<sup>3</sup> approximately 81% of calls to 9-1-1 in California are made on mobile phones. To this point, in 2015 when the Federal Communications Commission (“FCC”) rejected a proposal to require interconnected VoIP providers to power certain network equipment,<sup>4</sup> the FCC found that consumers typically decline offers for backup batteries and rely on their mobile devices rather than VoIP during power outages.<sup>5</sup>

As the Commission recognized in the Ruling, communications networks “are complex and diverse and there may not be a ‘one size fits all’ approach to ensuring resiliency.”<sup>6</sup> This essential maxim reflects the regulatory approach taken by other agencies, including the FCC in 2016 when it endorsed the wireless industry’s flexible approach for enhancing coordination during an emergency.<sup>7</sup>

Accordingly, the Commission should avoid overly prescriptive and arbitrary backup power requirements that treat all networks as if they have similar architectures and uses. Nothing in the record indicates that 72 hours should be required for the entirety of every communications provider’s network. Mandating 72 hours of backup power for non-essential facilities would

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service” under the Act.”). However even interconnected VoIP subscriptions, at 6.554 million, are only a small fraction of the total number of mobile telephony subscriptions in the state.

<sup>3</sup> PHC Transcript (Nov. 20, 2019) at 9.

<sup>4</sup> See *Ensuring Continuity of 911 Communications*, Report and Order, 30 FCC Rcd. 8677 ¶¶ 3, 9 (2015) (“*VoIP Backup Power Order*”); see also 47 C.F.R. § 9.20(b), (d) (codifying FCC VoIP backup power and disclosure requirements).

<sup>5</sup> See *VoIP Backup Power Order* ¶ 37 (acknowledging that “comments in the record indicate that, when it is offered, consumers often may not choose to avail themselves of options to purchase backup power”).

<sup>6</sup> Ruling, Appendix A at 2.

<sup>7</sup> *Improving the Resiliency of Mobile Wireless Commc’ns. Networks*, Order, 31 FCC Rcd 13745, 13747 ¶ 5 (2016).

disserve the public interest by: (i) introducing fire risks that endanger communities (*see* Section II.4.B); (ii) potentially causing significant harm to the natural environment (*see* Section III.C), (iii) creating permitting and zoning quagmires for both the provider and local governments (*see* Section II.4.C); and (iv) directing massive amounts of time, money, and energy to be spent on facilities less likely to be relied upon in emergencies (*see* Section II.4).

**B. The Commission Should Defer to the Office of Emergency Services to Avoid Duplicative Reporting**

Rather than imposing new, though duplicative, reporting and information sharing requirements, the Commission should defer to other state agencies that already collect emergency information, particularly to the California Office of Emergency Services (“OES”). California law has delegated to OES the responsibility for coordinating the state’s agencies and first responders in response to disasters.<sup>8</sup> And in accordance with Senate Bill 670, OES already has a proceeding underway to address the notifications that telecommunications providers must provide to OES during outages. Especially because some of the Commission’s proposals involve disclosure of critical network information which raises national security implications, Cox recommends that the Commission significantly eschew these reporting proposals and defer to the expertise of OES.

**C. The Commission Should Avoid Issuing Mandates that Conflict with State and Federal Law**

As noted below in Section III.E, the overly broad applicability of the Proposal to broadband, VoIP, and potentially even cable services risks embroiling the Commission in resource-intensive litigation with little upside. Specifically, these requirements would conflict

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<sup>8</sup> “The Office of Emergency Services shall be responsible for the state’s emergency and disaster response services for natural, technological, or manmade disasters and emergencies, including responsibility for activities necessary to prevent, respond to, recover from, and mitigate the effects of emergencies and disasters to people and property.” Gov’t Code § 8585 (e).

with FCC rulings and undermine a deregulatory federal policy toward information services. Any Commission rules resulting from the Proposal would therefore be vulnerable to federal preemption and other legal challenges.

Similarly, the Proposal appears to exceed the Commission's statutory authority. Article XII of the California Constitution and the California Public Utilities Code establish the Commission's authority over "public utilities." However, here the Proposal seeks to overreach and impose cumbersome regulations on non-public utilities. For example, even though Cox's network is owned and operated by a cable company, which is expressly not a public utility,<sup>9</sup> the Proposal would seemingly seek to impose stringent backup power and reporting regulations on that network. Similarly, the Proposal would seek to impose performance reliability requirements with regard to "data" and "web browsing" but those are plainly part of broadband Internet access service, which the Commission itself has acknowledged is not a public utility service subject to its jurisdiction.<sup>10</sup>

## II. RESPONSES TO QUESTIONS IN THE ASSIGNED COMMISSIONER RULING

### 1. Applicability of Requirements

*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.*

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

*1(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 include 9-1-1/E9-1-1 providers, LifeLine providers, providers of Voice Over Internet Protocol [VoIP],*

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<sup>9</sup> Pub. Util. Code § 5820(c).

<sup>10</sup> See, e.g., D.06-03-013, Appendix C at C-3 ("In adopting these principles the [Commission] does not assert regulatory jurisdiction over broadband service providers; Internet Service Providers; Internet content or advanced services; or any other entity or service not currently subject to regulation by the [Commission].").

*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, include resellers and mobile virtual network operators [MVNOs].*

2(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?*

It bears repeating — approximately 81% of calls to 9-1-1 in California are made on mobile phones. If the Commission’s proposed requirements are to have any effect on upcoming fire seasons, the Commission must target and tailor its efforts where they will have the greatest impact—on boosting the resiliency of mobile telephony and ensuring that first responders have access to telecommunications during emergencies.

Accordingly, the Commission should reasonably tailor any backup power requirements to apply to *telephone corporations*, over which the Commission has authority. The Commission’s jurisdiction over communications service providers is limited to “telephone corporations,”<sup>11</sup> unless otherwise specified in statute.<sup>12</sup> The Legislature has not provided the Commission further authority in this circumstance but, if anything, narrowed the Commission’s authority to *telecommunications service*.<sup>13</sup> Applying requirements to providers of non-jurisdictional services risks conflict with state and federal law and embroiling the Commission in resource-intensive litigation.<sup>14</sup>

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<sup>11</sup> Pub. Util. Code § 216.

<sup>12</sup> Cal. Const. Article XII, § 5 (“The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the [C]ommission . . .”).

<sup>13</sup> See Pub. Util. Code § 2892.1 (“The [C]ommission . . . shall . . . identify the need for telecommunications service systems not on the customer’s premises to have backup electricity to enable telecommunications networks.”).

<sup>14</sup> As discussed below, applying these requirements to providers of non-jurisdictional services risks conflict with federal law and embroiling the Commission in resource-intensive litigation (see Section III.E).



Accordingly, as discussed further below, Cox urges the Commission to apply its proposals only to telephone corporations that provide mobile telecommunications services, including cellular backhaul, and telecommunications services for first responders.

3. *Definition of Resiliency: 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.*
  - 3(a) *Please provide comments on the definition of resiliency in the context of communications service resiliency strategies and their definitions.*
  - 3(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.*

While there is no one-size-fits-all definition of resiliency, given that different parts of the network have different levels of importance roles, the Commission could consider the following definition of resilience from the 2011 National Preparedness Presidential Policy Directive PPD-8: “the ability to adapt to changing conditions and withstand and rapidly recover from disruption due to emergencies.”<sup>15</sup> That Directive is aimed at strengthening the security and resilience of the United States through systematic preparation for the threats that pose the greatest risk to the security of the nation, including acts of terrorism, cyber-attacks, pandemics, and catastrophic natural disasters.<sup>16</sup>

4. *Backup Power Requirement: 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*

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<sup>15</sup> President Barack Obama, *Presidential Policy Directive/PPD-8* (Washington, DC) March 30, 2011.

<sup>16</sup> The associated National Preparedness Goal states its purpose as producing “a secure and resilient nation with the capabilities required across the whole community to prevent, protect against, mitigate, respond to, and recover from the threats and hazards that pose the greatest risk.” U.S. Department of Homeland Security, *National Preparedness Goal*, September 2011.

*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.*

- 4(a) Please provide comments on the proposed backup power requirement.*
- 4(b) How should “outage” be defined?*
- 4(c) Should the length of the 72 hour backup power requirement be shorter, longer or indefinite? Please provide an analysis to support your recommendation.*
- 4(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.*

The 72-hour backup power proposal fails to recognize that communications networks were never contemplated, nor intended, to be a replacement for commercial power, provided by the electric utility. In addition, various factors discussed below would limit the onsite backup power that would be necessary to meet such a requirement. To enable our entire network to operate for 72 hours without commercial power would require extensive deployment of large noisy generators, fuel and large arrays of batteries deep in the neighborhoods Cox serves. This equipment would consume tremendous amounts of space on sidewalks, public rights-of-ways and private property easements, raising a myriad of permitting and regulatory barriers and community concerns. New generators, fuel sources and batteries would increase the risk of fire to our communities, especially in Tier 2 and 3 High Fire-Threat Districts. The equipment would also be costly and logistically demanding to deploy throughout the state.

To realize the goal of enhancing the resiliency of telecommunications networks during emergencies, the Commission should prioritize requirements for backup power to critical facilities located in Tiers 2 and 3 for cell towers and cellular backhaul, as well as first responder locations. For such backup power to be effective, however, cellular providers and first responder customers must also have backup power for all needed customer premises equipment — otherwise, those customers would be unable to use their telecommunications service. Moreover, the goal of ensuring backup power should not compromise safety, and it would be ill-advised to encourage backup power even where, for example, generators, fuel sources and batteries present serious fire

risks to our communities, such as areas where the electric providers have shut off power to avoid fires.

This approach of prioritizing backup power requirements is consistent with existing industry efforts. Like other wireline providers, Cox offers backhaul to mobile telecommunications providers. Cox has arrangements in place with its mobile telecommunications provider customers and in its network to maintain backhaul services for those customers that allows for joint monitoring and coordination.

**A. Cox’s Network Relies on Commercial Power; Increasing Backup Power Capacity to 72 Hours is Not Feasible**

Cox’s core network and field equipment relies on commercial power to operate. At the core network level,<sup>17</sup> our Master Telecommunications Centers (“MTC”) and Secondary Telecommunications Centers (“STCs”) operate using fixed diesel generators that can last several days without refueling, field-based fixed natural generators, and in most instances, portable backup generators, which will be deployed only when conditions are safe.<sup>18</sup> Cox’s practice is to “top off” the generators every other day that they are in use.

However, in instances where outages occur over large geographic areas for an extended period of time, it is infeasible and unsafe for Cox to provide backup power to keep our entire network, including all field equipment, running without commercial power.<sup>19</sup> Our field

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<sup>17</sup> Cox’s core network facilities include MTCs and STCs, which house the network equipment associated with Cox’s access network devices, metro network devices, phone switches, and RF combining networks.

<sup>18</sup> See Cox’s Response to November 13, 2019 Letter to Cox Communications et al. (November 18, 2019) (“Cox’s November 2019 Letter”) at 3.

<sup>19</sup> *Id.*

equipment,<sup>20</sup> which is spread throughout our footprint closer to our customers, comprises thousands of nodes and hundreds of fiber cabinets often located in neighborhoods near our customers' homes, and, as discussed below, there are limitations on the use of many types of fixed generators because of space and permitting constraints.<sup>21</sup> Although Cox is able to power about 36% of its nodes with fixed natural gas generators, which will run as long as natural gas is available, as discussed later in these comments, these come with many challenges.<sup>22</sup> Most field equipment have backup batteries that can run from 2 to 4 hours, depending on the equipment, enabling time for Cox to deploy a portable generator if conditions are safe.<sup>23</sup> Once batteries deplete, a portable generator can power equipment for up to 12 hours before needing to be refueled.<sup>24</sup> Additionally, Cox's practice during PSPS events is to have technicians monitor portable generators while running, to help ensure safe operations.

To increase the backup power capacity of Cox's entire network to 72 hours is not feasible and would be extraordinarily costly. Aside from permitting and neighborhood issues that would likely stand in the way of such deployment in the first place, the planning, design, purchase and installation of thousands of large generators, fuel sources and large arrays of batteries throughout our network would present complex logistical challenges and would take years to implement.<sup>25</sup> The cost of the equipment and its deployment would likely be tens of millions of dollars, just to

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<sup>20</sup> Between the core network facilities and subscribers' homes and businesses, Cox has field equipment in the form of nodes, fiber cabinets and on-net fiber buildings.

<sup>21</sup> Cox's November 2019 Letter, Attachment 1 at 1-2.

<sup>22</sup> Cox is in active discussions with SDG&E and SoCalGas to identify additional areas where Cox may add fixed natural gas generators, although as discussed herein, there are many challenges.

<sup>23</sup> Cox's November 2019 Letter, Attachment 1 at 1.

<sup>24</sup> *Id.*

<sup>25</sup> Attachment 1, Affidavit of Ingo Hentschel ("Hentschel Affidavit"), ¶ 3.

begin, and for Cox alone.<sup>26</sup> Under the Proposal, every communications provider in the state would have to undertake extensive and costly efforts – which would result in multiple providers installing similar backup equipment in the same neighborhoods and locations.<sup>27</sup> Even if the Proposal could be implemented, the timeframe for implementing all of the plans and work would extend for many years.<sup>28</sup>

**B. Deploying Backup Power During PSPS Events Creates Safety Risks for Our Employees and Communities**

Under normal conditions, the backup power built into Cox’s network, combined with deployment of portable backup generators enables Cox to recover from power outages and restore service to customers. However, in instances where a PSPS creates outages over large geographic areas for an extended period of time, it is infeasible and unsafe for Cox to provide backup power to keep our entire network, including all field equipment, running without commercial power.<sup>29</sup> Cox deploys portable generators where it determine it is safe to do so, and where it has the requisite personnel for monitoring (during PSPS events) and refueling. Deploying this equipment in high fire areas (Tiers 2 and 3) can, in certain situations, risk the safety of Cox employees who must install and refuel the generators. It also presents a risk to the local community, as well as fire fighters and other first responders.<sup>30</sup> A portable generator could cause a fire to start (if for example tree branches or debris blow into it) or could introduce a volatile fuel source in an area already at high risk.<sup>31</sup> This is why during PSPS events Cox will not deploy portable generators today in the

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<sup>26</sup> *Id.*, ¶ 5.

<sup>27</sup> *Id.*, ¶ 6.

<sup>28</sup> *Id.*, ¶ 3.

<sup>29</sup> *Id.*, ¶ 7.

<sup>30</sup> Cox’s November 2019 Letter, Attachment 1 at 2.

<sup>31</sup> Hentschel Affidavit, ¶ 7.

Tier 3 High Fire-Threat Districts.<sup>32</sup> Other unsafe environmental conditions, such as high winds, flooding, or lack of proper ventilation for carbon monoxide, also raise safety concerns.<sup>33</sup>

**C. Permitting and Regulatory Barriers Also Make the 72-Hour Requirement Impractical**

When Cox launched telephone service in 1997, Cox made efforts to deploy natural gas fixed generators throughout its service territory. However, because of permitting challenges and complaints from local government officials and residents regarding the size, and sometimes noise, of the units, Cox ceased installing any new fixed natural gas generators in the early 2000s.<sup>34</sup> Many of these barriers to backup power deployment have only grown more restrictive since that time.

Permitting and governmental regulations, as well as neighborhood concerns constrain Cox's use of generators regardless of the type of fuel used.<sup>35</sup> To install such large pieces of equipment, Cox must obtain access to rights-of-way and easements (both private and governmental), file permit applications and request exceptions to building codes. These permits and requests for access are often denied in the ordinary course of business, requiring additional filings, appeals and resources to obtain the necessary permissions.

Environmental regulations pose a barrier as well. Cox must obtain permits to operate engines it deploys according to air emissions regulations through local air districts (including the San Diego APCD, South Coast AQMD, and Santa Barbara APCD). The standard permitting

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<sup>32</sup> Cox does have fixed natural gas generators in portions of the Tier 3 Fire Threat District that have protective housing and operated during last October's PSPS events.

<sup>33</sup> Cox's November 2019 Letter, Attachment 1 at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*; *see also, e.g., Elsinore Valley Mun. Water Dist. v. O'Doherty*, No. E050909, 2012 Cal. App. Unpub. LEXIS 6332, at \*22 (Cal. Ct. App. Aug. 29, 2012) (neighbor filed suit against water district, in part, because the generators for the pump station were "discharging exhaust fumes onto the property.").

process takes 4-6 months and requires an extensive application, including receptor maps, dimensions of nearby buildings and other detailed information. In addition, the California Air Resources Control Board administers a voluntary program called the Portable Equipment Registration Program (“PERP”), which allows registration of certain qualifying portable equipment, including internal combustion and/or spark ignition engine generators greater than 50bhp. PERP generators may be designated for use to power stationary sources in limited circumstances, such as during emergencies.

Cox also must obtain permits for fuel sources from Certified Unified Program Agencies (“CUPAs”)<sup>36</sup> to comply with hazardous materials regulations. The Unified Program consolidates the administration, permitting, inspection, and enforcement activities of five California agencies<sup>37</sup> to oversee seven environmental emergency program areas.<sup>38</sup> Under the Unified Program, Cox must file an annual Hazardous Materials Business Plan (“HMBP”), which includes emergency response plans and training programs. Plans covering spill prevention, control, and countermeasures are required for certain sizes of tanks. Cox must also obtain hazmat permits from the San Diego Fire Department, a requirement unique to San Diego. These permits are required whenever Cox installs a new aboveground or underground storage tank, removes an existing one,

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<sup>36</sup> Cox works with the following CUPAs in California: San Diego County Department of Environmental Health-Hazmat Division, Orange County Health Care Agency, Los Angeles County Fire Department-Hazmat Division, and the Santa Barbara County Department of Environmental Health Services-Hazmat Division.

<sup>37</sup> The state agencies are the Office of Emergency Services, Department of Toxic Substances Control, Office of the State Fire Marshall, State Water Resources Control Board and the California Environmental Protection Agency.

<sup>38</sup> The areas are the Aboveground Petroleum Storage Act, Area Plans for Hazardous Materials Emergencies, California Accidental Release Prevention, Hazardous Materials Release Response Plans and Inventories, Hazardous Material Management Plan, Hazardous Material Inventory Statements for the California Fire Code, Hazardous Waste Generator and Onsite Hazardous Waste Treatment Programs and the Underground Storage Tank Program.

or installs or modifies any hazardous systems. Additionally, the Department of Occupational Safety & Health, a subdivision of CalOSHA, requires pressure vessel permits for compressed air storage tanks of a certain size.

**D. Customers Must Have Power for Customer Premise Equipment to Use Cox Services**

Like Cox's network, customer premises equipment for the VoIP, cable video and broadband service Cox provides is reliant on commercial power, and is not designed to support long-term backup power capability.<sup>39</sup> Indeed, cordless phones, televisions and most internet modems and routers do not have backup battery capability, so they will not work when power is out. For VoIP service to work on backup power, customers need to have both backup batteries in their phone modems and a corded phone, as most cordless phones do not work without commercial power. Cox offers a phone modem with a backup battery capability of 24 hours, as required by the FCC.<sup>40</sup> Additionally, these phone modems, which also support internet service when house power is working, are engineered to support only voice services when operating on backup battery. Thus, they do not today have the functionality to allow internet access. Even if they were able to support internet service, in addition to voice, which they are not, this would cause greater draw on the battery, depleting it well before the 24 hours. As noted above, consumers by an overwhelming margin rely on their mobile phones during emergencies to call 911. They rely less on their VoIP phones, wired broadband service and TVs during emergencies due to the inability to use most devices and equipment without power. Requiring 72-hour backup power to a VoIP, cable, and/or

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<sup>39</sup> Cox's November 2019 Letter at 3.

<sup>40</sup> Customers can purchase the batteries from Cox and our Lifeline customers receive them at no charge. A longer duration battery is not currently available and customers cannot use more than one battery during a single power outage event.



broadband network when consumers cannot access that network through their devices is unreasonable and makes no sense.

**E. There is No Evidence in the Record to Support a 72-Hour Requirement for Every Part of Every Network**

The record does not provide a factual basis to require 72 hours of backup power. Commission orders must be supported by findings.<sup>41</sup> However, here, the Proposal does not cite any record evidence regarding why 72 hours is the preferred or even feasible timeframe.<sup>42</sup> Instead, the Proposal appears to be an arbitrary choice and should not be supported by the Commission.

Accordingly, the Commission should not adopt the 72-hour backup power proposal. Communications providers should not, and cannot, serve as de facto power companies. The Proposal essentially shifts the responsibility for maintaining power during emergencies from electric utilities onto communications providers whose facilities are not designed to provide commercial power. Instead the Commission should tailor its requirements to focus on improvements that can be made to existing facilities and networks in furtherance of its goal to protect California communities during power outages.

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.*

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<sup>41</sup> See Pub. Util. Code § 1757.1.

<sup>42</sup> During the November 20, 2019 Prehearing Conference, Paul Troxel from Cal OES' 9-1-1 Communications Branch requested, without justification of the duration, a "minimum of 8 hours battery backup and permanent generator backup with a minimum of 72 hours of onsite fuel storage." PHC Transcript at 27. Although Mr. Troxel spoke generally about the need for a resilient and reliable communications network, he did not provide any details as to what facts supported a minimum back-up capacity of 72 hours. See *id.* at 23-27.

Cox recognizes the need of first responders to have access to backup power plans and is willing to work with the Commission (or other relevant agency) to determine how to securely provide information about backup power, on a confidential basis, to first responders and governmental entities that will need to access such plans.

It is unclear that the Commission needs this information and not apparent why the Commission should collect this critical information where it is not an emergency services agency. Especially, where there is no apparent use of this data, as is the case here, the Commission should practice its core principal of data minimization.<sup>43</sup>

In any event, plans that contain sensitive business critical information about equipment, employees and vendors must be deemed confidential, by any entity receiving the information. The specific aspects of Cox facilities operations is highly sensitive critical infrastructure data that could cause security issues if made publicly available.<sup>44</sup> The California Public Records Act (“CPRA”) protects against disclosure of confidential “utility systems development” data.<sup>45</sup> Moreover, the CPRA protects against disclosure that is prohibited under federal law<sup>46</sup> — federal law protects

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<sup>43</sup> The principle and practice of “data minimization” is, according to the Commission, consistent with California law and policy objectives of promoting data security. *See* D.11-07-056 at 21. Specifically, “[l]imiting the collection of ... data to just what is needed reduces the amount of data that requires protection, and reduces the risks that arise from a security breach.” *Id*

<sup>44</sup> *See* 47 C.F.R. § 0.457(d)(vi), (viii) (designating as “records not routinely available for public inspection” comparable information filed with the FCC, including outage reports and site-specific explanations provided with 911 reliability certifications).

<sup>45</sup> Gov’t. Code § 6254(e) (“this chapter does not require the disclosure of...(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.”).

<sup>46</sup> Gov’t Code § 6254(k) (“this chapter does not require the disclosure of...(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law....”).

against the disclosure of information regarding critical infrastructure,<sup>47</sup> which has been found to include communications network information.<sup>48</sup> Disclosure of that information could harm public safety and network reliability by exposing disruption of operations, and functionalities of communications infrastructure. Accordingly, such plans should not be available for public review.

5(a) *Clean Energy Generation: 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.).*

Cox is proud of its environmental record and has been working to incorporate clean energy options into our operations since 2007, when Cox launched its national sustainability program, Cox Conserves. Over the past decade Cox has made meaningful progress to become a more sustainable company by focusing on alternative energy, community engagement, employee engagement, energy conservation, waste diversion and recycling, and water conservation. Cox has adopted many different renewable forms of energy utilizing solar, fuel cells and recharging stations where technically feasible. Since the launch of Cox Conserves, Cox has invested over \$92 million in clean, renewable power and manages over 31 megawatts of renewable power assets. In California alone, Cox has invested more than \$20 million in renewable power assets, which includes solar photovoltaics and fuel cells. Cox’s vehicle fleet utilizes energy efficient vehicles such as electric and hybrid cars and hybrid bucket trucks.

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<sup>47</sup> 6 U.S.C. § 673(a)(1)(E) (protecting against state government disclosure of voluntarily shared critical infrastructure information).

<sup>48</sup> See, e.g., D.16-08-024 at 25 (identifying information regarding the location, function, and relationship between network facilities, including the identity of critical infrastructure as information that would meet the requirement for confidential treatment).

In January of this year, Cox completed an evaluation of powering options for its California field network facilities, comparing natural gas and propane generators to hydrogen and methanol fuel cells, while also considering solar and battery power options. Fixed natural gas generators remain the best option in terms of making power available for longer periods relatively safely and at a less expensive price, with relatively smaller cabinets and known maintenance and permitting requirements.<sup>49</sup> Natural gas generators, of course, require a natural gas line and extensions of those lines, which would take time and expense to procure.<sup>50</sup>

Solar panels are not feasible because they require as much as 430 square feet of space for a single panel,<sup>51</sup> are much more expensive than other options,<sup>52</sup> and have a shorter run time of 24-48 hours of power. Hydrogen fuel cells are expensive, require large cabinets, would need refueling or larger fuel tanks to meet a 72-hour run time, and would require a complex maintenance program.<sup>53</sup> Methanol fuel cells are prohibitively expensive<sup>54</sup> present challenges around

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<sup>49</sup> See Cox's November 2019 Letter, Attachment 1 at 2; see also Sean Ericson and Dan Olis. *A Comparison of Fuel Choice for Backup Generators*. Golden, CO: National Renewable Energy Laboratory. NREL/ TP-6A50-72509 (2019), at <https://www.nrel.gov/docs/fy19osti/72509.pdf> at v ("Natural gas generators' lower fuel costs per kilowatt-hour of energy generated allows grid connected natural gas backup generators to economically produce more revenue than diesel generators.") and at 5 ("This results in a simpler permitting process for natural gas compared to diesel.").

<sup>50</sup> *Id.* at 4 ("Natural gas generators are further constrained to locations with access to natural gas pipelines").

<sup>51</sup> See *Solar Power* (Elizabeth Lachner) (2019) ("Because the intensity of the sun's radiation at the surface of the earth is so low, collectors designed to capture solar energy must be large in area....").

<sup>52</sup> See *The Levelized Cost of Electricity from Existing Generation Resources*, Institute for Energy Research (June 2019), at [https://www.instituteforenergyresearch.org/wp-content/uploads/2019/06/IER\\_LCOE2019Final-.pdf](https://www.instituteforenergyresearch.org/wp-content/uploads/2019/06/IER_LCOE2019Final-.pdf) at Table 1.

<sup>53</sup> See *Techno-Economic Challenges of Fuel Cell Commercialization*, Engineering, Volume 4, Issue 3, June 2018, Pages 352-360, Junye Wang et al., <https://doi.org/10.1016/j.eng.2018.05.007>.

<sup>54</sup> See *More-Powerful Fuel Cells*, MIT Technology Review (May 22, 2008), <https://www.technologyreview.com/s/410171/more-powerful-fuel-cells/>; see also *Nano-Porous*

maintenance, and require underground fuel storage tanks, which pose challenges for installing and refueling.

Additionally, several of these clean energy solutions raise a number of risks especially in high fire risk areas such as Tier 2 and 3, as they require on-site fuel storage, which runs counter to the objective of avoiding fires. Every powering option Cox evaluated of course would require additional permitting, and would require compliance with the environmental regulations described in Section II.4.C.

Cox urges the Commission to resist limiting diesel generators, the tried and true workhorses capable of providing days' worth of backup power to large facility switching centers in communications networks, including the MTCs and STCs in Cox's network. Clean energy backup power options are in various stages of development, but at present, they remain impracticable alternatives for diesel generators. Additionally, dictating alternative energy sources for Cox's facilities, especially where implementing such mandates are infeasible, would risk running afoul of substantive due process rights.<sup>55</sup>

5(b) *Waivers: 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.*

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*Silicon-Based Mini Hydrogen Fuel Cells* (August 9, 2011),  
<https://www.intechopen.com/books/alternative-fuel/nano-porous-silicon-based-mini-hydrogen-fuel-cells>.

<sup>55</sup> Specifically, the Commission risks violating substantive due process rights when it (1) deprives plaintiff of property, and (2) lacks "rational means of achieving a legitimate governmental end." See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Here, the Proposal would burden providers' ability to provide service and use the public right-of-way. Moreover, the Proposal would impose significant financial and resource costs, present insurmountable compliance challenges given the infeasibility of clean energy requirements, increase risks of wildfires, and ultimately not assure continued availability of emergency communications for California consumers.

Cox appreciates the Proposal's recognition that the enumerated exceptions for a waiver for noncompliant facilities should include "significant risk to safety of life or health; or specific existing federal, state, tribal or local law" which are critical concerns. Cox suggests that the exceptions should include specific issues that are commonplace when communications providers propose to make changes to their backup power sources. These include denials of access to rights-of-way and easements (both private and governmental), denials of permit applications, building codes and environmental regulations, insurmountable safety risks, or other showing that implementation of backup power source is infeasible. This list is not exhaustive, but the grounds for waiver should include known hurdles that providers encounter today as well as leave room for those that may arise.

- 5(c) *Critical Facility Location Information Sharing: 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.*
- 5(d) *Critical Infrastructure Resiliency, Hardening and Location Information Sharing: 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.*

For the same reasons mentioned in response to Question 5, above, Cox is willing to work with the Commission to consider if and how to securely provide current information about its facilities, on a confidential basis, to first responders and governmental entities that will need to access to such information for emergency purposes.

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.*
- 6(a) *Additionally, the Proposal itemizes required content that the Providers must submit to the Commission. Please provide comments and analysis on this issue.*

*6(b) Should the proposed rule for Emergency Operations Plans include any other information that the Proposal does not address? Please explain why any additional information is legitimate and necessary for adoption.*

Rather than imposing new and possibly duplicative requirements for filing emergency operations plans, the Commission should defer to other state agencies that may utilize such information, particularly OES. OES, not the Commission, is responsible for the coordination of the state's agencies and first responders in response to disasters. OES is at the center of local communities' emergency response coordination. Cox has twice (as recently as last year) included OES personnel in our Business Continuity Plan ("BCP") simulations in San Diego and Santa Barbara. The Commission should expend its resources to support communications providers' efforts to coordinate with OES, but not duplicate OES' work.

Under Senate Bill 670, adopted last year, all telecommunications service providers that provide access to 911 services must notify OES and report the following information about any community isolation outage: a staff contact name and number, the estimated area affected, the communities affected, the estimated time to repair the outage, and when service is restored. OES is statutorily required to keep this information confidential.<sup>56</sup> The Proposal would require much of the same information, but for no discernable purpose or benefit.

The proposal regarding emergency preparedness exercises are similarly unnecessary as Cox and most companies already engage in such efforts and follow national standards such as those established by FEMA. FEMA runs the Incident Command System and publishes guidance on mitigation, preparation, response, recovery and rebuilding which also includes exercises. Cox has in place a detailed and extensive BCP that includes training personnel regarding emergency plans and conducts preparedness exercises annually to test those plans.

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<sup>56</sup> Gov't Code § 53122(e).

Finally, the outage map reporting requirement would be counter-productive to the efforts already made by entities to inform their customers of outages. Cox already posts targeted information about outages on its website for the benefit of its customers. An outage map gives no information about a customer's particular circumstances and therefore would not be helpful to customers.

7. *Current Mitigation Efforts: In 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. This should include, but is not limited to, the following topics:*

(a) *Number of additional generators acquired (both fixed and mobile)*

Cox has recently acquired 61 additional portable generators and now has 237 such generators in its California inventory. Additionally, Cox has 1,138 fixed, natural gas generators across our California footprint.

(b) *Number of additional temporary facilities acquired (e.g., COWs, COLTs, etc.);*

Cox is not a mobile telecommunications provider and so does not deploy COWs or COLTs.

(c) *Additional network redundancy built into network (e.g., logical and physical);*

Cox operates a high-speed, national fiber optic backbone comprised of tens of thousands of fiber miles. Our backbone is self-healing through strategic deployment of core infrastructure components. Multiple diverse connections help ensure backbone locations are not isolated in the event of an outage and that Cox maintains ample capacity to handle peak traffic periods. Cox is also installing Optical Bypass Switches to minimize the impact of outages to customers on fiber.

Our core network facilities in California are all equipped with both DC battery backup systems, and two fixed redundant AC diesel-fueled generators on site, with each generator capable of powering the facility. Should one generator fail, the second generator automatically assumes the load. DC battery backup systems are in place should the generators not operate properly. The



batteries operate for a minimum of four hours and the generators, can — depending on the facility — last for several days to a week before requiring refueling. Cox ensures that the diesel fuel is always at capacity in all diesel generators, and has in place several fuel providers that will “top off” the diesel generators’ fuel every other day during the time the generators are in use.

Cox has placed portable backup generators in strategic locations in its service territory that can be deployed to any portion of its California footprint in safe conditions should an extended power outage occur. Cox also has generators in its inventory that can be flown or trucked into California from out of state if needed. Once in place, these portable generators may operate on average for 12 hours before needing to be refueled.

Between the core network facilities and the subscribers’ home or business, Cox has thousands of nodes. This field equipment is equipped with battery backup systems designed to keep services functioning from two to four hours, depending on the equipment and current load, until deployable generators can be placed at an impacted site. Cox only deploys portable generators where safe, and during PSPS events Cox technicians monitor generators for safety.

*(d) Provide details on plans in the near, intermediate and long term to further harden facilities;*

In spite of the challenges Cox previously experienced regarding permits and community concerns, Cox is exploring with SDG&E and SoCal Gas expanding our current use of fixed natural gas generators at the node level of our network. Cox is also installing several optical bypass switches, which will help reduce the impact of a commercial power outage on customers on fiber optic rings.

*(e) Identify barriers to building resiliency into your networks;*

As mentioned above, safety, permitting, community concerns, noise, physical size of potential backup power options, cost, environmental regulations, among others, pose

insurmountable challenges to implementing the requirements of the Proposal. This is why the Commission needs to prioritize network components most needed during an emergency, as discussed in these comments.

*(f) Identify any other investments or cooperative agreements that will be made to build in more backup generation or minimize the need for backup generation;*

As discussed in Section II.7(d), Cox is exploring expanding use of fixed natural gas generators in parts of the network. Additionally, under Cox's agreements with cellular providers for backhaul, cellular provider customers provide access to power and backup power at the point of interconnection. Further, Cox is discussing with SDG&E, coordinated use of backup power for operating certain town centers during PSPS events.

*(g) Identify if communications service outages as a result of future public safety power shutoff events are expected. Identify specific locations and reasons where network outages are expected.*

Only the electric providers responsible for PSPS events can inform the Commission of areas that will be subject to outages. Cox, like other Californians, is subject to the electric providers' decisions to shut off power during a PSPS event. While Cox does operate on backup power during power outages, and maintained services for most customers during last October's events, Cox will not deploy backup power when conditions are unsafe. Tier 3 Fire Threat Districts during PSPS events are unsafe, given the Commission-recognized fire risk.

### **III. OTHER TOPICS FOR COMMISSION CONSIDERATION**

#### **A. The Commission Must Ensure Sufficient Time for Implementation of Any Backup Power Requirements**

The Commission must ensure parties have sufficient timeline to implement any new requirements. As noted above, there are significant barriers to deployment of backup power, which can take years from designing and planning to installation. Moreover, any backup power

requirements should be limited to Tiers 2 and 3 High Fire-Threat Districts – and if the fire map changes, network operators would need another sufficient timeline for implementation.

The Proposal also directs the Communications Division to “develop, and adopt standards, templates, and a schedule for reporting requirements.” While reporting requirements should not be imposed for the reasons stated above, if the Communications Division adopts a template for reporting requirements, Communications Division should make the template publicly available at least six months prior to the report due date to give sufficient time to gather data and adapt its reporting to the required format. More importantly, it is not the Communications Division’s role to set “standards” for such reporting. Such a role would clearly run afoul of laws that limit staff to ministerial functions.<sup>57</sup> The Commission should establish any standards applicable to the reports through this rulemaking proceeding so that Providers have notice and an opportunity to comment on any such proposals.

**B. The Commission Should Require a Role for Electric Utilities in Ensuring Network Resiliency**

Cox’s network, and all communications networks, rely on commercial power supplied by electric utilities, and obtaining information from electric utilities when commercial power is impacted will ensure Cox can react more quickly and effectively to ensure reliable telecommunications service.<sup>58</sup> The Commission should direct electric utilities to: (i) communicate

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<sup>57</sup> While ministerial tasks may be delegated, actions that involve the exercise of judgment or discretion, as is the case here, cannot be delegated to staff without statutory authorization. *California Sch. Emps. Ass’n v. Personnel Comm’n*, 3 Cal. 3d 139, 143-144 (1970); *Southern Cal. Edison Co. v. Pub. Util. Comm’n*, 227 Cal. App. 4th 172 (2014).

<sup>58</sup> For example, at our request, SDG&E agreed to provide Cox with GIS information so that Cox could overlay areas of its network that could be impacted by a PSPS event. This helped to quickly identify what network assets and customers could be impacted, and enabled Cox to more easily find and deploy available employees and prepare additional employee assistance. Use of microgrids significantly reduces the number of customers who lose power thereby minimizing the impact of the PSPS on a community.

with communications service providers before, during and after commercial power outages; (ii) provide GIS map sharing to determine where commercial power outages are located; and (iii) adopt microgrid practices, which requires electric utilities to maintain reliable backup power.

Furthermore, while Cox opposes the proposed backup power requirements as they stand, to the extent that the Commission moves forward with any backup power requirements, Cox recommends that Commission mitigate the significant costs of such a mandate by requiring regulated natural gas utilities to provide natural gas for backup power generators and necessary construction at cost. Similarly, Cox requests that the Commission expedite any needed approvals for natural gas line extensions that would serve generators that provide backup power to telecommunications facilities.

### **C. The Commission Must Conduct a Full Environmental Review**

The 72-hour backup power proposal would effectively impose an obligation to install backup power supplies at thousands of communications infrastructure locations across California, and have a significant effect on the environment. The Commission must conduct environmental review prior to approving any discretionary project that may have a significant impact on the environment.<sup>59</sup> “Project” means “the whole of an action, which has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”<sup>60</sup> Here, the backup power proposal would lead to land disturbance and other impacts from the installation of backup power, significant emissions from transportation

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<sup>59</sup> See Pub. Res. Code § 21063; CEQA Guidelines, California Code of Regulation, Title 14 § 15379; 14 CCR § 15352. (defining “approval” of a project as “the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.”); Pub. Res. Code § 21080; 14 CCR § 15379 (defining a “public agency” under CEQA as “any state agency, board, or commission,” among others).

<sup>60</sup> 14 CCR § 15378(a).

of fuels and operation of generators, and deployment of toxic or corrosive materials in batteries that are deemed hazardous in California.

Finally, leaving the California Environmental Quality Act (“CEQA”) analysis to other state or local agencies to approve some portion of a single company’s proposed compliance options, is prohibited under the CEQA regime.<sup>61</sup> The Commission is *the* agency with the regulatory scope to analyze the environmental impacts of *all* entities subject to the Proposal (although the Commission lacks regulatory jurisdiction over many of the services subject to the Proposal, as discussed below).

**D. The Commission is Obligated to Review Costs, Benefits and Safety Impacts of the Proposed Rules**

Public Utilities Code section 321.1 requires that the Commission “take all necessary and appropriate actions to assess the economic effects of its decisions and to assess and mitigate the impacts of its decisions on customer, public, and employee safety.” Similarly, Public Utilities Code section 2892.1 states: “[T]he commission shall not implement [performance reliability standards] ... unless it determines that the benefits of the standards exceed the costs.” The Proposal makes no attempt at evaluating the economic impact of such a massive obligation placed upon communications service providers and their customers. This failure is highly problematic given that industry-wide the Proposal could, among other things, cost billions of dollars just for service providers deployment of backup power.<sup>62</sup> To make matters worse, under the Proposal, the bulk of those costs would need to be directed toward services rarely used in emergency situations.

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<sup>61</sup> *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal.App.4th 1170, 1208 (2005); *cf. County of Amador v. El Dorado Cty Water Agency* 76 Cal.App.4th 931, 948 (1999) (because “the purpose of an EIR is to ensure an informed public and informed decision-making ... another entity’s subsequent determinations are irrelevant when considering whether the lead agency complied with CEQA mandates.”) (citations omitted).

<sup>62</sup> As noted above, Cox estimates that implementation of the Proposal, to the extent implementation is possible, would cost tens of millions of dollars just for Cox, and Cox is just one of many service providers in the state.

Nor does the Proposal address the necessary assessment and mitigation of the impacts of a 72-hour backup power requirement on customer, public, and employee safety. As stated in these comments, a 72-hour requirement placed on network providers like Cox would introduce fire risks that endanger our employees, customers and the public, as well as potentially cause significant harm to the natural environment in the communities Cox serves.

**E. The Proposal’s Attempt to Assert Regulatory Jurisdiction over Non-Jurisdictional Entities and Services Risks Conflict with Federal Law**

The overly broad applicability of the Proposal far exceeds the Commission’s jurisdiction and risks embroiling the Commission in resource-intensive litigation with little upside. Specifically, these requirements would conflict with FCC rulings and undermine a deregulatory federal policy toward information services. Any Commission rules resulting from the Proposal would therefore be vulnerable to federal preemption and other legal challenges.

*Broadband Jurisdictional Issues.* With respect to the Proposal’s focus on “data” services and “web browsing,” the Proposal plainly conflicts with federal law and policy. In 2018, the FCC reinstated its longstanding classification of broadband Internet access services (“BIAS”) as an interstate information service, rejecting “heavy-handed utility-style regulation of [BIAS] and return[ing] to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades.”<sup>63</sup> In so doing, the FCC expressly repealed common carrier classification and prescriptive conduct rules for Internet service providers (“ISPs”), finding that “a return to [an information service] classification will facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering

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<sup>63</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 ¶ 1 (2018) (“*Restoring Internet Freedom Order*”).

compliance costs.”<sup>64</sup> These FCC rulings have been affirmed on direct appeal.<sup>65</sup> By purporting to mandate unprecedented amounts of reporting obligations and backup power throughout Internet service provider networks in California, the Proposal would subject ISPs and their facilities to impermissible common carrier regulation<sup>66</sup> and undermine the deregulatory objectives announced by the FCC.

The D.C. Circuit Court of Appeals vacated the FCC’s express “preemption directive,” which would have prohibited all state regulation of BIAS on a prospective basis.<sup>67</sup> However, the court recognized the continuing application of conflict preemption on a fact-specific basis where, as here, state-level regulation actually conflicts with or undermines the FCC’s rulings.<sup>68</sup> It is well-established under FCC and judicial precedent that BIAS is a jurisdictionally interstate service that “provides the capability to transmit data to and receive data from *all or substantially all internet endpoints*,” notwithstanding the location of certain network equipment and facilities within state boundaries.<sup>69</sup> The Proposal would impermissibly burden interstate BIAS offerings by imposing

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<sup>64</sup> *Id.* ¶ 20.

<sup>65</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 35 (D.C. Cir. 2019).

<sup>66</sup> *See, e.g.*, 47 U.S.C. § 214(d) (requiring a common carrier “to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier”).

<sup>67</sup> *Mozilla*, 940 F.3d at 74.

<sup>68</sup> *See id.* at 85 (“In vacating the Preemption Directive, we do not consider whether the remaining portions of the [Restoring Internet Freedom] Order have preemptive effect under principles of conflict preemption or any other implied-preemption doctrine.”); *id.* (“If the [FCC] can explain how a state practice actually undermines the [Restoring Internet Freedom] Order, then it can invoke conflict preemption.”).

<sup>69</sup> 47 C.F.R. § 8.1(b) (emphasis added); *see also Protecting and Promoting the Open Internet*, Report on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶ 431 (2015), *aff’d*, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (reaffirming the FCC’s “longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes”).

costly and technologically infeasible backup power mandates for facilities in California that transmit BIAS traffic throughout the nation and the world.

The Commission and the State of California may not attempt to rely on their traditional “police powers” or invocation of public safety concerns to adopt rules that conflict with the FCC’s rulings.<sup>70</sup> Nor does the Commission have independent federal authority under Section 706 of the Telecommunications Act of 1996 to adopt backup power mandates under the guise of promoting deployment of “advanced telecommunications capability.” As the FCC has determined and the D.C. Circuit Court of Appeals has affirmed, Section 706 is merely a policy statement “exhorting the [FCC] to exercise market-based or deregulatory authority granted under other statutory provisions,” not “an independent grant of regulatory authority.”<sup>71</sup> Accordingly, subjecting BIAS to public utility regulation at the state level would conflict with this federal law and policy and would be preempted.<sup>72</sup>

Additionally, the Commission lacks statutory authority over BIAS. Article XII of the California Constitution and the California Public Utilities Code establish the Commission’s authority over “public utilities.”<sup>73</sup> The California Public Utilities Code notably does not grant the

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<sup>70</sup> 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).

<sup>71</sup> *Mozilla*, 940 F.3d at 46.

<sup>72</sup> Adopting an ACR Proposal that regards broadband to be a public utility also would violate due process and Commission decision-making requirements. See Pub. Util. Code § 1705 (requiring conclusions of law).

<sup>73</sup> See Cal. Const. art. XII, § 6, for example, which provides that the Commission “may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all *public utilities* subject to its jurisdiction.” (Emphasis added.) Article XII, § 5 provides that “The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the [Commission] . . . .”



Commission authority to regulate broadband,<sup>74</sup> except in connection to certain subsidy programs that are irrelevant here. The Commission itself has specifically acknowledged that it does not have jurisdiction over broadband.<sup>75</sup>

*VoIP Jurisdiction Issues.* Similarly, the Proposal risks conflict with federal law to the extent it seeks to impose performance reliability requirements on VoIP service. The Eighth Circuit recently held that interconnected VoIP service is an “information service” under the Communications Act.<sup>76</sup> Accordingly, the court determined that “any state regulation of an information service conflicts with the federal policy of nonregulation,’ so that such regulation is preempted by federal law.”<sup>77</sup> In an amicus brief, the FCC further stated that a state commission’s “sweeping assertion of regulatory authority over VoIP service threatens to disrupt the national voice services market,” and that “[u]nder the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation.”<sup>78</sup> The Proposal is especially subject to conflict preemption

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<sup>74</sup> See Pub. Util. Code § 216(a)(1) (itemizing entities subject to public utility regulation).

<sup>75</sup> See, e.g., D.13-12-005 at 2 (“It is well-established that Internet service is classified for state and federal regulatory purposes as an ‘information service’ and that state commissions such as the [CPUC] do not have jurisdiction over information services even if the providers also provide ‘communications services’ that are subject to state regulation.”); D.06-03-013 at Appendix A-4 (“In adopting these principles the [Commission] does not assert regulatory jurisdiction over broadband service providers; Internet Service Providers; Internet content or advanced services; or any other entity or service not currently subject to regulation by the [Commission].”).

<sup>76</sup> *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018), cert. denied sub nom. *Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6 (2019); see also 47 U.S.C. § 153(24) (defining “information service”).

<sup>77</sup> *Id.* at 718 (quoting *Minnesota Pub. Utilities Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)).

<sup>78</sup> Brief for FCC as Amicus Curiae in *Charter v. Lange* at 10, 18 (Oct. 27, 2017), <https://docs.fcc.gov/public/attachments/DOC-347483A1.pdf>.

given that the FCC has already evaluated backup power requirements for VoIP,<sup>79</sup> and any attempt for the Commission to do so here risks conflict with federal policy. For that matter, the Proposal also appears to exceed the Commission’s statutory authority in that VoIP service is not a public utility service.<sup>80</sup>

*Cable Jurisdictional Issues.* Requirements dictating how cable operators must design and configure their systems would also violate 47 U.S.C. § 544(e), which provides that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.”<sup>81</sup>

#### **IV. CONCLUSION**

For the reasons stated above, the Commission should narrowly tailor its backup power initiative to ensuring power for the mobile telephony network, including wireline backhaul of cellular traffic, and maintaining telecommunications service for first responders. Additionally, rather than mandate burdensome disclosures of highly sensitive data, the Commission should instead defer to agencies tasked with overseeing emergency coordination.

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<sup>79</sup> See *supra* n.4.

<sup>80</sup> See *VoIP Coalition Application for Rehearing of Decision 19-08-025, Decision Adopting An Emergency Disaster Relief Program for Communication Service Provider Customers* dated September 23, 2019. The Commission has yet to act on the outstanding AFR.

<sup>81</sup> See also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable TV Consumer Protection and Competition Act of 1992*, Third Report and Order, FCC 19-80 ¶ 76 (2019) (restricting the Commission’s authority over cable operators).

Respectfully submitted,

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*Attorneys for Cox*

Dated: April 3, 2020

**ATTACHMENT 1**

**AFFIDAVIT OF INGO HENTSCHEL**

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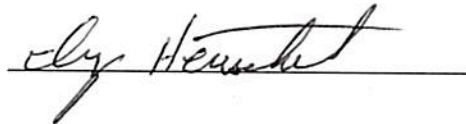
I, Ingo Hentschel, am informed and believe and hereby declare as follows:

1. I am Vice President of Field and maintenance Operations, of Cox Communications, California. The information stated herein has been derived from my employment with Cox.
2. To increase the backup power capacity of Cox's entire network to 72 hours is not practical due to a number of barriers.
3. The planning, design, purchase and installation of thousands of large generators, fuel sources and oversized packs of batteries throughout our network would present complex logistical challenges, including size constraints posed by large backup power equipment, and would take years to implement.
4. For example, currently most field equipment have backup batteries that can run from 2 to 4 hours, using 3-6 batteries, each the size of a car battery. To achieve 72 hour backup power for field equipment using batteries, there would need to be several dozen of these batteries per field equipment site, which would severely overcrowd space on sidewalks, public rights-of-ways and private property easements and present severe maintenance challenges.
5. The cost of the backup power equipment and its deployment to meet a 72 hour backup standard throughout the network would likely be tens of millions of dollars, just to begin, and for Cox alone.
6. If every communications provider in the state would have to undertake these same extensive and costly efforts, it would result in multiple providers installing

similar cumbersome backup equipment in the same neighborhoods and locations.

7. Moreover, in instances where a public safety power shut-off creates power outage over large geographic areas for an extended period of time, it is infeasible and unsafe for Cox to provide backup power to keep our entire network running without commercial power given the risks associated with deploying or refueling generators in high fire-risk conditions.
8. I affirm and declare under penalty of perjury that, to the best of my knowledge, all of the statements and representations made in this declaration are true and correct.

Executed on this April 1, 2020

A handwritten signature in cursive script, appearing to read "Oly Henshel", is written over a solid horizontal line.