



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking
Regarding Emergency Relief Disaster
Program

Rulemaking 18-03-011
(Filed March 22, 2018)

**OPENING COMMENTS OF CTIA ON PROPOSED
DECISION OF PRESIDENT BATJER**

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CTIA respectfully submits these comments on the June 11, 2020 Proposed Decision of Commissioner Batjer in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

CTIA and its member wireless carriers fully support the goals of this rulemaking, are highly committed to maintaining and improving the resilience of carriers' networks, and work diligently toward that end. CTIA's member companies have undertaken robust efforts to maintain service in the face of overwhelming natural disasters, and even when electric utilities have shut off the electric power that wireless carriers rely on. The wireless industry will continue to work cooperatively and voluntarily with the Commission, the California Governor's Office of Emergency Services, and other state and local agencies to improve coordination during disasters and other events.

CTIA appreciates the PD's recognition that "communications networks are complex, diverse, and there may not be a 'one size fits all' approach to ensuring resiliency."² CTIA also applauds the PD's recognition that an "all customers, all the time" service requirement is simply unworkable as would be an onsite backup power mandate. Nevertheless, the PD proposes several requirements that are unworkable³ and, as discussed below, exceed the Commission's legal authority and are preempted by federal law.

The PD's jurisdictional analysis fails to recognize the breadth of federal preemption of state regulation of the adequacy of wireless carriers' network infrastructure. Much of what has been proposed is expressly preempted by the federal Communications Act, barred by conflict preemption in light of the Federal Communications Commission's ("FCC's") affirmative decision not to regulate these matters, and barred by field preemption as well.

The Commission can avoid these preemption issues while still obtaining the information it needs about carriers' network resiliency plans simply by calling for informational filings. Wireless carriers are willing to provide reasonable information to the Commission about their

¹ Proposed Decision of Commissioner Batjer, R. 18-03-011, June 11, 2020 ("PD").

² PD at 88.

³ CTIA has previously explained at length the significant practical problems raised by, and unintended adverse consequences of, several of the proposed rules—notably including the 72-hour backup power requirement. CTIA incorporates by reference those points, and focuses in these comments on the threshold jurisdictional concerns presented by the proposed rules.

resiliency plans once preempted prescriptive regulation of those plans has been taken off the table. In any event, CTIA urges the Commission to require the Communications Division to work with industry in developing a template for resiliency reporting.

II. THE WIRELESS INDUSTRY IS STRONGLY COMMITTED TO NETWORK RESILIENCY AND TO COORDINATION WITH EMERGENCY OFFICIALS

As CTIA and its members have discussed in their past filings in this proceeding, the wireless industry is strongly committed to ensuring that their networks remain functional in emergency situations. Wireless carriers have made extraordinary efforts to maintain critical communications services in disaster-affected areas in the face of the wildfires, floods, and other disasters that have occurred in recent years. The record in this proceeding is replete with examples. Wireless carriers have taken a wide range of 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;⁴ deploying additional temporary wireless facilities to improve service in areas where permanent wireless towers may have been damaged or networks were overburdened by the movement of people seeking refuge;⁵ and dispatching emergency response teams to address a wide variety of network and community challenges in the field.⁶

Wireless carriers also 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 charge.⁷ Most recently, in the face of the COVID-19 pandemic, wireless carriers have done everything from waiving overage charges and

⁴ 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"); Response of Cellco Partnership *et al.* to Motion of the Public Advocates Office at 1, 4-8 (filed June 19, 2019) ("Verizon Opposition").

⁵ 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 Opposition at 4.

⁶ See, e.g., AT&T Opposition at 16-17; Verizon Opposition at 4-5.

⁷ 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/>.

extending payment dates once again,⁸ to expanding data plans at no charge,⁹ expanding network capacity,¹⁰ and working to reduce the homework gap as many schools move all-online.¹¹

California's wireless carriers have even gone above and beyond and helped with matters *unrelated* to the provision wireless service. For example, wireless carriers have provided fire-affected customers with basic support such as water, food, and smoke-protection face masks.¹²

In addition, CTIA's member companies continue to work with the Governor's Office of Emergency Services and the California Department of Forestry and Fire Protection to ensure that these agencies are provided the information that they need.¹³ Indeed, the wireless industry understands that preparing for and responding to the next storm or emergency requires ongoing engagement with key infrastructure, public safety, and government stakeholders. Such efforts are ongoing at the state, local, and federal levels.¹⁴ Even as Americans rely on wireless service during emergencies, wireless carriers rely 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 critical sites. Cooperative efforts among these interdependent stakeholders are required to prepare for and respond rapidly to disasters.

⁸ See, e.g., *COVID-19: Our Response*, AT&T (Mar. 23, 2020), <https://about.att.com/pages/COVID-19.html>, *Coronavirus (COVID-19) Facts*, VERIZON, <https://www.verizonwireless.com/support/covid-19-faqs/> (last visited Mar. 23, 2020).

⁹ 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>.

¹⁰ 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>.

¹¹ 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>.

¹² 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>; *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; see also Verizon June 19 Comments at 2-3; T-Mobile Advice Letter No. 8 at 2.

¹³ 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).

¹⁴ See, e.g., *Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Second Further Notice of Proposed Rulemaking, FCC 20-20 (rel. March 2, 2020).

CTIA recognizes that every stakeholder, including wireless carriers, must constantly strive to do more to protect consumers and ensure continuity of communications capabilities. This will require extensive coordination, and CTIA and its members will continue to work with the Commission and other stakeholders to improve the resiliency of their networks.

III. THE REGULATIONS PROPOSED ARE PREEMPTED BY FEDERAL LAW

The PD fails to recognize the breadth of federal preemption of state regulation of the adequacy of wireless carriers' network infrastructure. While well-intentioned, the regulations proposed in the PD – including mandatory resiliency plans, backup power, and service level requirements – are clearly preempted and thus are beyond the Commission's authority to impose.

Courts recognize at least three varieties of preemption – express, conflict, and field preemption.¹⁵ The PD's proposed resiliency, backup power, and service level requirements are barred by all three.

A. Section 332 Expressly Preempts the Regulations in the PD

1. Section 332(c)(3)(A) Is a Broad Express Preemption of State Authority

As the PD acknowledges,¹⁶ the federal Communications Act “contains a broad preemption clause”¹⁷ that expressly preempts state regulation of the rates or entry of mobile wireless providers.¹⁸ Courts have held that the prohibition on state regulation of rates and/or entry precludes state regulation of the adequacy of wireless network facilities or the level or quality of wireless service: “The statute makes the FCC responsible for determining the number, placement, and operation of the cellular towers and other infrastructure,” and “the modes and conditions under which” wireless providers may offer services in a given market are among “the very areas reserved to the FCC” under the Communications Act.¹⁹ In adding section 332,

¹⁵ See, e.g., *Baker & Drake, Inc. v. Public Serv. Comm'n*, 35 F.3d 1348, 1352-53 (9th Cir. 1994).

¹⁶ See PD at 20.

¹⁷ *McKinney v. Google, Inc.*, 2010 U.S. Dist. LEXIS 144800 at *28 (N.D. Cal. 2010).

¹⁸ 47 U.S.C. § 332(c)(3)(A).

¹⁹ *Bastien v. AT&T Wireless Svcs. Inc.*, 205 F.3d 983, 989 (7th Cir. 2000). See also *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1008 (9th Cir. 2010) (recognizing that spectrum licensing is the “FCC’s core tool in the regulation of market entry” and that “[s]uch licensing directly involves agency determinations of public interest, safety, efficiency, and adequate competition, all inquiries specially within the expertise of the FCC.”); *Shroyer v. New Cingular Wireless Svcs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010) (noting that

“Congress preempted state laws that not only regulate market entry, but also state laws that ‘obstruct or burden a wireless service provider’s ability to provide a network of wireless service coverage.’”²⁰

The PD’s proposed requirements for wireless resiliency plans, backup power, minimum levels of service, and clean backup power generation all purport to regulate the adequacy of wireless carriers’ network infrastructure.²¹ For example, they would require wireless carriers potentially to build additional towers in order to provide required levels of service and add equipment (including backup power facilities) to infrastructure that may not currently have it. Such regulation is thus expressly preempted and cannot be sustained.

2. *The PD’s Discussion of the Scope of Federal Preemption Under Section 332(c)(3)(A) Is Inconsistent With Governing Precedent*

The PD’s attempts to evade express preemption are unavailing. First, the PD asserts that “[n]owhere has Congress expressly stated or clearly manifested any intention to prohibit all State public safety regulations that apply to wireless carriers.”²² That incorrectly frames the issue,²³ and, in any event, misses the point: *Bastien* and the Ninth Circuit precedent cited above make clear that Congress *has* expressly preempted the type of regulations proposed here – those that would control the type and adequacy of wireless network infrastructure and the quality of wireless service. For the same reason, the PD errs in asserting that “a backup power requirement [is not] tantamount to rate regulation” and in disregarding the broad terms of section

Bastien involved a challenge to “the level of [wireless] service” and “the number of cellular towers needed to support service”).

²⁰ *Johnson v. American Towers, LLC*, 781 F.3d 693, 705 (4th Cir. 2015). *See also, e.g., In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1071 (N.D. Cal. 2010) (“*iPhone 3G*”) (Where state action “would ‘alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service,’ the claims tread upon the FCC’s role in regulating the ‘modes and conditions under which’ a wireless carrier offers service.”).

²¹ As a result, the PD’s reliance on various provisions of state law to justify its impermissible regulation of wireless providers’ “services and facilities” does not salvage the proposed rules. *See* PD at 13-14, *citing* Cal. Const. Art. XII §§ 1-6; P.U. Code §§ 233, 234, 451, 701, 761-62, 1001, 1013. “‘The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that federal law must prevail.’” *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (citation omitted).

²² PD at 23.

²³ The issue is whether the rules proposed in the PD are preempted – not whether “all State public safety regulations that apply to wireless carriers” are preempted.

332(c)(3)(A) while attempting to cabin that provision to FCC decisions addressing “the allocation of spectrum.”²⁴ In fact, the FCC has made clear that the preemptive language in section 332(c)(3)(A), as interpreted by *Bastien* and its progeny, means that state and local regulators “do not have the authority to require that [wireless] providers offer certain types or levels of service, or to dictate the design of a provider’s network.”²⁵ The PD’s requirements not only run afoul of the explicit terms of section 332, but also directly conflict with the FCC’s interpretation of that provision and are independently preempted on that ground.

The PD’s attempted collateral attacks on the scope of preemption of state “entry” regulation are similarly unavailing. The PD attempts to invoke, as a basis of authority for the proposed regulations, its authority to issue certificates of public convenience and necessity under section 1001 and related sections of the Public Utilities Code,²⁶ but the Commission itself has acknowledged that section 332 prevents it from enforcing section 1001 against wireless providers.²⁷

The PD also asserts that its proposed regulations are not “entry” regulations at all because some wireless carriers are already operating in the state.²⁸ But the text of section 332(c)(3)(A) does not limit “entry” to the regulation of entities that had no prior presence in the state; instead, it refers to “entry of . . . *any* commercial mobile *service* or *any* private mobile *service*” – not a “new” market entrant.²⁹ That is not surprising. The PD never identifies any plausible reason

²⁴ PD at 23.

²⁵ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9104 n.84 (2018), *appeal pending sub nom. Sprint Corp. et al. v. FCC*, Nos. 19-70123 *et al.* (9th Cir. 2019), *citing* 47 U.S.C. § 332(c)(3)(A), *Bastien*, 205 F.3d at 989.

²⁶ PD at 14, *citing* P.U. Code §§ 1001, 1013. The PD also invokes “benefits” such as interconnection and rights-of-way rights granted to CPCN holders under state law, but these rights do not (and cannot) trump federal preemption. *See de la Cuesta*, 458 U.S. at 154. Indeed, the same rights are granted to all telecommunications carriers under the same federal statute (the Communications Act) that expressly preempts the PD’s proposed rules here. *See* 47 U.S.C. §§ 251(a), 253(c).

²⁷ *See* D.94-10-031 (“The Budget Act eliminated the requirement for a certificate of public convenience and necessity (CPCN) as a prerequisite to providing wireless telecommunications services . . .”); *see also* D. 95-10-032, at 12-13 (similar), *modified in part on rehearing*, D. 98-07-037, 1998 Cal. PUC LEXIS 339, at *4 (acknowledging that “the federal Act’s preemption of state regulation of entry conflicts with PU Code section 1001’s requirement to obtain a CPCN before market entry” and that requirement therefore “does not apply to CMRS providers.”).

²⁸ PD at 23.

²⁹ 47 U.S.C. § 332(c)(3)(A) (emphasis added).

why Congress would have exempted incumbent carriers from the prohibition on state attempts to regulate wireless infrastructure and service quality. And, under the PD’s logic, the Commission would be free to adopt any such rules for incumbents and need only re-adopt those rules annually in order to extend the rules to any carriers that started operating in the relevant market within the year preceding re-adoption. It makes no sense that Congress would have intended to create such a loophole in the statute’s broad preemption provision. Moreover, the cases discussed above refute the PD’s narrow reading of section 332(c)(3)(A). In *Shroyer*, for example, the Ninth Circuit held that state-law claims that would effectively call into question the FCC’s judgment in approving a wireless merger were preempted under section 332(c)(3)(A), and it reached that conclusion even though AT&T was already providing wireless service in California before it acquired Cingular.³⁰ In short, the PD’s cramped reading of section 332 is at odds with the statutory text, binding precedent, and common sense.

3. *The Proposed Regulations Are Not Saved From Preemption By State “Police Powers” Or the Exception for State Regulation of “the Other Terms and Conditions” of Wireless Services*

The PD attempts to avoid preemption by invoking state police powers and asserting that a “presumption against preemption” applies.³¹ No such presumption applies at all, however, in express preemption cases such as this one – section 332(c)(3)(A) expressly preempts state action for the reasons explained above.³²

Nor is there any presumption in conflict preemption cases where there is a longstanding federal presence (as is the case with the FCC’s longstanding regulation of wireless licensing, equipment, and networks).³³ Indeed, the primary case that the PD cites in support of a presumption against preemption, *Farina v. Nokia*, rebuffed the state’s assertion of its police

³⁰ *Shroyer*, 622 F.3d at 1039 (“At the time of the merger in 2004, Shroyer had a contract for wireless telephone services with AT&T.”). Similarly, in *Johnson*, the Fourth Circuit held that requiring a wireless carrier to prevent calls from contraband cellphones in prisons would violate section 332’s ban on rate and entry regulation even though the wireless provider was already operating in the state. 781 F.3d at 706.

³¹ See PD at 23, citing *Farina v. Nokia*, 625 F.3d 97, 121-22 (3rd Cir. 2010).

³² See, e.g., *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

³³ See *Qwest Corp. v. Ariz. Corp. Comm’n*, 567 F.3d 1109, 1118 (9th Cir. 2009); *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003).

power to protect health and safety, finding that “[a]llowing juries to impose liability on cell phone companies for claims like Farina’s would conflict with the FCC’s regulations.”³⁴

The PD also relies on the exception to section 332(c)(3)(A)’s express preemption for state regulation of “the other terms and conditions of commercial mobile services.”³⁵ But that exception is inapplicable here. A state action cannot be both an “entry” subject to the FCC’s exclusive authority and a “term and condition” of service subject to state regulation; under the statute, they are mutually exclusive categories. Because the statutory text and binding precedent make clear that the PD’s proposed requirements impermissibly regulate entry, they are not saved by the exception.

Furthermore, the PD’s reading contradicts the ordinary meaning of the phrase “other terms and conditions of commercial mobile services.” Onerous requirements that regulate wireless network infrastructure are not a “term and condition” of wireless service. And the cases that the PD cites applying the exception under section 332(c)(3)(A) are inapposite. Most of these cases stand for the unremarkable proposition that states may regulate false advertising and other deceptive practices (including inadequate disclosures) in connection with wireless services.³⁶ But that classic form of consumer protection regulation is a far cry from the Commission’s attempt to regulate the adequacy of wireless carriers’ network facilities. Indeed, even these cases acknowledge that, “[u]nder the Communications Act, the FCC is responsible for the number, placement and operation of cellular towers and other infrastructure.”³⁷ In short, none of these cases involved state attempts to regulate wireless network infrastructure, and none of them questions the FCC’s sole authority over those issues.

³⁴ *Farina*, 625 F.3d at 125.

³⁵ 47 U.S.C. § 332(c)(3)(A); *see also* PD at 24.

³⁶ *See, e.g., Fedor*, 355 F.3d 1069, 1074 (7th Cir. 2004); *Spieholtz v. Superior Court*, 86 Cal. App. 4th 1366 (2001); *Iowa v. USCellular*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000).

³⁷ *Iowa* at *18. Other cases cited in the PD involved attempts at state regulation of RF exposure from cellphones, all of which were found to be preempted. *See, e.g., Murray v. Motorola*, 982 F.2d 764 (D.C. Cir. 2009). Finally, the PD cites cases involving state and local zoning decisions regarding wireless facilities, but section 332 expressly preserves state authority over zoning, subject to carefully circumscribed limits. *See, e.g., MetroPCS v. City and County of San Fran.*, 400 F.3d 715 (9th Cir. 2005); *Sprint v. County of San Diego*, 497 F.3d 1061 (9th Cir. 2007). The PD does not pertain to zoning, so these cases are inapposite, as are related provisions such as General Order (“GO”) 52, 95, 128, and 159. *See* PD at 18.

Under these circumstances, the operative “presumption” is that the savings clause allowing states to regulate “other terms and conditions” must be read narrowly,³⁸ otherwise, the exception would swallow the rule, allowing the Commission to impinge on areas exclusively reserved to the FCC.³⁹

In sum, the PD’s requirements regarding wireless network resiliency, backup power facilities, and service levels all represent the kind of regulation of wireless carriers’ network infrastructure and service quality that have been held to be precluded by the express preemption provision in section 332(c)(3)(A).

B. The Proposed Resiliency, Backup Power, Service Level, and Clean Generation Requirements Are Preempted Because They Conflict With and Undermine Federal Policies

1. The PD’s Proposed Requirements Conflict With an Explicit Federal Policy Decision to Use Disclosure Rather Than Prescriptive Regulation to Improve Network Resiliency

The Commission also lacks jurisdiction to adopt the proposed requirements on the independent ground that they are preempted under ordinary principles of conflict preemption. It is well-established that conflict preemption can exist beyond the scope of a related express preemption statute.⁴⁰ Under principles of conflict preemption, state law is preempted whenever it “prevent[s] or frustrate[s] the accomplishment of a federal objective,”⁴¹ including “the purposes and objectives of the [FCC].”⁴² Moreover, “[w]hen Congress charges an agency with balancing competing [statutory] objectives,” a state’s attempts to re-balance those objectives or “impose a different standard” are preempted⁴³ because they would present an obstacle to the

³⁸ The Supreme Court has “repeatedly decline[d] to give broad effect to saving clauses where doing so” would pose an “actual conflict” with federal policy or “upset the careful the careful regulatory scheme established by federal law.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000).

³⁹ See, e.g. *Bastien*, 205 F.3d at 987 (“To read the [savings] clause expansively would abrogate the very federal regulation of mobile telephone providers that the act was intended to create.”).

⁴⁰ See, e.g., *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 319-320 (6th Cir. 2017); accord *Farina*, 625 F.3d at 122-134.

⁴¹ *Geier*, 529 U.S. at 873.

⁴² *Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072-73 (9th Cir. 2005), *aff’d*, 550 U.S. 45 (2007); see also *Qwest Corp.*, 567 F.3d at 1119-20 (state utility commission’s order preempted based on conflict with FCC orders).

⁴³ *Farina*, 625 F.3d at 123.

accomplishment and execution of federal objectives.⁴⁴ These preemption principles apply with full force here.

In dismissing the wireless industry’s arguments about preemption, the PD emphasizes that an FCC docket, opened in 2007, concluded in 2009 without any effective backup power rules in place.⁴⁵ The PD then mentions, yet fails to grapple with the import of, another critical FCC proceeding. In 2013, the FCC initiated a rulemaking titled “*Improving the Resiliency of Mobile Wireless Communications Networks*,”⁴⁶ the very same subject that the PD addresses. In that proceeding, the FCC fully acknowledged the importance of wireless communications in emergency situations, and it weighed the costs and benefits of three alternatives for improving wireless network resiliency and backup power: reporting and disclosure rules; performance standards (including specific resiliency and backup power standards of the type contained in the PD); and voluntary industry actions. In a 2016 order resolving the proceeding,⁴⁷ the FCC chose a voluntary industry solution, *and specifically rejected* the other two alternatives.

More specifically, in its notice opening the proceeding, the FCC first considered addressing network reliability and resiliency concerns via disclosure and reporting requirements and asked whether they could facilitate network resiliency while enabling providers to maintain operational flexibility.⁴⁸ The FCC sought comment on whether it should adopt performance standards – explicitly including emergency backup power requirements of the type contained in the PD.⁴⁹ The FCC considered whether the burden and cost of performance standards of the type Commission is now considering outweighed their benefits.⁵⁰ And finally, the FCC sought comment on whether heightened resiliency could be achieved through voluntary measures.

⁴⁴ *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

⁴⁵ See *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, 22 FCC Rcd 18013 (2007) (“Wireless Network Resiliency Order”), cited in PD at 9, n. 19.

⁴⁶ *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14373 (2013) (“Wireless Network Resiliency Notice”).

⁴⁷ *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, Order, 31 FCC Rcd 13745 (2016).

⁴⁸ See Wireless Network Resiliency Notice at 14381-93.

⁴⁹ See *id.* at 14394-95, para. 62.

⁵⁰ *Id.*

After carefully considering the record and balancing the relevant policy considerations, the FCC rejected the reporting and performance standards approaches. It decided instead that a voluntary Wireless Network Resiliency Cooperative Framework “presents a more appropriate path forward to improving wireless resiliency and provider transparency, *and we refrain from adopting further regulations at this time.*”⁵¹ The FCC held that this framework was a reasonable approach to “promoting availability of wireless mobile services in the event of natural disasters and other emergencies”⁵² – precisely what the PD attempts to accomplish under its own balancing of the public interest. Based on the record, the FCC found the voluntary industry approach to be a more cost-effective way of promoting the agency’s goals and a better way to address the highly dynamic challenges of emergency situations.

In sum, then, the FCC *considered, but rejected*, imposing the types of requirements that the Commission is now considering. The FCC chose a flexible alternative for promoting network resiliency, while the PD would impose a more rigid and prescriptive approach that the FCC has already disapproved. Consequently, the PD’s requirements are preempted under ordinary principles of conflict preemption. The PD effectively attempts to re-balance the FCC’s objectives and “impose[s] a different standard” from the one the FCC adopted, in violation of federal law.⁵³

The absence of prescriptive backup power rules does not mean that the FCC’s policy decision in the Wireless Networks Resiliency proceeding does not have preemptive effect, as the PD incorrectly suggests.⁵⁴ Courts have made clear – including in cases referenced in the PD – that “if the agency has determined that non-regulation advances the objectives of the governing statute, additional state regulation will conflict with federal regulatory policy, and federal policy will trump state restrictions.”⁵⁵ The PD errs by conflating the lack of an FCC *rule* regarding

⁵¹ See Wireless Networks Resiliency Order at 13745, para. 1 (emphasis added).

⁵² *Id.*

⁵³ *Farina*, 625 F.3d at 123; see also *Geier*, 529 U.S. at 875, 881 (preemption of state action that effectively undermined flexibility afforded to car manufacturers under a federal regulation “deliberately provided” them “with a range of choices among different passive restraint devices”).

⁵⁴ PD at 25-26.

⁵⁵ *Murray v. Motorola, Inc.*, 982 A.2d 764, 779 note 21, D.C. Court of Appeals (2009), referenced in the PD at note 91; see also *Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983); *Computer & Comm’n Indus. Assoc. v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982) (“*CCIA*”).

resiliency with a lack of FCC *policy* regarding resiliency. Because there is a federal policy, conflict preemption applies.

2. *The Service-Level Requirements Conflict With the Federal Policy of Non-Regulation of Information Services to the Extent they Apply to Mobile Internet Access and Text Messaging Services*

Portions of the PD are also preempted to the extent that they would apply to “information services”⁵⁶ – broadband Internet access (“broadband”) and text messaging – that are governed by a federal policy of deregulation. Specifically, the minimum service level requirements in the proposed backup power rules are preempted to the extent that they require service providers to maintain basic internet browsing functionality and the ability to receive emergency alerts and notifications via text message during a disaster or commercial power outage.⁵⁷

The FCC has determined that both broadband and text messaging are information services under the Communications Act and that broadband is an interstate information service.⁵⁸ In reaching these conclusions, the FCC noted the importance of preserving the federal policy of rejecting utility-style regulation of information services.⁵⁹ And in classifying text messaging as an information service, the FCC emphasized the benefits of its “long-standing national policy of nonregulation of information services.”⁶⁰

⁵⁶ “Information service” is defined at 47 U.S.C. § 153(24).

⁵⁷ PD at 81-82. The PD generically refers to “emergency alerts and notifications” without specifying the technology used to send such alerts. To the extent the PD applies to WEAs, the PD is preempted for the reasons discussed below.

⁵⁸ See *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (“*Restoring Internet Freedom Order*”), vacated in part on other grounds, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) and *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling (“*Wireless Messaging Order*”), 33 FCC Rcd 12075 (2018) (finding that two forms of wireless messaging, Short Message Service (SMS) and Multimedia Messaging Service (MMS), are information services).

⁵⁹ See *Restoring Internet Freedom Order* at 426-29 paras. 194-95. Although the *Mozilla* court vacated the FCC’s express preemption of state net neutrality regulation, which the court found went “far beyond conflict preemption,” it clarified that “we do not consider whether the remaining portions of the 2018 Order have preemptive effect under principles of conflict preemption or any other implied-preemption doctrine.” *Id.* at 74, 85 and n.5 (citing *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 330 (2011) for the proposition that “conflict preemption wipes out ‘state law that stands as an obstacle to the accomplishment and execution of the [federal law’s] full purposes and objectives’”) (brackets in original).

⁶⁰ See 33 FCC Rcd at 12101 (innovative services flourish when “subject to the Commission’s long-standing national policy of nonregulation of information services,” citing *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*,

Here, the proposed obligations to provide services at times, locations, and service levels specified by the Commission are classic forms of common carriage and public utility regulation that are incompatible with the FCC’s classification of broadband and text messaging services as “information services.”⁶¹ Indeed, the PD repeatedly justifies its regulation based on the status of wireless carriers as “public utilities” under California law. Such obligations are therefore preempted.⁶²

3. A Service-Level Requirements for Wireless Emergency Alerts Would Conflict With the Voluntary Federal Framework Regulated by the FCC.

To the extent that the minimum service mandate requires wireless carriers to ensure that subscribers continue to receive Wireless Emergency Alerts following power outages, that mandate is preempted for additional reasons. Federal law establishes a *voluntary* framework that affords wireless carriers the *choice* of opting into a carefully delineated regulatory scheme for WEAs developed by the FCC under an express statutory delegation of authority.⁶³ By proposing a *mandate* for ensuring that wireless subscribers continue to receive WEAs in the wake of power outages, the PD would deprive wireless carriers of the flexibility they enjoy under federal law. It follows that the PD’s mandate conflicts with the federal policy promoting carrier flexibility and choice, and is therefore preempted.⁶⁴

Memorandum Opinion and Order, 19 FCC Rcd 22404, 22416, para. 21 (2004), *aff’d*, *Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007)).

⁶¹ See, e.g., *FCC v. Midwest Video*, 440 U.S. at 689, 706 (1979) (obligation to operate a minimum number of channels and hold certain channels open for specific users).

⁶² See, e.g., *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 717-20 (8th Cir. 2018) (recognizing that state PUC regulation of VoIP, an information service, is preempted), *cert. denied sub nom. Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6 (2019); *CCLIA*, 693 F.2d at 217 (statement of express preemption by the FCC “was not necessary, for preemption of any inconsistent statutory scheme would follow automatically under the Supremacy Clause”).

⁶³ See 47 U.S.C. §§ 1201(a) (directing the FCC to adopt “relevant technical standards, protocols, procedures, and other technical requirements” to “enable commercial mobile service alerting capability” for wireless providers “that *voluntarily elect* to transmit emergency alerts”), 1201(b)(2)(A) (“each licensee providing commercial mobile service shall file *an election* with the [FCC] with respect to whether or not it intends to transmit emergency alerts”) (emphases added); see also, e.g., 47 C.F.R. § 10.10(c) (“The Wireless Emergency Alerts (WEA) system refers to the *voluntary* emergency alerting system established by this part, whereby Commercial Mobile Service Providers *may elect* to transmit Alert Messages to the public”) (emphasis added); 47 C.F.R. § 10.210 (process for voluntary election).

⁶⁴ See, e.g., *de la Cuesta*, 458 U.S. at 155-56 (California law was preempted because it “deprived” companies of the “‘flexibility’” they enjoyed under a federal regulation); *Geier*, 529 U.S. at 875, 881.

C. Field Preemption Also Prevents Adoption of the Proposed Requirements

Finally, and contrary to the view expressed in the PD,⁶⁵ field preemption does apply here, and many of the PD's requirements are preempted by the broad provisions in Title III of the Communications Act establishing exclusive federal authority over the operation of wireless networks. As CTIA has previously noted, the type of regulation the PD would impose would intrude impermissibly on the plenary authority vested in the FCC by Title III of the Communications Act.⁶⁶ The FCC has exclusive jurisdiction to regulate use of radio spectrum in terms of the nature of service to be offered, spectrum to be used, transmission power, times of operation, location, areas, or zones of operation, apparatus stations may use, as well as jurisdiction over other matters that are less relevant to the matter at bar.⁶⁷ The FCC has exercised its authority in each of these regards either in the licenses it has issued to CTIA's members, the conditions and restrictions placed on those licenses, or the rules it maintains for how wireless carriers may or must operate their networks. That pervasive federal regulation in these areas precludes this Commission's attempt to regulate the same matters.⁶⁸ Yet the PD would dictate the nature of service to be offered (e.g., a service that will remain available for 72 hours in the event of a power outage) and the times of operation (e.g., at all times other than after 72 hours of any power outage). The PD would also establish zones of operation (e.g., service must be provided for at least 72 hours after a power outage anywhere a carrier provides coverage within its licensed footprint). Such decision-making is reserved exclusively to the FCC.

IV. THE COMMISSION COULD RESOLVE PREEMPTION PROBLEMS WITH THE RESILIENCY PLAN REQUIREMENTS BY REQUIRING INFORMATION-ONLY FILINGS INSTEAD OF ADVICE LETTERS

Finally, CTIA wishes to emphasize that the wireless industry does not object to providing reasonable information to the Commission about companies' resiliency plans; they simply object to the PD's impermissible effort to regulate the substance of those plans. The Commission could

⁶⁵ See PD at 21-22.

⁶⁶ See Opening Comments of CTIA on the Assigned Commissioner's ruling and Proposal, R.18-03-011 (filed April 3, 2020); 47 U.S.C. §§ 301, 303, 307, 308, 310 (establishing broad FCC authority over spectrum licensing); see also 47 U.S.C. § 201.

⁶⁷ 47 U.S.C. §§ 303(b), (c), (d), (e), and (h).

⁶⁸ See, e.g., *Hawaiian Tel. Co. v. Pub. Utils. Comm'n of Haw.*, 827 F.2d 1264, 1275-76 (9th Cir. 1987).

easily avoid preemption problems by directing wireless providers to submit their resiliency plans as information-only filings rather than as advice letters that must be approved by the Commission.⁶⁹ In any event, if the Commission does produce a template for resiliency reports, CTIA urges the Commission to accept input from carriers regarding the format and information to be included.

V. CONCLUSION

CTIA's members have consistently demonstrated their commitment to maintaining robust and resilient networks, and to working with emergency officials to protect the public in the event of a disaster or power outage. Wireless carriers remain willing to share information with the Commission, but the PD proposes to regulate carriers' network infrastructure and operations in ways that are not permitted by federal law. CTIA accordingly urges the Commission to reject those proposals.

Respectfully submitted this 1st day of July, 2020, at San Francisco, California.

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⁶⁹ See CPUC General Order 96-B, 3.9 (information-only submittal is not submitted for Commission approval or authorization), in contrast to CPUC General Order 96-B, 3.1 (advice letter is a request for approval or authorization).