



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

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Order Instituting Rulemaking Regarding
Emergency Disaster Relief Program

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

**APPLICATION OF CTIA, AT&T MOBILITY, CELLCO
PARTNERSHIP AND T-MOBILE FOR REHEARING
OF DECISION 20-07-011**

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Pursuant to California Public Utilities Code Section 1731(b)(1) and Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), CTIA, AT&T Mobility,¹ Cellco Partnership (U 3001 C) d/b/a Verizon Wireless (“Verizon”) and T-Mobile² respectfully submit this Application for Rehearing (“Application”) of Commission Decision (D.) 20-07-011, which was issued on July 20, 2020.

I. INTRODUCTION AND SUMMARY

The wireless industry remains committed to responding quickly and constructively to all disasters affecting California consumers. Wireless carriers have made extraordinary efforts to maintain communications services after public safety power shutoffs and in disaster-affected areas in the face of the wildfires, floods, and other disasters. And they remain fully committed to continuing to enhance their network resiliency and reliability. The carriers have proactively – and voluntarily – 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;³ deploying additional temporary wireless facilities to improve service in areas where permanent wireless towers may have been damaged or networks were overburdened;⁴ and dispatching emergency response teams to address a wide variety of

¹ AT&T Mobility refers to the following entities: New Cingular Wireless PCS, LLC (U 3060 C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U 3015 C).

² T-Mobile refers to the following entities: T-Mobile West LLC dba T-Mobile (U-3056-C); MetroPCS California, LLC dba Metro by T-Mobile (U-3079-C); Sprint Spectrum L.P. dba Sprint (U-3062-C) and Assurance Wireless USA L.P. dba Assurance (U-4327-C).

³ *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”).

⁴ *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.

network and community challenges in the field.⁵ Wireless carriers also continue to take significant steps to aid disaster-affected consumers, including waiving overage charges, extending payment dates, and providing additional data allotments free of charge.⁶ More recently, in the wake of the COVID-19 pandemic, wireless carriers have voluntarily taken a host of steps to help consumers in need, including again waiving overage charges and extending payment dates,⁷ expanding data plans at no charge,⁸ expanding network capacity,⁹ and working to reduce the homework gap as schools have moved to online learning.¹⁰ Indeed, California’s wireless carriers have voluntarily taken steps that go above and beyond the provision of wireless service.¹¹

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

⁶ 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/>.

⁷ See, e.g., *COVID-19: Our Response*, AT&T, <https://about.att.com/pages/COVID-19.html> (last updated July 30, 2020); *COVID-19 (Coronavirus) FAQs*, VERIZON, <https://www.verizonwireless.com/support/covid-19-faqs/> (last visited Aug. 16, 2020).

⁸ 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>.

⁹ 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>; *How Wireless Kept Americans Connected During COVID-19*, CTIA at 6 (June 23, 2020), <https://api.ctia.org/wp-content/uploads/2020/06/How-Wireless-Kept-Americans-Connected-During-COVID-19-2.pdf> (“Wireless COVID-19 Report”) (noting the FCC enabled wireless providers to boost wireless capacity—resulting, in some cases, in a doubling of capacity and speeds in some areas).

¹⁰ See, e.g., Doug Michelman, *An Open Letter to Participating 1Million Project School Districts*, T-MOBILE (Mar. 16, 2020), <https://newsroom.sprint.com/an-open-letter-to-participating-1-million-project-school-districts.htm>; *The Wireless Industry Responds to COVID-19: Education Support*, CTIA, <https://www.ctia.org/covid-19> (last updated July 31, 2020).

¹¹ For example, wireless carriers have provided fire-affected customers with basic support such as water, food, and smoke-protection face masks. See, e.g., *T-Mobile Responds to California Wildfires*, T-MOBILE (Dec. 8, 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*

Nevertheless, in D. 20-07-011 (the “Decision”), the Commission rejected the wireless industry’s requests to leave a voluntary disaster response framework in place and refrain from adopting prescriptive rules in this highly technical and dynamic area.¹² Although the Decision noted the Commission’s intent to establish a flexible structure for network resiliency,¹³ it falls short of doing so to the extent that it imposes (i) specific service-level and/or wireless infrastructure requirements and (ii) a process for submitting resiliency plans that is subject to the Commission’s approval. Specifically, the Decision required wireless carriers to submit resiliency plans in the form of advice letters (implying that the Commission’s approval for those plans is needed or may be withheld); and in those advice letter filings, carriers must document – among a plethora of other infrastructure-related items – “their ability to maintain a sufficient level of service and coverage to maintain access to 9-1-1 and 2-1-1, maintain the ability to receive emergency notifications, and maintain access to Internet browsing for emergency notices immediately following the event of a disaster or power outage, including identifying how they maintain the resiliency of their networks.”¹⁴ While the Decision appropriately recognized the infeasibility of requiring wireless providers to provide service to all customers following certain power outages,¹⁵ it further directed that:

Connected, AT&T (Oct. 20, 2017), https://about.att.com/inside_connections_blog/california_fires; see also Verizon Opposition at 2-3; T-Mobile Advice Letter No. 8 at 2; Report and Recommendations, Disaster Response and Recovery Working Group, Broadband Deployment Advisory Committee, FCC at 12, 17 (Mar. 27, 2020), <https://www.fcc.gov/sites/default/files/bdac-disaster-response-recovery-approved-rec-03272020.pdf>.

¹² See Decision Adopting Wireless Provider Resiliency Strategies, D. 20-07-011 at 100 (filed July 16, 2020) (“Decision”).

¹³ *Id.* at 90.

¹⁴ *Id.* at 131 (Ordering Paragraph (OP) 1).

¹⁵ See, e.g., *id.* at 84 (“We acknowledge Verizon’s, T-Mobile’s, and CTIA’s assertions that a requirement to maintain service for 100 percent of customers 100 percent of the time, is not always possible, even in

Facilities-based wireless providers shall, in their Communications Resiliency Plan pursuant to Section 6.5.2 of this decision, *demonstrate their ability to meet the 72-hour backup power requirement*, in Tier 2 and Tier 3 High Fire Threat Districts, *consistent with Sections 6.4.2*, which adopts the 72-hour backup power requirement in Tier 2 and Tier 3 High Fire Threat Districts for the wireless providers operating in California, 6.4.4, which establishes that the 72-hours of backup power can be met with flexible procurement and deployment, and is a reasonable duration of time to fulfill the backup power requirement, *and 6.4.6, which requires the wireless providers to ensure customers and first responders have access to minimum service levels and coverage including 9-1-1 service, 2-1-1, ability to receive alerts and notifications, and basic internet browsing during a disaster or commercial power outage of this decision, as well as describe their ability to maintain a minimum level of service and their long-term investment plan to comply with the 72-hour backup power requirement of this decision.*¹⁶

While this Application asks the Commission to correct legal errors in the Decision, we underscore that wireless carriers will continue to focus on network resiliency – which is an imperative for their businesses and customers – as they have done for decades without regulatory directives. Moreover, the wireless carrier parties to this Application do not object to providing reasonable notice to the Commission about their resiliency plans in the form of purely

non-emergency conditions.... We agree with parties that the ‘100 percent language’ creates an inappropriate expectation....”); *id.* at 85 (“[T]here are certain disasters where it will be impossible to maintain service, including during extended power outages.”); *id.* at 96-97 (“CTIA and WIA caution that any backup power requirement should also exclude wireless facilities where it is not possible to deploy backup power. CTIA and WIA both suggest that the Proposal should include an exemption for impossibility or infeasibility. We agree. Despite best efforts, there may be factors that come into play over which the wireless provider has very little control.”) (footnote omitted); *id.* at 56-57 (“We ... acknowledge that these [resiliency] measures are not fool proof – that no matter how many strategies are employed, sometimes, because of their scale, disasters will cause severe service disruption.”); *id.* at 90 (“[W]e agree with T-Mobile, that communications networks are complex, diverse, and there may not be a ‘one size fits all’ approach to ensuring resiliency.”) (footnote omitted).

¹⁶ *Id.* at 132-33 (OP 2) (emphasis added); *see also* Assigned Commissioner and Administrative Law Judge’s Ruling Requesting Comments on Wireline Provider Resiliency Strategies, R. 18-03-011 (filed July 22, 2020) at 3-4.

informational filings.¹⁷ The mandated advice letter process, however, implies that the Commission may regulate the substance of those plans. For the reasons explained below, that is neither reasonable nor lawful. The Decision conflicts with federal law, and therefore must be revised on rehearing.

To the extent that the Decision (i) imposes backup power, minimum service-level and/or wireless infrastructure deployment requirements, and (ii) requires the submission of resiliency plans pursuant to the Commission’s advice letter process (collectively, the “Wireless Service Requirements”),¹⁸ it is preempted by federal law on three distinct grounds.

First, the Wireless Service Requirements are expressly preempted by Section 332 of the Communications Act.¹⁹ Longstanding case law, including Ninth Circuit precedent, holds that any such state regulation – which attempts to regulate the adequacy of wireless carriers’ network facilities and the level or quality of their services – constitutes impermissible regulation of market “entry” and is therefore barred by Section 332(c)(3)(A).

Second, the Wireless Service Requirements are preempted on the independent ground that they conflict with federal policy – specifically, the policy decision of the Federal Communications Commission (“FCC”) to adopt a voluntary and cooperative framework offered

¹⁷ See CPUC General Order 96-B, 3.9 – Information-only Submittal (information-only filings are not submitted for Commission approval or authorization), in contrast to CPUC General Order 96-B, 3.1 – Advice Letter (an advice letter is a request for approval or authorization).

¹⁸ The Decision also requires wireless carriers to include in their resiliency plans a discussion of efforts to use “clean energy.” See Decision at 102-03, 130-131 (OP 1). The Decision does not require the *use* of clean energy, but seems to suggest that it could impose such a requirement. See, e.g., *id.* at 2 (“[T]he decision directs the wireless providers to *explore* ways to transition to renewable generation for backup power.”) (emphasis added); 110 (same); 102 (“We allow the wireless providers to use fossil fuel generators for backup power in the short-term however, we adopt some of the Proposal’s recommendations with modification.”). Any such mandate to use clean energy, however, would be preempted by federal law for same reasons as the Wireless Service Requirements, and would also exceed the Commission’s jurisdiction under California law.

¹⁹ 47 U.S.C. § 332(c)(3)(A).

by the wireless industry and to *reject* prescriptive regulations for wireless network resiliency and backup power. Similarly, the Decision is preempted to the extent that it seeks to regulate wireless carriers' provision of broadband Internet access service and text messaging services, both of which are "information services" subject to a federal deregulatory policy that is incompatible with common carrier or utility-style regulation.

Third, the Wireless Service Requirements are subject to "field preemption" under Title III of the Communications Act, which vests the FCC with broad and exclusive authority to regulate the operation of wireless networks, as the Decision impermissibly attempts to do. Congress gave the FCC – not this Commission – jurisdiction over decisions about how, where, and for what duration wireless services are provided. The Decision impinges on the FCC's exclusive domain.

Any one of the legal errors discussed above requires the Commission to grant rehearing and revise the Wireless Service Requirements.²⁰

II. THE WIRELESS SERVICE REQUIREMENTS ARE PREEMPTED BY FEDERAL LAW

The Decision's Wireless Service Requirements are preempted by federal law on three independent grounds: (i) express preemption under Section 332 of the Communications Act, (ii) conflict preemption, and (iii) field preemption.²¹ As a result, the Decision should be revised to delete these unlawful mandates.

²⁰ See Commission Rule of Practice and Procedure 16.1(c) ("The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."); see also Pub. Util. Code 1732 (application for rehearing must identify "the ground or grounds on which the applicant considers the decision or order to be unlawful"). The Commission may "abrogate, change or modify" a decision if it determines the decision, "or any part thereof is in any respect unjust, unwarranted, or should be changed." See Pub. Util. Code 1736.

²¹ See, e.g., *Baker & Drake, Inc. v. Public Serv. Comm'n*, 35 F.3d 1348, 1352-53 (9th Cir. 1994) (recognizing three types of preemption).

A. Section 332 Expressly Preempts the Wireless Service Requirements

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

The federal Communications Act “contains a broad preemption clause”²² that expressly preempts state regulation of the entry of mobile wireless providers.²³ As the FCC has instructed, Section 332(c)(3)(A) “*completely preempts*” state regulation of wireless “entry,”²⁴ which includes “[a]ny requirement that functions as an entry regulation.”²⁵

Moreover, courts have specifically held that Section 332(c)(3)(A)’s prohibition on state entry regulation bars state efforts to regulate 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.²⁶ Where state action “would ‘alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service,’” the state has impermissibly impinged upon the FCC’s

²² *McKinney v. Google, Inc.*, 2010 U.S. Dist. LEXIS 144800 at *28 (N.D. Cal. 2010).

²³ 47 U.S.C. § 332(c)(3)(A) (“[N]o State or local government shall have *any authority to regulate the entry of* or the rates charged by *any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.”) (emphasis added).

²⁴ *Matter of Petition of the State of Ohio for Auth. to Continue to Regulate Mobile Radio Servs.*, 10 FCC Rcd 7842, 7853 ¶ 45 (1995) (emphasis added).

²⁵ *Promotion of Competitive Networks in Local Telecomms. Mkts.*, 14 FCC Rcd 12673, 12714 ¶ 74 (1999).

²⁶ *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 Servs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010) (noting that *Bastien* involved a challenge to “the level of [wireless] service” and “the number of cellular towers needed to support service”).

exclusive role in regulating the “modes and conditions” under which a wireless carrier offers service.²⁷ This settled application of Section 332(c)(3)(A) is consistent with the FCC’s expansive authority under the Act.²⁸

In the face of Section 332(c)(3)(A)’s clear prohibition, the Decision’s Wireless Service Requirements expressly purport to regulate the adequacy of wireless carriers’ network infrastructure, level of service, and resiliency plans.²⁹ But mandating backup power and particular service levels (including by regulating the content of resiliency plans via the Commission’s advice letter process) is precisely the sort of regulation that is expressly preempted under Section 332. The Commission should therefore grant rehearing to delete those unlawful requirements.

2. *The Decision’s Description of Federal Preemption Under Section 332 Is Unduly Narrow and Inconsistent With Governing Precedent*

The Decision’s attempts to evade express preemption are unavailing. First, the Decision 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.”³⁰ That incorrectly frames the issue,³¹ and, in any event, misses the point: *Bastien, Johnson*, and the Ninth Circuit precedent cited above make clear that Congress *has* expressly preempted the type of regulations

²⁷ *In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1071 (N.D. Cal. 2010) (“*iPhone 3G*”); *see also Johnson v. Am. Towers, LLC*, 781 F.3d 693, 705 (4th Cir. 2015) (“[I]n amending the Communications Act, 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.’”) (citation omitted).

²⁸ *See, e.g.*, 47 U.S.C. §§ 201, 301, 303, 307, 308, 310; *see also* Section II.C, *infra*.

²⁹ *See, e.g.*, Decision at 2, 77, 81, 84, 110, 112, 132-33 (OP 2); *see also supra* Section I at 3-4.

³⁰ Decision at 23.

³¹ The issue is whether the Wireless Service Requirements adopted in the Decision are preempted – not whether “all State public safety regulations that apply to wireless carriers” are preempted.

adopted here – those that would control the type and adequacy of wireless network infrastructure and the level or quality of wireless service. For the same reason, the Decision errs in disregarding the broad terms of Section 332(c)(3)(A) and attempting to cabin that provision to FCC decisions addressing “the allocation of spectrum.”³² In fact, the FCC has made clear that the preemptive language in Section 332(c)(3)(A), as interpreted by *Bastien* and related cases, 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.”³³ The Decision’s requirements not only run afoul of the explicit terms of Section 332, but even if there were any ambiguity, the FCC’s interpretations of that provision confirm that the Decision’s requirements are expressly preempted.

For similar reasons, the Decision’s reliance on the Commission’s authority under state law to issue certificates of public convenience and necessity³⁴ is beside the point. Indeed, the Commission itself has acknowledged that Section 332 prevents it from enforcing provisions of

³² Decision at 23-24.

³³ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9103 n.84 (2018) (“*Wireless Deployment Order*”) (citing 47 U.S.C. § 332(c)(3)(A) and *Bastien*, 205 F.3d at 989), *pets. for review denied in part and granted in part sub nom. City of Portland v. United States*, Nos. 18-72689 *et al.*, 2020 WL 4669906, at *3 (9th Cir. Aug. 12, 2020) (substantially upholding the challenged FCC orders “given the deference owed to the agency in interpreting and enforcing this important legislation”).

³⁴ Decision at 14 (citing P.U. Code §§ 1001, 1013). The Decision invokes “benefits” such as interconnection and rights-of-way rights granted to CPCN holders under state law (*see id.* at 15), but these “benefits” do not (and cannot) trump express federal preemption. *See Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (citation omitted). Indeed, what the Commission identifies as “benefits” are actually the same rights that are granted to all telecommunications carriers under the same federal statute (the Communications Act) that expressly preempts the Wireless Service Requirements here. *See* 47 U.S.C. §§ 251(a), 253(c). The Commission is equally preempted from hindering wireless carriers’ enjoyment of what it identifies as “benefits” as it is from imposing the Wireless Service Requirements.

the Public Utilities Code against wireless providers.³⁵ Similarly, the Decision’s reliance on other provisions of state law to justify its impermissible regulation of wireless providers’ “services and facilities” does not salvage the Wireless Service Requirements.³⁶ ““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.””³⁷

The Decision also asserts that its requirements do not constitute “entry” regulations at all because various wireless carriers are already operating in the state.³⁸ 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.³⁹ That is not surprising. The Decision never identifies any plausible reason why Congress would have initially precluded state attempts to regulate wireless infrastructure and service quality only to allow such regulation after carriers entered the marketplace. And, under the Decision’s logic, the Commission presumably 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. Nothing in Section 332 suggests that Congress adopted an express

³⁵ 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.”).

³⁶ See Decision at 13-14 (citing Cal. Const. Art. XII, §§ 1-6; P.U. Code §§ 216, 233-34, 451, 701, 761-62, 1001, 1013).

³⁷ *De la Cuesta*, 458 U.S. 153.

³⁸ Decision at 23-24.

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

preemption provision with such a massive loophole, and any such interpretation would undermine Congress' intent to establish a "uniform national policy" for wireless services and prevent regulation "that is balkanized state-by-state."⁴⁰

Moreover, the cases discussed above refute the Decision'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.⁴¹

The Decision's assertion that "[t]he scope of § 332's preemptive language is limited to regulations that *directly and explicitly* ... prevent market entry"⁴² is similarly incorrect. Nothing in the text of Section 332 or the cases discussed above suggests that states may evade preemption simply by avoiding any explicit statement that they are seeking to regulate wireless infrastructure; if the practical effect of such regulation is to dictate infrastructure deployment, the regulation is equally preempted: "Any [state] requirement that *functions as* an entry regulation ... is not permissible as applied to CMRS providers."⁴³

⁴⁰ *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1056 (9th Cir. 2008).

⁴¹ *Shroyer*, 622 F.3d at 1038 ("At the time of the merger in 2004, Shroyer had a contract for wireless telephone services with AT&T."). Similarly, the Fourth Circuit has held that requiring a wireless carrier to prevent calls from contraband cellphones in prisons would violate Section 332(c)(3)(A)'s prohibition on entry regulation even though the wireless provider was already operating in the state. *Johnson*, 781 F.3d at 706.

⁴² Decision at 24 (emphasis in original).

⁴³ *Promotion of Competitive Networks*, 14 FCC Red at 12714 ¶ 74 (emphasis added); see also *Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d at 1071 ("where the relief sought would 'alter the federal regulation of,'" among other things, "location and coverage," the claims are preempted under *Bastien's* standard); *Carmell v. Texas*, 529 U.S. 513, 541 (2000) (that which "cannot be done directly cannot be done indirectly.").

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

Equally unavailing is the Decision’s attempt to avoid preemption by invoking state police powers and asserting that a “presumption against preemption” applies.⁴⁴ To begin, no such presumption applies in express preemption cases such as this one – Section 332(c)(3)(A) expressly preempts state action for the reasons explained above.⁴⁵ 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).⁴⁶ And even if the presumption applied (which it does not), it would be readily overcome by Congress’ explicit preemption in 332(c)(3)(A).

The Decision next 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.”⁴⁷ But that exception is inapplicable here. A state action cannot be both (i) an “entry” regulation subject to the FCC’s exclusive authority and (ii) a regulation of the “other terms and conditions” of service left to states; under the statute, these are mutually exclusive categories. Because the statutory text and binding precedent make clear that the Decision’s requirements impermissibly regulate entry, they are not saved by the exception.

Furthermore, the Commission’s reading contradicts the ordinary meaning of the phrase “other terms and conditions of commercial mobile services.” Requirements that regulate a

⁴⁴ See Decision at 24.

⁴⁵ See, e.g., *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

⁴⁶ 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).

⁴⁷ See 47 U.S.C. § 332(c)(3)(A); see also Decision at 24-25.

service provider’s wireless network infrastructure are not a “term and condition” of wireless service. And the cases that the Decision cites applying the exception under Section 332(c)(3)(A) are inapposite.⁴⁸ Most of those cases stand for the unremarkable proposition that states may regulate false advertising and other deceptive practices in connection with wireless services.⁴⁹ But that classic form of consumer protection regulation is a far cry from regulation of the adequacy of wireless carriers’ network facilities and service levels.⁵⁰ 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.

Under these circumstances, the operative “presumption” is that the savings clause allowing states to regulate “other terms and conditions” must be read narrowly,⁵¹ otherwise, the

⁴⁸ See, e.g., Decision at 25 nn.79, 80.

⁴⁹ See, e.g., *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004); *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366 (2001); *Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000); see also *State ex rel. Nixon v. Nextel W. Corp.*, 248 F. Supp.2d 885, 892 (E.D. Mo. 2003) (relying on exception to authorize state regulation of “deceptive description[s] of [] rates in invoices and advertising”); *Matter of Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd. 19898, 19908 ¶ 23 (1999) (“[B]illing information, practices and disputes ... fall within ‘other terms and conditions[.]’”).

⁵⁰ The Decision (at 30 & n.101) also 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 47 U.S.C. § 332(c)(7) (providing, subject to specified “[l]imitations,” that “nothing ... shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities”). The Decision does not involve zoning or land use, so these cases are inapposite. The same goes for the legislative history cited in the Decision. See Decision at 22 (quoting H.R. Rep. No. 103-111, 103d Con. 1st Sess. (1993), at 251, reprinted in 1993 U.S.C.C.A.N. 378, 588). In any event, the snippet of a House Conference report cited by the Commission cannot overcome the clear import of the statutory text. See, e.g., *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011) (“We will not ... allow[] ambiguous legislative history to muddy clear statutory language.”).

⁵¹ 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, 862, 871 (2000).

exception would swallow the rule, allowing the Commission to impinge on areas exclusively reserved to the FCC.⁵²

In sum, the Decision's Wireless Service Requirements are expressly preempted by Section 332(c)(3)(A).

B. The Wireless Service Requirements Are Preempted Because They Conflict With and Undermine Federal Policies

1. The Wireless Service Requirements Conflict With an Explicit Federal Policy Decision to Promote a Voluntary Industry Framework Rather Than Prescriptive Regulation to Improve Network Resiliency

The Wireless Service Requirements are also 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.⁵³ Under principles of conflict preemption, state law is preempted whenever it “prevent[s] or frustrate[s] the accomplishment of a federal objective,”⁵⁴ including “the purposes and objectives of the [FCC].”⁵⁵ 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 preempted⁵⁶ because they would present an

⁵² 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.”).

⁵³ See, e.g., *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 319-320 (6th Cir. 2017); accord *Farina v. Nokia*, 625 F.3d 97, 122-34 (3d Cir. 2010).

⁵⁴ *Geier*, 529 U.S. at 873.

⁵⁵ *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).

⁵⁶ *Farina*, 625 F.3d at 123.

obstacle to the accomplishment and execution of federal objectives.⁵⁷ These preemption principles apply with full force here.

In dismissing the wireless industry's arguments about preemption, the Decision emphasizes that an FCC docket, opened in 2007 but closed in 2009 without adopting backup power rules that ultimately went into effect.⁵⁸ The Decision briefly notes,⁵⁹ but fails to adequately address, another critical FCC proceeding. In 2013, the FCC initiated a rulemaking titled "*Improving the Resiliency of Mobile Wireless Communications Networks*,"⁶⁰ the very same subject that the Decision addresses. While the Decision attempts to brush aside the *Wireless Resiliency Notice* as addressing only disclosure rules and asserts that "the FCC was not attempting to or considering adoption of backup power rules,"⁶¹ the FCC did not limit its inquiry in that way. Rather, it explicitly asked about potentially adopting "performance standards" beyond transparency requirements,⁶² and included a series of questions covering potential backup power and service obligations. These questions included, among others, whether the FCC "should ... consider emergency back-up power requirements similar to the requirements the Commission previously adopted for mobile wireless networks but never made effective" in 2009; "[i]f we were to specify a minimum duration for provision of back-up power, what would be a

⁵⁷ *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

⁵⁸ See *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, 22 FCC Rcd 18013 (2007), cited in Decision at 9, n.19 and 27, n.89.

⁵⁹ See Decision at 11, n.25 (citing *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*").

⁶⁰ *Wireless Network Resiliency Notice*, 28 FCC Rcd at 14373.

⁶¹ Decision at 11.

⁶² See *Wireless Network Resiliency Notice*, 28 FCC Rcd at 14394 ¶ 61.

reasonable threshold?"; and whether such performance standards "exceed the costs and burdens."⁶³ The FCC, moreover, explicitly sought comment on adopting a framework of "voluntary measures undertaken by industry" rather than prescriptive rules.⁶⁴

After receiving extensive public comment, the FCC weighed the costs and benefits of three approaches to improving wireless network resiliency and backup power: (i) reporting and disclosure rules; (ii) prescriptive performance standards (including specific resiliency and backup power standards of the type contained in the Decision); and (iii) a voluntary industry framework. In a 2016 order, the FCC unanimously chose a voluntary industry solution, *and specifically rejected* the other two alternatives.⁶⁵ The FCC specifically determined 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.*"⁶⁶ Indeed, the Decision initially acknowledges this fact,⁶⁷ but later ignores it. The FCC held that this framework was the appropriate approach to "promoting availability of wireless mobile services in the event of natural disasters and other emergencies"⁶⁸ – precisely what the Decision attempts to accomplish under its own balancing of the public

⁶³ *See id.* at 14394-95 ¶ 62.

⁶⁴ *See id.* at 14395-96 ¶¶ 63-64.

⁶⁵ *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, Order, 31 FCC Rcd 13745 (2016) ("*Wireless Networks Resiliency Order*").

⁶⁶ *See id.* at 13745-46 ¶ 1 (emphasis added).

⁶⁷ *See* Decision at 11-12 ("On December 14, 2016, the FCC adopted a voluntary framework put forward by CTIA, AT&T Wireless, Sprint, T-Mobile, U.S. Cellular, and Verizon to enhance coordination and communication to advance wireless service continuity and information sharing during and after emergencies and disasters. The FCC found that this was a reasonable initial path forward to improving wireless resiliency.").

⁶⁸ *Wireless Networks Resiliency Order*, 31 FCC Rcd at 13745-46 ¶ 1.

interest. Based on the record, the FCC concluded that “the voluntary Framework submitted by the major wireless providers presents a more appropriate solution for improving wireless resiliency and enabling provider transparency” than adopting prescriptive rules.⁶⁹

In sum, the FCC *considered, but rejected*, the types of requirements that the Commission seeks to impose in the Decision. The FCC chose a flexible alternative for promoting network resiliency, while the Decision would impose a more prescriptive approach that the FCC has already disapproved. As a result, the Decision’s Wireless Service Requirements are preempted under ordinary principles of conflict preemption. The Decision 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.⁷⁰

The Commission incorrectly suggests that the absence of prescriptive backup power rules in the Decision means that the FCC’s policy decision cannot have preemptive effect.⁷¹ Quite the opposite: Courts have made clear – including authority cited by the Commission – 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.”⁷² The Decision errs by conflating the lack of an FCC *rule* regarding

⁶⁹ *Id.* at 13753 ¶ 23.

⁷⁰ *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”).

⁷¹ Decision at 26-27.

⁷² *Murray v. Motorola, Inc.*, 982 A.2d 764, 779 n.21 (D.C. Ct. of App. 2009), cited in the Decision at note 96; *see also Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (federal determination that an “area is best left *un* regulated” has “as much pre-emptive force as a decision to regulate”); *Computer & Commc’ns Indus. Assoc. v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982) (“*CCLIA*”) (rejecting argument that “preemption can be accomplished only by affirmative regulation that occupies the field”).

resiliency with a lack of FCC *policy* regarding resiliency.⁷³ Because there is a governing federal policy regarding the optimal balancing of costs and benefits – and the most appropriate means to achieve disaster resiliency – conflict preemption applies.⁷⁴

2. *The Wireless Service 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*

The Decision is also preempted to the extent it imposes obligations concerning “information services”⁷⁵ – broadband Internet access (“broadband”) and text messaging – that are governed by a federal policy of deregulation. Thus, the Decision violates federal law to the extent it requires 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.⁷⁶

⁷³ See Decision at 27 (rejecting conflict preemption argument and asserting that “[t]his is difficult to understand because the FCC has no backup power rules”).

⁷⁴ To the extent the Decision requires wireless carriers to ensure that subscribers continue to receive Wireless Emergency Alerts (“WEAs”) following power outages, any such 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. 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). While AT&T, T-Mobile, and Verizon all participate in and support WEA and otherwise remain committed to ensuring that their customers continue to receive timely emergency alerts, a state *mandate* requiring participation in WEA would conflict with the federal policy promoting carrier flexibility and choice. 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.

⁷⁵ “Information service” is defined at 47 U.S.C. § 153(24).

⁷⁶ Decision at 84, 130-31 (OP 1), 132-33 (OP 2). The Decision generically refers to “emergency alerts and notifications” without specifying the technology used to send such alerts.

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.⁷⁷ In reaching these conclusions, the FCC noted the importance of preserving the federal policy of rejecting utility-style regulation of information services.⁷⁸ 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.”⁷⁹

Here, any obligations to provide services at particular times and of particular 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.”⁸⁰ Indeed, the Decision repeatedly justifies the Wireless Service Requirements based on the status of wireless carriers as “public utilities” under

⁷⁷ 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, 33 FCC Rcd 12075 (2018) (“*Wireless Messaging Order*”) (finding that two forms of wireless messaging, Short Message Service (SMS) and Multimedia Messaging Service (MMS), are information services).

⁷⁸ See *Restoring Internet Freedom Order*, 33 FCC Rcd at 426-29 ¶¶ 194-95. Although the *Mozilla* court vacated the FCC’s express preemption of state regulation of intrastate broadband, 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.” *Mozilla*, 940 F.3d at 74, 85 and n.4 (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). *Mozilla* also did not address whether the Communications Act preempted any particular state statute, whether under field, express, or conflict preemption principles.

⁷⁹ *Wireless Messaging Order*, 33 FCC Rcd at 12101 ¶ 49 (innovative services flourish when “subject to the Commission’s long-standing national policy of nonregulation of information services”) (quoting *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 21 (2004), *aff’d*, *Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007)).

⁸⁰ See, e.g., *FCC v. Midwest Video*, 440 U.S. 689, 706 (1979) (obligation to operate a minimum number of channels and hold certain channels open for specific users).

California law.⁸¹ Such obligations are therefore preempted to the extent they apply to broadband and text messaging.⁸²

C. The Wireless Service Requirements Are Barred by Field Preemption

Finally, the Wireless Service Requirements are subject to field preemption under the broad provisions in Title III of the Communications Act establishing plenary federal authority over the operation of wireless networks.⁸³ The FCC has exclusive jurisdiction to regulate (among other things) the 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, and apparatus stations may use.⁸⁴ That pervasive federal regulation in these areas precludes this Commission’s attempt to regulate the same matters.⁸⁵ Yet the Decision purports to dictate the nature of service to be offered⁸⁶ and the times of operation.⁸⁷ The Decision would

⁸¹ See, e.g., Decision at 13.

⁸² 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); *CCIA*, 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”).

⁸³ 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.

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

⁸⁵ See, e.g., *Hawaiian Tel. Co. v. Pub. Utils. Comm’n of Haw.*, 827 F.2d 1264, 1275-76 (9th Cir. 1987).

⁸⁶ See, e.g., Decision at 83-84 (“We find it reasonable to adopt a rule that requires the wireless providers to ensure customers and first responders have access to minimum service levels and coverage. Minimum service levels and coverage include the following: (1) 9-1-1 service; (2) 2-1-1; (3) the ability to receive emergency alerts and notification; and (4) basic internet browsing during a disaster or commercial power outage.”).

⁸⁷ See, e.g., *id.* at 77 (“We direct the wireless providers to have emergency backup power for a minimum of 72-hours in Tier 2 and Tier 3 High Fire Threat Districts – as discussed below - immediately following a commercial grid outage to support all essential communications equipment and minimum service levels for the public.”).

also establish zones of operation (*e.g.*, the specified minimum level of service must be provided after a power outage anywhere a carrier provides coverage within its licensed footprint). Such decision-making is reserved exclusively to the FCC.

III. CONCLUSION

For the foregoing reasons, CTIA and the carrier parties to this Application respectfully urge the Commission to reconsider its imposition of the Wireless Service Requirements and revise the Decision for the reasons stated above.

Respectfully submitted August 19, 2020, at San Francisco, California.

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⁸⁸ In accordance with Commission Rule 1.8(d), counsel for CTIA is authorized to sign these comments on behalf of AT&T Mobility, Cellco Partnership and T-Mobile.