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

RESPONSE OF THE PUBLIC ADVOCATES OFFICE, THE UTILITY REFORM NETWORK, CENTER FOR ACCESSIBLE TECHNOLOGY, AND THE GREENLINING INSTITUTE TO APPLICATION FOR REHEARING OF DECISION 20-07-011 FILED BY CTIA, 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), CELLCO PARTNERSHIP (U 3001 C) D/B/A VERIZON WIRELESS AND 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)

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I. INTRODUCTION AND SUMMARY

Pursuant to Rule 16.1(d) of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure (Rules), the Public Advocates Office at the California Public Utilities Commission, The Utility Reform Network, the Center for Accessible Technology, and the Greenlining Institute (hereafter collectively the "Joint Consumer Parties") hereby submit this response to the Application for Rehearing of Decision (D.) 20-07-011, the *Decision Adopting Wireless Provider Resiliency Strategies* (hereafter, the "Decision"), filed by CTIA[1], AT&T Mobility[2], and Cellco Partnership[3] and T-Mobile[4] (hereafter, the "Wireless Applicants") on August 19, 2020 ("Application").

This Application challenges the Decision primarily on jurisdictional grounds. These arguments are not new. The Application is now the third one pending review, all raising jurisdictional challenges, within this docket. The wireless carriers, either on their own or in conjunction with the wireline carriers, have made similar arguments relating to D.18-08-004 (*Decision Affirming the Provisions of Resolutions M-4833 and M-4835 as Interim Disaster Relief Emergency Customer Protections*) and D.19-08-025 (*Decision Adopting an Emergency Disaster Relief Program for Communications Service Provider Customers*).[5] The Wireless Applicants argue here, as they have before, that the Decision contains legal error, based on the incorrect claim that the Commission lacks jurisdiction to regulate wireless services.[6] The Joint Consumer Parties wish to be as direct as possible: there is no legal error in the Decision. The issue of the Commission's jurisdiction has already been exhaustively briefed and taken up in the

[1] CTIA represents the U.S. wireless communications industry.

[2] Per AT&T Mobility, this includes 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).

[3] Cellco Partnership (U 3001 C) d/b/a Verizon Wireless.

[4] 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).

[5] Applicants made the same or substantially the same preemption arguments being made here, in comments and in a Request for Rehearing, submitted September 19, 2018, following D.18-08-004, issued on August 19, 2018. Applicants made the same or substantially the same preemption arguments being made here, in comments and in a Request for Rehearing, submitted September 23, 2019, following D.19-08-025, issued on August 15, 2019.

[6] Application, p. 14.

prior decisions and in this instant Decision.[7] In this latest iteration of these challenges, Wireless Applicants raise *no new facts or legal arguments to support their positions*.

In both this Decision and D.19-08-025, the Commission has made clear that in adopting public health and safety rules to support the reliability of communications networks in emergencies and catastrophes, the Commission's jurisdiction over public utilities and telephone corporations is broad and technology neutral.[8] [9] This jurisdiction extends to wireless services and Internet and Voice over Internet Protocol (VoIP) services, as well as traditional wireline services.[10] The Wireless Applicants' repeated protestations on jurisdictional grounds have been rejected without exception and found to be meritless. There is no reason to believe the Applicants' jurisdictional arguments made in this instance, should result in a different outcome. The Decision is well-reasoned, detailed and thorough, providing solid legal support for its conclusions.

Wireless Applicants also argue that this Decision is in error because it fails to rely on the fact that wireless carriers voluntarily undertake proactive measures to assist customers impacted by a disaster, and Applicants attempt to rely on these voluntary actions as a basis to oppose any action by the Commission to impose mandatory requirements to further public health and safety.[11] This argument too has already been presented multiple times and is without merit.[12] Even if the carriers took voluntary actions that were identical to the rules adopted in the Decision, there remains a need for mandatory and enforceable requirements that allow the Commission, public safety agencies and the public, to ensure that everyone receives equal and meaningful public health and safety protections that are at the heart of this matter.

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[7] D.19-08-025, pp. 9-15; Decision at pp. 17-22.

[8] D.19-08-025, pp. 9-15; Decision at pp. 17-22.

[9] See Public Utilities Code § 233. "Telephone line" includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without wires.

[10] D.19-08-025, pp. 11-15.

[11] Application, p. 3.

[12] The argument relating to voluntary as opposed to mandatory appears in Applications for Rehearing of D.18-08-004, filed 09/19/2018: CTIA AT&T, pp. 18-21; VOIP Coalition, *et al.* pp. 3, 11; Pacific Bell *et al*. pp. 2-3 and Applications for Rehearing of D.19-08-025, filed 09/23/2019: AT&T Mobility *el al*. pp 13, 16; Pacific Bell AT&T, *et al*. p.14; Cox California, p. 3.

Such enforceable rules, including specific and concrete reporting requirements, will ensure public health and safety, especially during times of emergency. Relying on each communications service provider to set their own standards through a voluntary framework leads to inconsistent service coverage during emergencies and customer confusion on service expectations. The lack of minimum, enforceable service standards during emergencies puts public safety and health at risk. Voluntary measures by the communications industry, no matter how well intentioned, can only serve as supplemental efforts because by their very nature are not transparent enough, consistent enough or reliable enough to be adequate to meet the needs of Californians in the aftermath of a declared emergency.

The record in this proceeding supports the Decision's refusal to rely solely on carriers' voluntary methods. The record shows that wireless service providers did not provide adequate service during widespread public safety power shutoffs (PSPS) in 2019 or during prior service failures due to events ranging from storms to accidents. During the October 2019 PSPS events hundreds of macro cell sites lost power and lost service, putting the public at elevated risk.[13] As reported by the Commission, "Marin County had 57 percent of its·280 cellular towers out of service" during the PSPS event that occurred on October 28, 2019.[14] Given that "eighty (80) percent of 911 calls are made over wireless networks," any extended wireless network outage results in significantly higher risks to the public.[15]

This response will address and refute each of Applicant's arguments as presented in the Application, showing there is no legal error in the Decision, and setting forth the reasons the application should be rejected.

II. BACKGROUND

This proceeding was opened in 2018 in order for the Commission "to consider whether to adopt comprehensive post-disaster consumer protection measures for all utilities under the

[13] Reply Comments of the Public Advocates Office on Assigned Commissioner's Ruling and Proposal for Communications Service Provider Resiliency and Disaster Response Requirements, Public Advocates Office April 17 Reply Comments.

[14] President Batjer, Prehearing Conference, p. 5 ll. 15-18. https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M320/K714/320714651.PDF

[15] Commissioner Rechtschaffen, Prehearing Conference, p. 11 ll. 21-22. https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M320/K714/320714651.PDF

Commission's jurisdiction."[16] To date, the Commission has issued decisions validating previous emergency resolutions,[17] adopting further emergency requirements for energy and water utilities,[18] adopting requirements for communications providers,[19] and opening a second Phase to consider network resiliency. As part of Phase 2, the Commission has issued its *Decision Adopting Wireless Provider Resiliency Strategies* (Decision) on July 20, 2020. The Decision requires facilities-based wireless providers in High Fire Threat Districts to develop comprehensive resiliency strategies to protect the health and safety of California citizens and to ensure continuity of communications services to customers in the event of catastrophic disasters and power outages. The decision adopts a 72-hour backup power requirement for wireless provider facilities to ensure minimum coverage is maintained during disasters and power outages and requires the wireless providers to file communications resiliency plans and emergency operations plans with the Commission. The public health and safety measures ordered in the Decision apply to facilities-based wireless carriers (also known as Commercial Mobile Radio Services (CMRS)[20]).

III. STANDARD OF REVIEW

The standard of review for applications for rehearing of Commission decisions is set forth in Rule 16.1 of the Commission's Rules of Practice and Procedure, and Public Utilities Code §1757.1. Under §1757.1, a reviewing court is limited to evaluating whether the Commission's decision was an abuse of discretion in light of the record, or whether the Commission exceeded its jurisdiction. The decision must also be supported by the findings, and it may not violate any constitutional rights of the applicant for rehearing.[21] The applicant bears the burden of proving that the Commission's decision was unlawful, and there is a strong presumption in favor of upholding the Commission's decision. For example, the Court of Appeal has held that:

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[16] OIR at p. 1.

[17] D.18-08-004 at p. 2.

[18] D.19-07-015 at p. 2.

[19] D.19-08-025 at p. 2,

[20] See Public Utilities Code § 216.8.

[21] Public Utilities Code § 1757.1 (a) 1 through 6; *see also* §1760 and §1705, and §1731.

> … when no constitutional issue is presented, a PUC decision has the same standing as a judgment of the superior court: it is presumed correct, and any party challenging the decision has the burden of proving that it suffers from prejudicial error. Indeed, our Supreme Court has repeatedly called the presumption in favor of the Commission's decision a "strong" one.[22]

Applying the standards of review set forth in Public Utilities Code §1757.1, there is no legal error in the Decision. The Commission has asserted and supported its jurisdiction to maintain communications service when power is cut off, and explained its authority over public utilities services and facilities.[23] As discussed below, there is no preemption of the wireless provider resiliency requirements adopted in the Decision. Because Wireless Applicants have not shown that the Commission abused its discretion or otherwise demonstrated legal error, the Application should be denied.

IV. THE WIRELESS SERVICE HEALTH AND SAFETY REQUIREMENTS ARE NOT PREEMPTED BY FEDERAL LAW

In adopting the health and safety requirements included in the Decision, the Commission already considered and rejected every preemption argument put forth by Wireless Applicants.[24] Even so, Wireless Applicants continue to raise issues already addressed, while alleging legal error and requesting corrections to the Decision. The following analysis demonstrates that there is no legal error in the Decision, and that there is nothing that merits correction.

A. Congress Did Not Expressly Preempt State Telecommunication Regulation

The Application argues the Decision is barred by express preemption. However, express preemption only occurs where a federal statute *explicitly* states the intention of Congress to preempt state law.

1. Contrary to Applicant's Assertions, Section 332(c)(3(A) Does Not Expressly Preempt State Authority

The Decision addresses express preemption with a reasoned and well thought out analysis, demonstrating that there is no basis for Wireless Applicants' challenge. Despite this, Wireless Applicants claim the Decision's health and safety regulations are expressly preempted

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[22] *PG&E v. Public Utilities Commission* (2015) 237 Cal. App. 4th 812, 838.

[23] D.20-07-011, pp. 14-15.

[24] D.20-07-011, pp. 20-26.

by federal law; this argument primarily rests on their analysis of *Mozilla Corp. v. FCC*.[25] While Section 332 of the Federal Communications Act expressly preempts state regulation of the *entry and rates* of mobile wireless providers,[26] Wireless Applicants admit the *Mozilla* Court rejected the argument that federal law expressly preempts state regulation of interstate communication where the regulation does not impact rates or market entry.[27] [28] Neither Joint Consumer Advocates nor the Decision, dispute that state-mandated barriers to market entry and rates are prohibited. However, the Decision does not purport to regulate rates or market entry but instead focuses on *other terms and conditions*, specifically relating to public health and safety. Yet, Wireless Applicants unsuccessfully attempt to contort the Decision's application of health and safety regulations into a barrier to entry—an argument that was flatly analyzed and rejected in the Decision.[29]

Wireless Applicants argue that "attempts to regulate the adequacy of wireless carriers' network facilities and the level or quality of their services" represent a barrier to market entry.[30] Indeed, if the Applicant's broad interpretation were adopted, it would have the unintended consequence of preempting states from regulating any aspect of wireless telecommunication as a potential "barrier to entry," a result that Congress did not intend and a result that should be avoided.

In contrast, there is clear authority, as found by California courts, to support the Commission's jurisdiction over utility "instrumentalities, equipment, and facilities . . . as are necessary to promote the health, safety comfort, and convenience of [the utility's] patrons, employees, and the public."[31] In the Decision, the Commission clearly addressed § 332, noting that it does not allow state or local governments to regulate rates or market entry of mobile providers, while further stating that it does "*not prohibit a State from regulating the other terms*

[25] *Mozilla Corp. v. FCC*, 940 F.3d 1,7 (D.C. Cir. 2019).

[26] Application, p. 7, citing Federal Communications Act, 47 U.S.C. sec. 332 (c)(3)(A).

[27] Application p. 19, fn. 77, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

[28] D.20-07-011 pp. 25-26.

[29] D.20-07-011, pp. 26-28.

[30] Application, p. 5.

[31] *Pacific Bell Wireless (Cingular), supra v CPUC,* 140 CA4th at 740-741.

and conditions of commercial mobile service.[32] Joint Consumer Advocates agree. Put another way, the Decision correctly notes that § 332 expressly reserves state jurisdiction over all matters not falling within the categories of rate or market entry regulation, including "other terms and conditions" of wireless service.[33] This belies Wireless Applicants' theory that imposition of minimum service standards for network facilities constitutes impermissible regulation of market entry.

2. Wireless Applicants Misinterpret the Savings Clause in Section 332

Wireless Applicants attempt to argue the Decision's interpretation of § 332 is unduly narrow and incorrect. Wireless Applicants base this argument on their own erroneously narrow interpretation of *Bastien v. AT&T Wireless Svcs. Inc*., 205 F.3d 983, 989 (7th Cir. 2000) (*Bastien*), even though the facts of *Bastien* have nothing to do with the type of health and safety regulations which are preserved to states through the statutes' savings clause.

In *Bastien,* the plaintiff filed suit in state court challenging AT&T's rates and a Federal Communications Commission (FCC) mandated radio tower build out plan. The *Bastien* Court held that while Congress intended complete preemption of state authority over rates and market entry of commercial mobile services, "the saving clause continues to allow claims that do not touch upon the areas of rates and market entry."[34] Simply put *Bastien* does not hold that a state's attempt to regulate the other terms and conditions of wireless services, like health and safety, are preempted by federal law. Thus, *Bastien* supports the Decision's interpretation that § 332 does not provide for an express preemption on all regulation of wireless telephone services.

In the alternative, Wireless Applicants attempt to argue that the savings clause does not apply in this case because the consumer protection rules at issue here are barriers to entry.[35] Wireless Applicants then contend "binding precedent makes clear that the Decision's

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[32] D.20-07-011, p. 22 (emphasis added).

[33] D.20-07-011, p. 22. In addition, in a May 1995 Report and Order in *In re Petition of the People of the State of California … to Retain Regulatory Authority over Intrastate Cellular Service Rates,* 10 FCC Record 7486, The FCC stated that the "CPUC retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state." This does not comport with Wireless Applicants half-baked barrier to entry theory. Rather it renders it moot.

[34] *Bastien v. AT&T Wireless Servs., Inc.,* 205 F.3d 983, 987 (7th Cir. 2000).

[35] Application, p. 12.

requirements impermissibly regulate entry."[36] However, the Wireless Application cites no "binding" precedent, or any precedent at all to support this statement. Wireless Applicants attempt to distinguish the cases cited in the Decision, claiming they are "inapposite" because "[m]ost of those cases stand for the unremarkable proposition that states may regulate false advertising and other deceptive practices in connection with wireless services."[37] Contrary to Wireless Applicants' assertions, however, those cases are analogous to the current Decision because it is the savings clause that allows States to enact and enforce consumer protection laws and public health and safety laws relating to wireless services, including the regulations at issue here.

Additionally, Wireless Applicants attempt to rely on *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 705 (4th Cir. 2015). In *Johnson*, the Court of Appeals held the Federal Communication Act did not preempt all state law claims and does not completely immunize wireless service providers from all civil suits under state law.[38] Thus, *Johnson* does not stand for the premise, as Wireless Applicants would have us believe, that any and all regulation of wireless services is expressly preempted by federal law. The *Johnson* Court did not find express preemption and provides no support for Wireless Applicants' allegations of legal error.

Moreover, the Federal Communications Act is clear that providers of commercial mobile service are treated as common carriers under federal law, and that states retain their general authority to regulate these providers even as they are specifically prohibited from regulating market entry or rates.[39] As illustrated above, the legislative history of 47 U.S.C. § 332(c)(3)(A) and its interpretation in the Courts show that states are not preempted from regulating matters that fall under "terms and conditions" of service, like consumer protection and health and safety.

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[36] Application, p. 12.

[37] Application, p. 13. Cases cited include *Pacific Bell Wireless (Cingular) v CPUC,* 140 CA 4th 718 (2005)(state consumer protection law not preempted because it did not directly impact rates.); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004)(no preemption where consumer protection issue in state court did not impact rates directly); *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366 (2001)(no preemption where consumer protection issue in state court did not impact rates directly)*; Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000)(no preemption relating to consumer protection law); *State ex rel. Nixon v. Nextel W. Corp.*, 248 F. Supp.2d 885, 892 (E.D. Mo. 2003)(no preemption of state law regulating relying deceptive descriptions 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[.]'").

[38] *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 705, 706 (4th Cir. 2015).

[39] 47 U.S.C sec. 332 (c)(1)(A).

Section 332 does not, and is not intended to, preempt all state level regulation. If it were, the Commission would be preempted from exercising its authority to support a Wireless Registration process to ensure wireless providers operating in the state comply with state law and Commission regulation, and to confer certain benefits such as interconnection and numbering.[40] Far from being "beside the point" as Wireless Applicants argued,[41] the fact that the Commission exercises the regulatory authority to issue Wireless Registrations, in the face of similar jurisdictional challenges by the wireless carriers, not only refutes their overly expansive view of § 332 but exposes the wireless carriers attempt to use jurisdiction as a tool to dispute meaningful regulations, but be silent on the issue when it comes to using the benefits conferred by Commission regulation. Therefore, the Decision is not in error in terms of the application of § 332 and the savings clause.

3. The Wireless Service Requirements Are Considered State "Police Powers" and are Protected by the "Presumption Against Preemption."

Wireless Applicants contend the Commission may not invoke state police powers because there is no "presumption against preemption" in "express preemption" cases, citing a line of cases that are for the most part, inapposite. As the Decision correctly notes, 47 U.S.C. sec. 332(c)(3)(A) expressly reserves state jurisdiction over all other matters not falling within the categories of rate or entry regulation, including other terms and conditions of wireless service.

Wireless Applicants cite *Puerto Rico v. Franklin Cal. Tax-Free Tr*., 136 S. Ct. 1938, 1946 (2016) in support of their express preemption argument. In *Franklin*, the Court of Appeals recognized a "presumption against preemption" but found it was inapplicable because the statute in question contained clear evidence of congressional intent of preemption.[42] Here, no such preemptive language exists to support Wireless Applicants express preemption argument and thus the "presumption against preemption" is relevant here and the *Franklin* case has no application here.

Applicant's also cite *Qwest Corp. v. Ariz. Corp. Comm'n*, 567 F.3d 1109, 1118 (9th Cir. 2009) and *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) in support of their argument that

[40] Pub. Util. Code Section 1013 (registration authority to companies lacking market power); D.94-10-031, D.13-05-035.

[41] Application, p. 9.

[42] *Puerto Rico v. Franklin Cal. Tax-Free Tr*., 136 S. Ct. 1938, 1946 (2016).

there should be no presumption against preemption here. In *Qwest,* there was no express preemption, only conflict preemption was found.[43] The statute in question at the heart of the *Qwest* case is not § 332 but 47 U.S.C.S. § 271, which is applied through 47 U.S.C.S. § 252; Section 252, also contains a savings clause. The *Qwest* Court held that the savings clause did not apply because the Arizona Corporations Commission proposed actions that would impact rates, an action which was outside of the savings clause. Wireless Applicants cite the case in an attempt to support their contention that the ordinary presumption against a finding of preemption should not apply here; however, both the law and the facts in Qwest are not at all analogous. Again, a cherry-picked quote out of dicta in a case does not support Wireless Applicants' express preemption argument or their attempt to dismiss the presumption against preemption principle.

Applicants further cite to *Ting*, a consumer class action case to dismiss the presumption against preemption, but the statutes in question did not contain preemptive text, so express preemption was not an issue.[44] The court pointed out that it did not believe that the state consumer protection laws at issue in *Ting* obstructed congressional intent of the Act. By looking at the provisions of the "whole law, and . . . its objectives and policy" the *Ting* Court found that, in terms of the laws at issue, consumer protection and other police power interests may be reserved to the states. Not only does *Ting* fail to support Wireless Applicants' claim of express preemption, it stands in opposition to Wireless Applicants' preemption arguments, and specifically Wireless Applicants' express preemption arguments. That the *Ting* Court did not end up applying the presumption against preemption principle does nothing to support Wireless Applicants' arguments here.

Contrary to Wireless Applicants' assertions, and as Joint Consumer parties have already discussed, the Decision is correct in ruling that there is a "presumption against preemption" as it relates to a state's police powers exercised through traditional health and safety regulation.[45] The Decision is equally correct in asserting that health and safety regulations are "other terms and conditions of wireless service."[46] This reasoning is especially appropriate because, as the

[43] Joint Consumer Parties address conflict preemption below.

[44] *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003).

[45] D.20-07-011, p. 12.

[46] D.20-07-011, p. 12.

Decision points out, the presumption against preemption where the State is exercising traditional health and safety police powers is particularly strong.[47]

B. The Wireless Service Requirements Are Not Preempted Because They Do Not Conflict with or Undermine Federal Policies

1. The Wireless Service Requirements Do Not Conflict with an Explicit Federal Policy Decision to Promote a Voluntary Industry Framework Rather Than Prescriptive Regulation to Improve Network Resiliency

Wireless Applicants purport to rely on "ordinary principles of conflict preemption" arguing that where there is no express preemption, there may still be conflict preemption.

Wireless Applicants argue that under the ordinary principles of conflict preemption "state law is preempted whenever it 'prevent[s] or frustrate[s] the accomplishment of a federal objective,' including 'the purposes and objectives of the [FCC].'"[48] They cite *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 862, 871 (2000) in support. While *Geier* is often cited to demonstrate the legal principle of conflict preemption, it has its limits and is not appropriate here. In *Geier*, the Court relied on more formal administrative process conducted by the Department of Transportation, as well as a more direct and contemporaneous statement of the agency's intent that does not exist here. That case tells us nothing about how principles of conflict preemption apply to the FCC's varied approach to public safety, must less the possible conflict with the health and safety regulation adopted in the Decision. Merely plucking some language from a general discussion in a case, does not provide legal support. To support a claim of preemption, Wireless Applicants must explain how the Decision's health and safety regulations prevent or frustrate specific federal objectives.

The Decision acknowledges the issue of conflict preemption but finds that its regulations cannot conflict with "nonexistent federal regulations."[49] As the Decision points out, conflict analysis is to be conducted on a case-by case basis and is dependent on the specific facts of the case.[50] Because the Application does not provide an explanation or specific examples of how it

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[47] D.20-07-011, p. 26, citing (*Farina v. Nokia Inc*, 625 F.3d 97, 117, 121-22 (3d Cir. 2010).

[48] Application, p. 14, citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 862, 871 (2000).

[49] D.20-07-011, p. 29.

[50] D.20-07-011, p. 31, fn 95, citing *Telesaurus VPC, LLC v Power* (9th Cir., 2010) 623 F.3d 998, 1007.

would be impossible for a provider to comply with both the Commission's regulations and relevant FCC regulations (if they existed), it fails to prove there is conflict preemption in this case.

2. The Wireless Service Requirements Do Not Conflict with the Federal Law or Policy of Non-Regulation of Information Services to the Extent they Apply to Mobile Internet Access and Text Messaging Services

The Wireless Applicants argue that Commission requirements involving messaging services and broadband Internet are preempted because these functions are "information services" under the 1996 Federal Communications Act, and thus they fall under an FCC policy of deregulation.[51] Yet, the Court of Appeals for the DC Circuit has addressed the issue of preemption of state regulation over information services, and found otherwise. In *Mozilla*, the DC Circuit found that services covered by Title I of the Communications Act (information services), rather than Title II (telecommunications services) are not subject to broad preemption, recognizing that "in any area where the [Federal Communications] Commission lacks the authority to regulate, it equally lacks the power to preempt state law."[52] Importantly, the Mozilla Court explicitly found that by giving up regulatory authority over information services, the FCC could not preempt state law specifically addressing public safety and emergency services. The Court found that the FCC missed, "the fact that, whenever public safety is involved, lives are at stake" and that the FCC's unwillingness to consider public safety as it divested itself of jurisdiction left a dangerous void that states should be able to fill, regardless of the Title I classification.[53]

Wireless Applicants do not address this provision of *Mozilla,* nor do they cite any authority, any case law, any statute, or any regulation, that would classify these specific services as being preempted by federal regulation. To quote the Decision, "Preemption of state laws, including laws regulating information services, requires 'a link to express delegated authority.'" (*Comcast Corp. v. FCC*, 600 F.3d 642 at 658 D.C. Cir. 2010.)"[54]

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[51] Application, p. 18.

[52] Mozilla at 123.

[53] Mozilla at 98-100.

[54] D.20-07-011, p. 23, fn. 67.

C. The Wireless Service Requirements Are Not Barred by Field Preemption

Having failed to formulate any legally supportable argument relating to express preemption or conflict preemption, Wireless Applicants pivot to field preemption. Field preemption is generally invoked where there is no express preemption, but a federal regulatory scheme is so pervasive it can be said to "occupy the field."[55]

1. No Field Preemption for Federal Non-Regulation

In their attempt to raise field preemption, Wireless Applicants identify various FCC rulemakings already discussed in the Decision, including an FCC rulemaking in 2007 where backup power rules for wireless and wireline were not adopted, in part due to challenges by the wireless industry.[56] Wireless Applicants also claim a 2013 FCC rulemaking proceeding regarding wireless telephone services was not "adequately addressed" in the Decision.[57] This is simply wrong.

The Decision is thorough in its recounting of the history of FCC's consideration of backup power regulation, including the 2013 FCC rulemaking referred to in the Application. Specifically, the Decision recounts a lengthy history of the exploration of backup power undertaken by the FCC and California going back as far as 2006, which did not result in any regulations being adopted.[58] It notes the 2006 California legislation that directed the Commission to explore backup power. It recounts how in 2007 the FCC promulgated backup power rules that were never formally adopted, but were held in abeyance waiting for approval of the Office of Management and Budget (OMB). The Decision further explains how in 2008-2009 the FCC rules were rejected by the OMB and the FCC *abandoned the proposed backup power rules*. The Decision recounts a subsequent (2013) FCC rulemaking and correctly states that FCC never again considered *rules specific to backup power*.[59] Thus, while Wireless Applicants contend that the Decision attempted to "brush aside" these FCC actions, the reality is that backup

[55] *Farina v. Nokia Inc*. 625 F.3d 97,116-117, 120-122 (3d. Cir.2010) (Finding that where a Congressional statute has a savings clause this weakens any field preemption argument, expressly noting that "if Congress intended to preempt the entire field . . . there would be nothing . . . to 'save' and the provision would be mere surplusage.")

[56] Application, p. 16.

[57] Application, p. 15.

[58] D.20-07-011, pp. 9-12.

[59] Decision 20-07-011, p 16.

power requirements were not part of the FCC's 2016 "*Wireless Networks Resiliency Order*," which resulted from the 2013 rulemaking.[60] Thus, the Decision correctly states that "the FCC was not attempting to or considering adoption of backup power rules" in this 2013-2016 rulemaking.[61] If the FCC never adopted a rule, there can be no conflict preemption.

Wireless Applicants further state that in the initial 2013 FCC notice, the FCC asked about performance standards, and included questions "covering potential backup power and service obligations."[62] They argue by implication that the mere fact that these questions were raised and rejected at the FCC provides sufficient grounds for a finding of preemption. Wireless Applicants admit that any development by the FCC of regulations pertaining to resiliency and backup power standards were rejected, in the 2016 Order, in favor of a "voluntary framework."[63] On this basis Wireless Applicants argue that the FCC's adoption of a voluntary framework preempts the Commission from issuing any regulations because that would "impose a different standard" than that of the FCC.

To support this argument, Wireless Applicants invoke the theory of nonregulation. In *Mozilla,* the FCC defended its attempt to make sweeping preemption claims based on classification even regarding resiliency and back-up power. That theory was rejected in *Mozilla,* where the court held, "No dice."[64] As the *Mozilla* Court explained, "as a matter of basic agency law and federalism, the power to preempt the States' laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy."[65] An agency statement of policy, where it adopts a voluntary scheme and refrains from regulating does not amount to a congressional delegation of authority.[66] Plainly the theory of nonregulation does not support preemption here.

Wireless Applicants also cite *Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, in support of their theory, offering a truncated and misleading quote from the

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[60] Application, p. 15.

[61] D.20-07-011, p. 12

[62] Application, p. 15.

[63] Application, p. 16.

[64] *Mozilla Corp. v. FCC*, 940 F.3d 1,78 (D.C. Cir. 2019).

[65] *Mozilla* at 78.

[66] *Mozilla* at 78.

case.[67] *Ark Elec.* concerns wholesale electricity rates charged to member distributors, and does not support Wireless Applicants' argument for field preemption. First, the discussion in *Ark. Elec.* finds that the regulation at issue was not preempted and that the Arkansas PUC properly exerted jurisdiction over these rates. The *Ark. Elec.* Court stated, acknowledged that a decision to "forgo regulation in a given area may imply" that an area is best left unregulated, but that such finding requires specific and explicit intent language and in that instance, "nothing in the language, history, policy of the Federal Powers Act suggests such a conclusion [to preempt]. Congress's purpose in 1935 was to fill a regulatory gap, not to perpetuate one."[68]

Similarly here, there is every indication based on recent public safety and natural disaster events, that there exists a regulatory gap that this Commission is trying to fill and there is no indication that nonregulation advances specific federal regulatory objectives and/or was intended to have a preemptive effect. The FCC, in declining to regulate resiliency and backup power, should properly be read as allowing the states to promulgate health and safety regulations.

2. There is No Field Preemption with Regard to Health and Safety Regulations

In another path arguing for field preemption, Wireless Applicants put forth the assertion that the health and safety regulations adopted by the Commission are "subject to field preemption under the broad provisions of Title III of the Communication Act establishing authority over the operation of wireless networks."[69] They argue that federal regulations on wireless service are so pervasive that any Commission attempt to regulate is preempted. The Application follows with the all too familiar argument that states are preempted from regulating anything having to do with "the use of radio spectrum." As clearly pointed out in the Decision itself, the Commission has not attempted to regulate radio spectrum in any way.[70]

As discussed above, the Federal Communications Act does not occupy the field for all aspects of wireless service, but rather anticipates that states will continue to have a role in regulating carrier activity. Specifically, the Federal Communications Act indicates that commercial mobile radio service providers are common carriers under federal law, and, as

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[67] Application, p. 17, fn.72.

[68] *Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 385.

[69] Application at p. 20.

[70] D.20-07-011 at pp. 25-26.

described above, states retain their general authority to regulate the "terms and conditions" of service offered by these carriers, even as they are specifically prohibited from regulating market entry or rates, and under Title III the states have limited authority over spectrum issues.[71] Yet, as already discussed, the legislative history of 47 U.S.C. sec. 332(c)(3)(A) provides a non-exhaustive list of areas covered, which specifically includes the authority to enact consumer protections:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other *consumer protection matters;* facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only *and not meant to preclude other matters generally understood to fall under "terms and conditions*."[72]

As the Decision properly notes, Congressional delegation over the FCC's authority over wireless spectrum pertains to the allocation of spectrum and the resulting national spectrum plan.[73] Nothing in the Decision relates to the allocation of spectrum, the carriers' serving footprints or any Title III regulation and the carriers' arguments must be rejected.

V. CONCLUSION

The Joint Consumer Parties support the Decision and urge the Commission to deny the Application for Rehearing. As discussed above, the Commission did not err in finding no preemption of any type. The Application should be denied as there is no error to correct.

[71] 47 U.S.C sec. 332 (c)(1)(A).

[72] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at p. 261 (*emphasis added*).

[73] D.20-07-011 p. 25.

Respectfully submitted,

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