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AT&T'S OPENING COMMENTS ON ORDER INSTITUTING RULEMAKING PROCEEDING TO CONSIDER AMENDMENTS TO GENERAL ORDER 133

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AT&T[1] respectfully submits these Opening Comments in response to the Order Instituting Rulemaking Proceeding to Consider Amendments to General Order 133 ("OIR").[2]

I. EXECUTIVE SUMMARY.

The OIR seeks comments regarding existing service quality regulation of traditional wireline voice service ("TDM") and whether to impose service-quality regulation on interconnected Voice over Internet Protocol ("VoIP") service and wireless services. AT&T welcomes the Commission's reconsideration of whether the out-of-date service-quality metrics for TDM service reflect the current market reality. Such an examination is important, and it is overdue. The telephone market and wider communications landscape is radically different from what it was when service-quality regulation was established decades ago. AT&T also appreciates that Commissioner Houck and fellow Commissioners have asked foundational questions that provide an opportunity to show why service-quality standards are unnecessary in today's fiercely-competitive marketplace.

Regarding TDM, the OIR asks whether current service-quality measures adopted in General Order ("GO") 133-D "[m]eet the goals of GO 133," "remain relevant in today's regulatory environment," and incorporate "an effective penalty mechanism and enforcement framework." Regarding interconnected VoIP and wireless services, it asks whether service-quality metrics should be applied to those services. GO 133-D service-quality requirements should be removed for TDM service, as those requirements are not relevant to or useful in

[1] Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C); AT&T Corp. (U 5002 C); Teleport Communications America, LLC (U 5454 C); and AT&T Mobility LLC (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)) are collectively referred to hereinafter as "AT&T."

[2] Order Instituting Rulemaking Proceeding to Consider Amendments to General Order 133, R.22-03-016, dated March 23. 2022.

today's market environment; and no service-quality requirements should apply to VoIP or wireless services, for policy, legal, and feasibility reasons.

TDM Service. The Commission's established policy, reflected in its Uniform Regulatory Framework ("URF") decision removing price regulation for large carriers, is that where competition exists the Commission should rely on competition – not regulatory mandates – as the best way to maximize consumer welfare.[3] The communications market, in California and nationwide, is intensely competitive, and has been so for years. Consumers in California choose every day among a variety of communications options, from voice to texting to email to social media, and do so based on their preferred mix of price, quality, convenience, and other attributes. They make that choice from among hundreds of providers offering an unprecedented range of technologies, including ILECs, CLECs, wireless carriers, cable companies, and both interconnected and over-the-top VoIP providers.

When there is robust competition, the marketplace ensures quality service attuned to customers' needs and desires. There is no more effective or efficient force to ensure strong service quality than the risk of losing customers or going out of business. Just as the competitive market acts to keep prices just and reasonable in the eyes of consumers, so too does it act to keep service quality at the level consumers demand, because any provider that fails to provide an attractive mix of price, quality, and other attributes faces loss of business, which is the most compelling incentive to respond in a market-driven economy.

[3] *Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities*, D.06-08-030, at 275-76 (Cal. P.U.C. 2006) ("*2006 URF Decision*").

As the Commission recognized in 2009, "competitive environments act to apply a natural pressure for carriers to ensure adequate service quality."[4] Accordingly, the Commission reduced and simplified its requirements. Now, well over a decade later, and with an even more diversified and competitive market, it is time to take the logical next step and remove service-quality requirements and penalties for TDM service.

Eliminating TDM service-quality requirements is a logical evolution. Service-quality regulation was first imposed in 1972, as a pure monopoly-era tool to ensure quality where the market could not.[5] That is not the world today, where competition thrives and replaces the need for prescriptive service-quality rules. Consumers continue to steadily abandon TDM, so it serves just a small and declining piece of the market. That makes the costs of TDM regulation, which are ultimately borne by consumers, outweigh any hypothetical benefit. Just as the Commission's removal of retail rate regulation in 2006 was "long overdue" in light of competition, so too has the time come to remove TDM service-quality regulation.[6]

Interconnected VoIP Service and Wireless Services. The above discussion also applies to interconnected VoIP and wireless services, as the competitive market in California means there is no basis for imposing service-quality regulation on those services. In fact, the Commission expressly declined to impose service-quality regulation on interconnected VoIP

[4] *Decision Adopting General Order 133-C and Addressing Other Telecommunications Service Quality Reporting Requirements*, D.09-07-019, at 2 (Cal. P.U.C. 2009) ("*2009 Service Quality Decision*").

[5] *General Order No. 133, Governing Standard of Telephone Service, Adopted*, D.80082 (C.9353), 73 CPUC 2d 426 (Cal. P.U.C. 1972).

[6] *2006 URF Decision*, D.06-08-030 at 3.

and wireless services in both 2009 and 2016.[7] And today the market has become even more competitive.

In fact, the OIR provides *no* basis to consider service-quality regulation for VoIP or wireless services, because it does not identify *any* service-quality deficiencies for those services in California. Thus, the OIR does not identify any "problem" to be solved by proposed regulation of VoIP and wireless services. As Justice Breyer wrote long ago, "before advocating the use of regulation, one must be quite clear that the unregulated market possesses serious defects for which regulation offers a cure," and public policy should "urge reliance upon an unregulated market in the absence of a significant market defect."[8]

The OIR seeks comment on service-quality regulation for VoIP and wireless service because more Californians are using those services.[9] While that observation is accurate and reflects a long-running trend, that trend provides no basis for imposing new regulation. To the contrary, it demonstrates the competitive nature of the communications market and that consumers are freely choosing services that meet their changing needs, thus abandoning TDM service for more advanced services. This outcome is a reason to celebrate the success of the Commission's deregulatory URF decisions and the Federal Communications Commission's ("FCC") "light-touch" approach to VoIP and wireless services. That approach has enabled those services to grow and improve, free from heavy-handed regulation, to become overwhelming consumer favorites. Promoting investment in building reliable networks and providing service that is attractive to consumers is precisely the point of the light-touch policy. By contrast, the

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[7] *2009 Service Quality Decision*, D.09-07-019 at 5, 23, 57-58; *Order Modifying Decision (D.) 16-08-021 on issue of Fines for CLECs and Denying Rehearing of Decision as Modified*, *2018 Service Quality Rehearing,* D.18-10-058, at 20-21 (Cal. P.U.C. 2018) ("*2018 Service Quality Rehearing*").

[8] Stephen Breyer, REGULATION AND ITS REFORM, at 184-85 (Harvard Univ. Press 1982).

[9] OIR at 14.

idea of imposing service-quality regulation of VoIP or wireless is a textbook example of unwarranted "regulatory overreach," a solution in search of a problem, and would undermine decades of procompetitive policy toward those services.

Such regulation also would distort incentives and impede competition. For example, while the OIR seeks comments on interconnected VoIP, there are many other ways to provide VoIP service, such as Skype, Facetime, Facebook Messenger, Google Voice, WhatsApp, or other apps. To the extent service-quality rules were applied only to interconnected VoIP providers, it would create severe regulatory asymmetry, which would be unfair and anticompetitive. It also is not practicable to apply TDM-type metrics to VoIP and wireless services due to technological differences. Imposing service-quality requirements would only divert interconnected VoIP and wireless providers' resources from continued investment and service improvements.
Finally, there are significant legal barriers to states imposing service-quality regulation on interconnected VoIP and wireless services, including federal preemption. The FCC has made clear that applying public utility-type state regulation to VoIP and wireless services would conflict with and undermine its carefully-crafted policy toward those services – which has led to the great success of those services with consumers.

II. BACKGROUND OF SERVICE-QUALITY REGULATION.

The Commission first adopted service-quality regulations for telephone voice service in 1972 because the service was treated as a pure natural monopoly.[10] That is decidedly no longer the case. In 1996, the federal Telecommunications Act opened the door to competition in local telephone service, and in 2006, the Commission determined that local competition was so robust

[10] D.80082, 73 CPUC 2d 426.

that price regulation was no longer necessary for the large incumbent LECs.[11] The *2006 URF Decision* accordingly found that the market – not regulation – could and should be relied upon to ensure just and reasonable rates under Section 451.[12] The Commission further recognized technological and competitive neutrality are essential to ensure the market is not distorted by asymmetric regulatory obligations, which in turn promotes a healthy competitive landscape.[13]

In 2007, the Commission defined its objectives for ensuring adequate service quality, stating that:

> Service-quality regulation should aim to 1) *rely on competition, wherever possible, to promote broad consumer interests* and 2) promote development of a wide variety of new technologies and services in a competitively and technologically neutral manner.[14]

In 2009, the Commission evaluated whether its then-existing service-quality standards, which pre-dated the 2006 URF proceeding, continued to protect California consumers and the public interest. Recognizing that "competitive environments act to apply a natural pressure for carriers to ensure adequate service quality," the Commission found "it is reasonable to simplify" its service-quality requirements. It therefore removed many service-quality measures and standards for TDM, and declined to impose quality requirements on wireless or VoIP services.[15] The Commission retained five requirements for rate-of-return carriers and three requirements for URF carriers (down from nine in GO 133-B and the 30 proposed in that proceeding).

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[11] *2009 Service Quality Decision*, D.09-07-019 at 2-3.

[12] *2006 URF Decision*, D.06-08-030 at 182-83, 265, 270-71.

[13] *Id*. at 151-52.

[14] Assigned Commissioner's Ruling and Scoping Memo, *Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B*, R.02-12-004, dated March 30, 2007, at 3-4 (emphasis added).

[15] *2009 Service Quality Decision*, D.09-07-019 at 2-4 ("We will require reporting of fewer measures for [URF carriers and CLECs] since these carriers operate in more competitive markets").

The Commission stated that "[t]hese reduced measures reflect our established policy of supporting reduced reporting requirements for competitive carriers."[16]

The Commission opened a new proceeding in 2011 to assess whether the service-quality standards established in 2009 were meeting its goals, whether they were "relevant to the current regulatory environment and market," and whether the Commission should establish penalties for performance that does not meet its standards.[17] In 2016, the Commission issued its order in that proceeding, adopting fines for not meeting service-quality standards in certain circumstances (including an alternative allowing a carrier to seek to make network investments rather than simply pay the fine).[18] Once again, the Commission declined to impose service-quality regulation on wireless or VoIP services.[19]

The OIR asks essentially the same questions the Commission asked in 2011 about its then-current standards, including whether the current standards in GO 133-D meet its goals, whether they are "relevant to the current regulatory environment and market," and whether the Commission's penalty and enforcement mechanisms are effective.[20] The OIR also asks, again, whether to impose service-quality regulation on interconnected VoIP and wireless services.[21]

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[16] *Id*. at 3-4, 23, 57-58. The Order also established the requirement that wireless carriers provide coverage maps depicting approximate wireless service coverage, both on carriers' websites and at their retail locations (*id*. at 6, 76). The Commission further requires all facilities-based carriers, including wireless carriers, to report major service interruptions. *See id*. at 93 (Ordering Paragraph 4). VoIP providers also are subject to some reporting requirements.

[17] *Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules*, R.11-12-001, at 3-4 (Dec. 12, 2011).

[18] GO 133-D, § 9.7

[19] *Decision Adopting General Order 133-D*, D.16-08-021 (Cal. P.U.C. 2016) ("*2016 Service Quality Decision*"). That Decision also extended certain outage service reporting requirements to VoIP providers. The Commission modified the Decision later by changing the rule for when a CLEC's failure to meet a standard is primarily the fault of another carrier. *2018 Service Quality Rehearing,* D.18-10-058.

[20] OIR at 15.

[21] *Id*. at 16.

III. THE COMMISSION SHOULD DISCONTINUE SERVICE-QUALITY REGULATION FOR TDM SERVICE AND REJECT SUCH REGULATION FOR INTERCONNECTED VOIP AND WIRELESS SERVICES.

A. The Communications Marketplace in California is Extremely Competitive.

The communications market in California is highly competitive. The Commission found competition to be strong enough to remove price regulation 16 years ago,[22] and competition has only grown since then. Wireless, VoIP, and broadband services have continued to improve in quality, pricing, availability, and subscribership. TDM service, by contrast, has significantly declined as consumers flock to newer technologies. As the FCC observed in late 2020:

> The Telecommunications Act of 1996 (the 1996 Act) changed the focus of telecommunications law and policy from the regulation of monopolies to the encouragement of robust intermodal competition. … In the nearly quarter-century since the passage of the 1996 Act, the telecommunications marketplace has transformed from a marketplace dominated by monopolies to a marketplace characterized by competition and technological innovation. Former monopolist incumbent LECs are now one of many intermodal competitors, facing fierce competition from competitive LECs, cable providers, and wireless providers, among others. And that competition has itself shifted from siloed markets to the Internet, as increasingly local and long distance voice, data, video, and nearly all communications technologies are delivered via broadband connections. The Commission has repeatedly adjusted the incumbent LEC-specific obligations in the 1996 Act to account for changed circumstances.[23]

The dramatic developments in wireless and broadband technologies and infrastructures, the continuing advancements in handsets, the ability of new devices to provide voice and video communications, and a variety of associated innovations give consumers a dizzying array of communications options. Therefore, as the FCC and this Commission have recognized,[24] it is

[22] *2006 URF Decision*, D.06-08-030.

[23] *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, 35 FCC Rcd. 12425, ¶¶ 1-2 (FCC 2020) ("*Modernizing Unbundling*").

[24] *Id*.; *2006 URF Decision*, D.06-08-030 at 74-76, 124, 157, 164; *Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the* Market, D.16-12-025, at 30, 125-26, 185 (Cal. P.U.C. 2016) ("*2016 URF Decision*").

necessary to analyze the marketplace as an interrelated competitive system, not individual silos of services, and to reduce or remove regulation as competition continues.

Interconnected VoIP and Broadband. Interconnected VoIP service is provided over a broadband connection. Broadband service is offered over a wide variety of technologies, which compete with each other and with voice service by offering consumers a range of options on various characteristics, such as price, speed, and latency.[25] This competition drives quality. As the FCC stated, in order "[t]o compete with other providers and to meet consumer's expectations, [broadband] providers are continually investing in network upgrades and implementing technological developments *that improve the quality of their services* and increase the speed of their networks."[26]

Broadband investment is rapid and ongoing, and will only grow with recent federal and state programs aimed at boosting deployment. For example, broadband providers made $80 billion in capital expenditures in 2018 alone,[27] which industry participants recognize "as a sign of a competitive marketplace."[28] At the same time, prices for the most popular fixed-broadband plans have "*decreased by 26.2%*" from 2015 to 2021, while speeds have "*increased by 126%*."[29] Similarly, the highest-speed plans in 2021 were priced *39.2% lower* than 2015.[30] Further, "consumers' actual broadband service speeds are generally close to or

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[25] *2020 Communications Marketplace Report*, 36 FCC Rcd 2945, ¶ 85 (FCC 2020) ("*FCC 2020 Competition Report*").

[26] *Id.*, ¶ 85 (emphasis added).

[27] *USTelecom Industry Metrics & Trends 2020*, at 7, available at https://www.ustelecom.org/wp-content/uploads/2020/04/USTelecom-State-of-Industry-2020-Update.pdf. Notably, "for fixed broadband, incumbent LECs are just one of many intermodal competitors, providing only about 22% of residential broadband subscriptions at or above 25/3 Mbps." *Modernizing Unbundling*, 35 FCC Rcd. 12425, ¶ 22.

[28] *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶ 106.

[29] *USTelecom 2021 Broadband Pricing Index,* at 4-5 (emphasis added), available at https://ustelecom.org/wp-content/uploads/2021/05/2021-Broadband-Pricing-Index-Report.pdf.

[30] *Id.* at 6 (emphasis added).

exceed advertised speeds,"[31] and any differences in latency among terrestrial-based broadband services "are relatively small and unlikely to affect the perceived quality of highly interactive applications (voice communications, video chat, and interactive gaming)."[32] Given the national "hands-off" approach toward broadband rules, these consumer benefits have resulted from competition, not regulation.

Interconnected VoIP service, like broadband in general, has always been subject to the FCC's "light-touch" approach.[33] The Commission recognized in the *2006 URF Decision* that VoIP technologies are a "near-perfect substitute" to traditional wireline service, and that cable companies offering VoIP service can enter the voice market very easily.[34] That is undeniably true, as interconnected VoIP subscriptions in California and nationwide now dwarf TDM subscriptions, for both retail and business customers. As of December 2019, of the 5.67 million residential wireline voice connections in California, 4.23 million were interconnected VoIP and just 1.4 million were TDM.[35]

The pattern in California tracks the rest of the nation. As of December 2019, there were close to 70 million interconnected VoIP subscriptions nationwide, the overwhelming majority of which were non-ILEC lines,[36] but just 38 million end-user TDM voice lines.[37] The number of TDM voice lines declined from 2016-2019 at a compound annual rate of 13%, while interconnected VoIP subscriptions increased at a compound annual growth rate of 3%.[38]

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[31] *FCC 2020 Competition Report*, ¶ 117.
[32] *Id.*, ¶ 120.
[33] *See infra*, p. __.
[34] *2006 URF Decision*, D.06-08-030 at 75.
[35] *FCC March 2022 Voice Report* at 12 (Table 3).
[36] *Id.*, Fig. 3.
[37] *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶ 146.
[38] *Id.*, ¶ 147.

Likewise, the number of interconnected VoIP providers nationally grew from 1,321 in 2018 to 1,457 in 2019, while the number of TDM voice providers dropped from 992 to 967.[39] Indeed, there are hundreds of companies listed on the California Public Utilities Commission's website under the utility type classification, "Digital Voice Service," which the Commission defines as "a company that provides Interconnected Voice Over Internet Protocol (VoIP) services and issued a utility number pursuant to PU Code Section 285."

Finally, prices for interconnected VoIP are naturally constrained by wireless competition, as wireless providers offer the same kind of voice/data bundles in which VoIP is often sold, as well as by Over-the-Top ("OTT") VoIP offerings and by apps, such as Skype, Google Voice, or Facetime, that effectively offer voice service for free.[40] And while VoIP requires a broadband connection, broadband prices have dropped.

Wireless Services. Wireless services are another prime example of the consumer benefits of relying on competition rather than regulation to meet consumer needs. Wireless providers continue to invest massively in their networks, enabling them to offer better, more innovative services at the lowest possible price and fastest rate of deployment, with a variety of options designed to meet customers' preferences. The resulting consumer benefits are shown in the ever-growing number of wireless subscriptions and wireless-only households, as well as the ever-growing use of wireless data services.

[39] *Id.*, ¶ 147.

[40] *Id.*, ¶ 143 ("We focus on voice services interconnected with the PSTN in our reporting, in light of the continued ubiquitous availability and use of the PSTN and interconnected services, but acknowledge that there are many other types of offerings, including apps running solely on data networks that provide similar functionality entirely outside the PSTN and nearly indistinguishable to providers and the Commission from other network data traffic. Many of these apps combine the benefits of voice, video, and text communications into one data-based service.").

Wireless providers have invested nearly $140 billion in their networks since 2016 [41] Last year alone they invested $30 billion, a five-year high,[42] and since 2018 have invested about $140 per person per year.[43] And that does not include $95 billion recently spent for 5G spectrum.[44] This investment leads to many benefits. One is faster speeds. Mobile data traffic was 108 times faster in 2020 than in 2010, with download speeds 31 times faster.[45] And, of course, wireless providers are rapidly deploying 5G networks, which will be faster still.[46] As the FCC has observed, "[n]etwork speed is a key characteristic of mobile wireless performance,"[47] and wireless providers are delivering.

Network coverage and network density also have improved, giving consumers a range of wireless choices. There are three nationwide mobile wireless providers, two large regional providers, and "dozens of other facilities-based mobile wireless service providers."[48] A fourth nationwide facilities-based competitor is in the process of entering the market.[49] In addition, consumers can obtain service from many Mobile Virtual Network Operators ("MVNOs").[50]

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[41] CTIA, *2021 Annual Survey Highlights*, at 3 ("CTIA 2021 Survey"), available at https://api.ctia.org/wp-content/uploads/2021/07/2021-Annual-Survey-Highlights.pdf.

[42] *Id*.

[43] Boston Consulting Group, *Building the US 5G Economy*, at 12 (Sept. 2020) ("BCG 5G Report"), available at https://api.ctia.org/wp-content/uploads/2020/09/Building-the-5G-US-Economy-1.pdf.

[44] Mike Dano, *After spending $117B, US carriers ask for even more 5G* spectrum, lightreading.com, March 16 2022 available at https://www.lightreading.com/5g/after-spending-$117b-us-carriers-ask-for-even-more-5g-spectrum/d/d-id/776097. In addition to the $81 billion wireless providers collectively spent on the C-band auction, AT&T and Verizon spent additional billions for accelerated clearing, bringing the total to $95 billion.

[45] Timothy J. Tardiff , *State Utility-Style Regulation of Wireless and Broadband Services? A Cautionary Tale from the Electric and Water Industries*, at 2 (Advanced Analytical Consulting Group, March 16, 2022) ("AACG Report"); *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶ 52.

[46] *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶¶ 79-80.

[47] *Id.*, ¶ 62.

[48] *Id.*, ¶ 9.

[49] *Id.*, ¶ 14.

[50] *Id.*, ¶¶ 12-13.

Overall, 99% of Americans can choose between three or more wireless providers from among national operators and more than 100 regional operators, including resellers and cable companies.[51] Similarly, as of December 2020, approximately 99.2% of California households have access to at least three 4G LTE service providers.[52] Mobile service providers also have increased deployment of small cells and DAS sites to fill local coverage gaps, to densify networks and increase local capacity, and to build their 5G networks.[53]

Even as wireless providers have been busy investing to improve their networks, they have reduced prices. The Consumer Price Index ("CPI") for Wireless Telephone Services *decreased* 5% from 2017-19, even as the overall CPI for all tracked goods and services increased 4%.[54] In California, wireless service prices fell an astonishing 43% from 2010 to 2019.[55] Wireless providers also "compete using differentiated plans and bundled services . . . to appeal to subsets of consumers."[56] This includes increasing the availability of unlimited data plans,[57] offering plans that "differ in features such as video streaming services, streaming quality, data limits, and thresholds that trigger speed limits" and "offering mobile hotspots with differing available speeds and data limits, cloud storage differentiated by storage allowances, and international service capabilities."[58]

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[51] CTIA, *Building the 5G Economy: The Wireless Industry's Plan to Invest and Innovate in the U.S.*, at 19 ("CTIA 5G Report"), available at https://api.ctia.org/wp-content/uploads/2021/01/2021-Wireless-Briefing-2_9.pdf.

[52] CensusNBM Report 357, Percentage of US Housing Units with Access to Multiple LTE Broadband Providers (December 2020) available at https://censusnbm.com/doc/CensusNBM%20358%20All%20Wireless%20Broadband%20Providers%20by%20State.pdf.

[53] *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶ 35.

[54] *Id.*, ¶ 45.

[55] AACG Report at 1.

[56] *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶ 58.

[57] *Id.*, ¶¶ 7, 38.

[58] *Id.*, ¶ 58.

All this has led to ever-growing mobile wireless subscribership and usage. As of June 2021, 60% of adults in California had cut the cord and live in wireless-only households, and another 22% live in "wireless-mostly" households.[59] In fact, in California there are 5 million more wireless voice subscriptions than there are people.[60] Mobile data consumption also continues to increase dramatically. In 2019, Americans used 96 times more mobile data than in 2010.[61]

In short, wireless prices are down, quality is up, and "consumers have benefitted greatly from the resulting increase in higher data speeds, expanded network coverage, and increased network densification,"[62] as well as "device promotions, unlimited data services, bundled service offerings, additional incentives, free add-ons, and more."[63] As with broadband, wireless service is lightly regulated, so these consumer benefits come from competition, not regulation.

TDM Wireline Voice Service. TDM wireline voice service has continued its steep and steady decline for several years as consumers transition to wireless, VoIP, and broadband data and apps. While still part of the intermodal competitive market, TDM has become obsolete as technology continues to evolve. As noted above, 60% of California adults live in wireless-only households, and most of the rest use VoIP rather than TDM. The decline of TDM is proof of the competitive success of newer technologies. Continued regulation of the quality of a service with a dwindling number of users makes no sense.

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[59] Stephen J. Blumberg & Julian V. Luke, *Wireless substitution: Early release of estimates from the National Health Interview Survey, January-June 2021*, at Table 1 (National Center for Health Statistics, Nov. 2021) ("CDC June 2021 Wireless Substitution Report"), available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202111.pdf.

[60] FCC Industry Analysis Division Office of Economics and Analytics, *Voice Telephone Services: Status as of December 31, 2019*, at Table 4 (March 2022) ("*FCC March 2022 Voice Report*").

[61] *FCC 2020 Competition Report*, 36 FCC Rcd. 2945, ¶ 52.

[62] *Id.*, ¶ 50.

[63] *Id.*, ¶ 38 (internal quotation marks omitted).

B. Competition Is the Most Effective Tool To Ensure High Service Quality.

Where a market is competitive the justification for public utility-style regulation disappears, and government should rely on competition to best serve consumers. Congress recognized this in the 1996 Act,[64] the FCC has recognized this policy,[65] the California Legislature recognized it in the Public Utilities Code,[66] the Commission recognized the concept in its decisions,[67] and distinguished commentators have long emphasized the point.[68] This principle led Congress to adopt a light-touch approach to wireless services,[69] Congress and the FCC to adopt a light touch for broadband services,[70] and this Commission and others across

[64] *2006 URF Decision* at 4 ("Congress made a national decision to rely on competition whenever possible 'in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'"), quoting preamble to federal Telecommunications Act of 1996, H.R. Rep. No. 104-458.

[65] "[W]hen possible, this Commission [the FCC] prefers that economic and market considerations drive the development of technology, rather than regulatory requirements." *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Utils. Comm'n*,, 19 FCC Rcd. 22404, n.108 (2004) ("*Vonage Order*").

[66] *See 2006 URF Decision*, D.06-08-030 at 4-5 ("California statutes now endorse a reliance on [an] open and competitive voice communications market unless the elimination of regulation would result in rates being set above 'just and reasonable' levels."), citing Pub. Util. Code § 451; *see also* Pub. Util. Code § 709 & 709.5; *2016 URF Decision*, D.16-12-025 at 190 ("Public Utilities Code § 709.5 endorses a reliance on competitive markets to achieve California's goals for telecommunications policy.").

[67] *2009 Service Quality Decision*, D.09-07-019 at 2; *2006 URF Decision*, D.06-08-030 at 261-62 ("Economic theory shows that the rates and range of services that result from a competitive market likely will be better than those that a regulated market would produce."); *2016 URF Decision*, D.16-12-025 at 131, 190 ("[A]n effort to regulate rates for telephone service, given the market transitions described in this decision, might create unintended consequences that would harm consumers. We are not certain that rate-regulating retail telephone services would result in just and reasonable rates.").

[68] *See supra* n.8 and *infra* n.75.

[69] *See* 47 U.S.C. § 332; Jonathan E. Neuchterlein and Philip J. Weiser, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE, at 270 (MIT Press 2005) ("In 1994, the FCC exempted wireless carriers from the tariffing obligations of section 203 and the market entry and exit regulations of section 214, reasoning that competition made most forms of common carrier regulation superfluous at best and counterproductive at worst.")

[70] *See infra*, p. 58.

the country to remove rate regulation (and, in other states, most other regulation as well) from local exchange service.[71] And the result is the vigorously competitive market today.[72]

The principle that competition is more effective than regulation applies with full force to service quality. Just as competition drives prices to efficient levels, a competitive market is the best guarantor that providers will offer the level of service quality consumers demand because the penalty – lost customers and lost profits – is instant, costly, and difficult to reverse.[73] And the marketplace feedback received by the losing carrier comes faster than any regulatory penalty and allows for a faster and more consumer-focused response.[74] As Professor Alfred Kahn explained:

> The superiority of the competitive market over governmental determinations is the positive stimuli it provides for constantly improving efficiency, innovating, and offering consumers diversity of choices. It is precisely because neither the government nor industry planners are capable of envisioning the ideal potential performance of an industry – how its costs will behave, what innovations it may make, what choices it will offer consumers – that we prefer, as a general public policy, to leave those determinations to the forces of a competitive market.[75]

Consistent with this, the Commission acknowledged in 2009 that "competitive environments act to apply a natural pressure for carriers to ensure adequate service quality," which led it to scale back service-quality regulation.[76]

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[71] Aron 2014 Decl., ¶ 25; National Regulatory Research Institute, *The Year in Review 2016: Moving Past Reduced Regulation*, Report No. 16-10, at 1 (Dec. 2016) ("By the end of September 2016, 41 states had eliminated or significantly reduced telecommunications regulation for both traditional wireline carriers (ILECs) and carriers that provide Internet-enabled services."), available at https://pubs.naruc.org/pub.

[72] Aron 2014 Decl., ¶ 32.

[73] *Id*., ¶¶ 43-50

[74] *Id*.

[75] Alfred E. Kahn, *Deregulation and Vested Interests: The Case of Airlines*, in THE POLITICAL ECONOMY OF DEREGULATION, eds. Roger G. Noll and Bruce M. Owen, (Washington D.C.: American Enterprise Institute, 1983), at 140.

[76] *2009 Service Quality Decision*, D.09-07-019 at 2.

While the Commission is charged with ensuring "reasonable" service quality,[77] there is no fixed definition of "reasonable" service quality. It necessarily is a flexible concept that turns on consumer preferences and the costs (and thus prices) of providing different levels of quality. "Reasonable" service quality therefore is best understood to be a level of quality that reasonably reflects consumer preferences, taking all the costs and benefits into account.

Economists refer to a reasonable level of service quality as "optimal" service quality – a level that maximizes social welfare, given that consumers have scarce resources they must allocate based on their own preferences for a mix of price, quality, and other service attributes.[78] Optimal service quality therefore does not mean the "highest possible" level of service quality or "perfect" service quality. That is because service improvements generally come at a cost, and perfect service would be prohibitively expensive, making consumers worse off.[79] Indeed, Section 451 directs the Commission to ensure "adequate," "efficient," and "just and reasonable" service – not "perfect" service.

Optimal service quality also cannot be defined by one or a few individual service attributes. The quality of a service is a portfolio of attributes, and consumers differ in how they prioritize them.[80] Thus, "[i]n a competitive market, firms compete on many dimensions, including price and quality,"[81] and "adjust their offerings on price and quality to meet consumer demand and try to offer the optimal combination."[82]

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[77] Pub. Util. Code § 451.

[78] Declaration of Dr. Debra J. Aron Supporting Comments of AT&T California, R.11-12-001, dated Jan. 31, 2012, at ¶ 21 ("Aron 2012 Decl.").

[79] *Id.*, ¶ 22.

[80] *Id.*, ¶¶ 27, 29.

[81] Aron 2014 Decl., ¶ 12.

[82] Aron 2012 Decl., ¶¶ 27, 29.

That is exactly what has happened in the communications market in California and across the nation. As noted above, investment in wireless and broadband networks – targeted at meeting consumer demand for speed, capacity, and coverage – is at an all-time high.[83] Providers advertise and compete on their network capabilities, *i.e.*, their service quality.[84] Providers also continue to revise their offerings to evolve with and meet consumer demands, and adjust their associated prices – which for wireless and broadband have fallen[85] – to stay competitive.[86] These improvements are tied to the growth of wireless and VoIP subscribership and usage. Moreover, consumers have "myriad sources by which to compare provider's quality results and shop around for the right provider," such as Consumer Reports, J.D. Power & Associates, Facebook, Twitter, online reviews, etc.[87]

Furthermore, competition empowers dissatisfied consumers to vote with their feet and switch providers at any time. Providers are well aware of this, and the economics of the communications industry gives them an especially strong incentive to provide the optimal mix of price, quality, and other attributes.[88] Communications is a network-intensive industry, which means providers have high sunk costs (to build and maintain their networks) and low incremental costs of serving each additional customer. Consequently, when a provider loses a customer, it

[83] *See supra*, nn.27, 41-44.

[84] *See* Opposition of AT&T California, *et al.* to Petition of Public Advocate's Office for Rulemaking to Amend General Order 133-D to Establish Minimum Service Quality Standards for All Essential Communications Services, P. 21-10-003, dated Oct. 29, 2021, at 5-6 & Att. A ("AT&T Opp. to PAO Pet.") (collecting wireless ads).

[85] *See supra*, nn.29, 54-55.

[86] *See supra*, pp. 9-15.

[87] Reply Declaration of Jeffrey E. Eisenach, Ph.D, on behalf of Verizon, in R.11-12-001, dated March 1, 2012, at 1-2; AT&T Opp. to PAO Pet. at 8-9.

[88] Aron 2014 Reply Decl., ¶ 18 ("The URF carriers have every incentive to provide their customers the quality of service customers demand, and they receive feedback from their customers continuously about what their consumers value and what they are willing to pay for.").

saves very little cost (it still has to bear all of its sunk network costs, which are most of the cost of serving the customer), but loses all the revenue from that customer.[89] As one author explained, in such an industry "even small reductions in demand can generate large losses in contribution to joint and common costs because the firm's revenues decline much more than the costs it can avoid."[90] As a result, rivals have strong incentives to compete fiercely to gain and retain every customer, which they cannot do if their service quality does not meet expectations.[91]

By contrast, imposing service-quality regulation in a competitive market is likely to harm both competition and consumers. In fact, "unnecessary regulation on quality distorts firms' incentives and ability to compete on price; just as unnecessary regulation on price distorts firms' incentives and ability to compete on quality."[92] This happens because every regulation has a cost of compliance. That cost, in turn, distorts how the provider must operate and use its resources, especially to avoid penalties. And that detracts from how the provider would act if its focus were solely on meeting customers' actual desires in the marketplace. Moreover, "this distortive effect is magnified when service-quality regulations are imposed on a service such as traditional wireline voice, which is in long run decline while facing intense competition from alternative

[89] J. Neuchterlein & H. Shelanski, *Analysis of U.S. Broadband Policy*, 73 Fed. Comms. L.J. 219, 230-31 (2021) ("*Analysis of U.S. Broadband Policy*") **(**"When one broadband provider loses a household to the other, it loses all revenues associated with that household but saves very little in the form of avoided costs. That economic reality gives each provider unusually strong incentives to offer" better service).

[90] Dennis L. Weisman, *When Can Regulation Defer to Competition for Constraining Market Power? Complements and Critical Elasticities*, 2 J. COMPETITION L. & ECON. 101, 102 (2006). *Accord*, Timothy J. Tardiff, *Changes in Industry Structure and Technological Convergence: Implications for Competition Policy and Regulation in Telecommunications*, 4 INT'L ECON. & ECON. POL. 109 (2006).

[91] *See* Comments of AT&T Services, Inc., *Restoring Internet Freedom*, WC Docket No. 17-108, Econ. Decl. ¶¶ 53-55.

[92] Aron 2014 Decl., ¶ 12.

technologies and services."[93] Dictating service-quality metrics (and imposing harsh penalties for failing to meet them) has the opposite effect of competition – it *reduces* consumer welfare.[94]

Imposing service-quality metrics, rather than relying on dynamic competition, also ignores that it is not possible to create static, *ex ante* regulations that will be as good as competition at producing the optimal level of service quality to efficiently maximize consumer welfare. Regulators have no crystal ball, and "even the smartest regulators can do more harm than good if they underestimate prospects for [competition] … and overestimate the efficacy and administrability of complex regulatory obligations."[95] As a result, "[i]t is faulty logic to conclude that quality standards determined by regulators are" – or ever could be – "a perfect reflection of the levels of service quality that would result in a competitive market."[96] Rather, "[i]n a competitive market, service providers will produce the service quality that best responds to consumer preferences," whereas imposing "ad hoc, costly service-quality regulations while providing no evidence of the effect they will have on the prices consumers pay, the costs firms incur, or the value that consumers place on such regulations" provides no benefit to anyone.[97] It would be regulation purely for the sake of regulation.[98]

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[93] *Id.*, ¶ 12.

[94] Aron 2012 Decl., ¶¶ 24, 29; *American Libraries Ass'n v. Pataki*, *American Libraries Ass'n*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) ("Haphazard and uncoordinated state regulation [of the Internet] can only frustrate the growth of cyberspace.").

[95] *Analysis of U.S. Broadband Policy*, 73 Fed. Comms. L.J. at 221-222 (2021).

[96] Aron 2014 Reply Decl., ¶ 18. H. Shelanski, *Adjusting Regulation To Competition: Toward A New Model For U.S. Telecommunications Policy*, 24 Yale J. on Reg. 55 (Winter 2007) ("Under competition, … regulators have no such margin for error. The errors and administrative costs that may still be compatible with net social gains under regulated monopoly become less so as competition develops. Rather than restraining the even greater harms of monopoly, the regulations impede the even greater benefits of competition.").

[97] *Id.*, ¶ 18.

[98] PAO argued in its Petition that some markets in California are "concentrated," and asserted that justifies service-quality regulation. But the alleged "concentration" of a market does not make it non-competitive or mandate public utility-type regulation. "Most markets, including very concentrated ones,

Continued regulation of TDM service quality would place California well out of the mainstream of modern state regulation. Outside California, 18 of the 20 states where AT&T operates as an ILEC have eliminated wireline voice service-quality standards for AT&T.[99] And even in states that retain some service-quality requirements, they are much more limited than in California, applying only to certain ILECs under certain types of regulation, or only to basic service, or only to residential service.[100] Neither the OIR nor any prior Commission decision indicates service quality is better in California than in states with no service-quality rules.[101]

For all of these reasons, California should rely on the fiercely competitive communications market to ensure reliable, efficient, and just and reasonable service quality, not prescriptive regulation created for a monopoly era.

IV. RESPONSE TO PRELIMINARY SCOPING MEMO.

The OIR directs parties to provide "[a]ny objections to the preliminary scoping memo regarding the category, issues to be considered, or schedule."[102]

Category. The OIR preliminarily categorizes this proceeding "Quasi-Legislative." AT&T does not object to this categorization.

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are not subject to economic regulation at all. … Instead, the government typically reserves such regulation for mature markets that are dominated by durable monopolies, [such as] the wireline telephone industry *of the mid-20th century*." *Analysis of U.S. Broadband Policy*, 73 Fed. Comms. L.J. at 224 (emphasis added). Moreover, PAO relies on outdated information, especially in light of the ongoing massive network investments by providers of all kinds to expand and improve the services consumers most desire.

[99] *Id.*, ¶ 25. Since Dr. Aron's 2014 Declaration, Kentucky eliminated service-quality standards and Louisiana now monitors service quality but does not have prescribed standards or metrics.

[100] *Id*., ¶¶ 25, 27. In Louisiana the commission has general power to penalize for substandard service, but there are no specific mandatory metrics. In Ohio and Illinois only basic services are subject to service-quality regulations, and neither state has penalty provisions, though Ohio allows for customer credits in some instances.

[101] *Id*., ¶ 28.

[102] *Id*. at 16.

Issues to be considered. The OIR invites comments on a vast potential expansion of state service-quality regulation to wireless and VoIP services, at odds with other states and this Commission's own prior decisions. Such a radical potential shift in regulatory policy requires thorough consideration of all the relevant facts, policies, and legal constraints. The Commission therefore should consider all the information that bears on whether service-quality metrics are necessary, relevant, and helpful to consumers in the modern marketplace. This requires a full review of the current state of competition; the preference to rely on competition rather than regulation; the feasibility, costs, and utility of such regulation; and the legal limits on the Commission's authority.

Such a thorough review will require developing a full evidentiary record. Among other things, while the OIR refers to Staff's Network Exams, providers have never had an opportunity to probe or respond to those documents with discovery, responsive testimony, or cross-examination. AT&T has significant factual disagreements with the Network Exams' methodology and conclusions, which AT&T is entitled to present in the factfinding process. The Commission also needs to develop a full record on the current facts regarding service performance and the current state of competition. Similarly, providers are entitled to investigate and address the technical and practical issues raised by any proposed metrics.

A full and complete record, including multiple rounds of testimony, workshops, evidentiary hearings, briefing, is therefore essential. Anything less would raise fundamental due process concerns and run afoul of the Commission's duty to base its decisions on the facts of record and provide a full and reasoned explanation for its decisions.

Schedule. The Commission should adopt a comprehensive schedule to develop a thorough factual record. AT&T's proposed schedule is included in **Attachment A** hereto.

In particular, the schedule must allow enough time for parties to retain expert witnesses and have them prepare testimony on the issues raised in the OIR.

V. RESPONSE TO OIR QUESTIONS REGARDING TDM SERVICE.

Regarding TDM wireline voice service, the OIR states as follows:

> This OIR is opened to assess whether service-quality measures adopted in D.16-08-021 (as modified by D.16-10-019)/GO 133-D:
>
> - Meet the goals of GO 133 (*i.e*., ensure that telecommunications providers meet the level of service required by Pub. Util. Code § 451);
> - Remain relevant to today's regulatory environment and market; and
> - Incorporate an effective penalty mechanism and enforcement framework.[103]

In addition, the OIR asks:

> Does GO 133-D's enforcement framework and penalty mechanism serve the public interest in ensuring adequate and appropriate investments in the state's telecommunications infrastructure? If not, how should the Commission modify GO 133-D to more effectively achieve this outcome?[104]

AT&T Response. The GO 133-D requirements for TDM service are not necessary or helpful to meet the goals of Section 451 and are not relevant to today's regulatory environment and market. Accordingly, the requirements for TDM should be discontinued, along with their associated penalty provisions.

A. Service-quality Regulation of TDM Service Does Not Meet the Goals of Section 451 and Is Not Relevant in Today's Marketplace.

As discussed above (part III.B), competition, not regulation, is the best means of guaranteeing providers will offer a level of service quality that maximizes overall consumer welfare. Continued regulation of TDM wireline voice service is therefore not just unnecessary, but harmful to consumers. As also shown above (part III.A), TDM service subscriptions have

[103] OIR at 16-17.

[104] *Id*. at 17.

been steeply declining for years, and that trend is not slowing. Imposing regulatory costs on selected providers, as GO 133-D does, only makes TDM service more costly to provide,[105] and penalties for not meeting metrics become more and more excessive compared to the shrinking number of users (*see infra*, part __). Nor is there any evidence the current metrics for URF providers actually reflect what consumers view as markers of "quality" service.[106] Unnecessary and interventionist regulation can divert investment away from new technologies, such as fiber optics and 5G wireless technologies, that consumers demand.[107]

B. The Phase 2 Network Exam is Flawed and Provide No Basis for Continuing or Expanding the GO 133-D Requirements for TDM Service.

The OIR cites the Phase 2 Network Exam Report by the Communications Division Staff, which found an alleged "trend of disinvestment and deteriorating service quality" in AT&T's and Frontier's wireline networks.[108] The Phase 2 Report, however, does not provide valid or relevant evidence for evaluating service quality, either today or going forward. Nor does it provide a basis for retaining or extending the GO 133-D requirements for TDM service.

First, he Phase 2 Report reaches the flawed conclusion that AT&T has "disinvested" in its TDM network. In doing so, however, it improperly (and misleadingly) relies on embedded/historical accounting costs as a proxy for forward-looking technology trends and network valuations.[109] This contention misunderstands the competitive landscape of the current

[105] Aron 2012 Decl., ¶¶ 24, 29.

[106] Aron 2014 Decl., ¶ 9.

[107] In comments on PAO's Petition, TURN argued that competition cannot be relied on in place of service-quality metrics because AT&T does not meet all the metrics today. That theory mistakenly assumes the OOS metric accurately reflects the totality of service quality and what consumers actually desire in a service. A shown in the text, there is no evidence the OOS metric does those things, or that any prescriptive metrics could ever be as effective as competition in conveying consumers' actual desires to providers and forcing those providers to react or lose business.

[108] OIR at 8-9.

[109] OIR at 7-8, citing Phase 2 Report.

technologies. Given the massive and ongoing declines in demand for TDM wireline voice service[110] and overwhelming consumer preference for wireless and broadband-based services,[111] the *shift* in investment focus to forward-looking technology is both unsurprising and one that should be welcomed by the Commission and customers, given that broadband investment is a top priority of the State and nation.

Furthermore, reduced investment in TDM, which the Report criticizes, does not mean the TDM network no longer operates effectively, or that AT&T is not providing good service to its customers. Instead, it simply means that annual purchases of new TDM capital equipment are not exceeding annual depreciation allowances that were set 10, 20 or 30 years ago under different circumstances and expectations.[112] That fact is irrelevant, because the accounting data are not a measure of economic value or a predictor of network efficiency. Rather, to determine the performance of this equipment today, one must look at how it is used today.

For example, suppose accounting data indicate that a copper facility installed 30 years ago is fully depreciated. But that would not mean the copper facility no longer works or is incapable of providing service. Rather, the facility still has economic value because it is still providing service. Thus, even though the accounting data may suggest otherwise, the current, working TDM network, while its parts may be old, is still working and providing TDM service. Because maintenance and repair can keep this network operating to a high standard – and at a cost less than would be required if new capital equipment were installed to provide future TDM

[110] *See supra*, pp. 15-16.

[111] *See supra*, pp. 9-15.

[112] Note that because of the sharp and continuing declines in demand for TDM services, required purchases of new TDM capital equipment are likely close to nil.

service – reliance on maintenance and repair (rather than new investment) is clearly the lower-cost, most efficient path, and the path consumers, and the Commission, should welcome.

Second, the OIR notes the Phase 2 Report's claim that AT&T has disproportionately upgraded its network with fiber optic cable in higher income areas, engaging in redlining.[113] That claim is false, as publicly available data refute any claims that AT&T's deployment of fiber-based broadband has been discriminatory based on race or income. Specifically, using deployment data from the FCC and demographic data from the Census Bureau to identify the percentage of households of different races and incomes in census blocks where AT&T has deployed fiber since 2016, AT&T has shown it has deployed fiber to poverty-level and above poverty-level households in similar proportions, and AT&T has deployed fiber to Census-designated White and non-White households in similar proportions.[114] Moreover, these proportional deployments have been consistent over time.[115] AT&T has also presented data to address whether the proportions of lower-income and non-White households in AT&T's fiber footprint are lower than those within AT&T's overall wireline footprint. Based on the data presented, AT&T's fiber footprint has about the same percentage of below poverty level,

[113] OIR at 8.

[114] Reply of AT&T California to Responses to the Petition of the Public Advocates Office for Rulemaking to Amend General Order 133-D to Establish Minimum Service Quality Standards for All Essential Communications Services, dated Nov. 15, 2021, in P.21-10-003, at 2-3 and Table 1.

[115] *Id*. at 3.

non-White, and white households as exist overall in its wireline footprint, refuting any redlining allegation.[116]

Similarly, AT&T's service quality does not vary by race or income, because AT&T operates its networks to similar standards appropriate to its networks throughout its footprint. AT&T has invested its shareholders' money to build robust and quality networks. If AT&T fails to provide service of sufficient quality, it will not gain and retain customers and shareholders will be harmed. In providing quality service, network operations are uniform regardless of the demographics of the areas served by AT&T's networks. In short, race or income has zero influence on the level of service quality that AT&T maintains in its network.[117]

Third, the conclusions from the Network Exam are entitled to little weight because it was not produced by an objective expert. Prior to the issuance of that exam, its author, Dr. Lee Selwyn, testified on behalf of ORA in criticizing AT&T's and Verizon's service quality in the Commission's competition investigation (I.15-11-007). In that proceeding Dr. Selwyn attacked

[116] *Id*. at 4-5 and Chart 1 and Table 2. As shown in Table 1 and the accompanying chart in that pleading, AT&T has been deploying fiber to higher- and low-income households in similar proportions.

Table 1. AT&T Fiber Deployments Since 2016[4]

Filing Period	% of Households in AT&T's CA Wireline Footprint With AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Below the Poverty Line with AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Above the Poverty Line with AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Designated by Census as "White" with AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Designated by Census as "Non-White" with AT&T Fiber
Dec-16	4.21%	3.37%	4.33%	4.19%	4.23%
Dec-17	11.45%	10.20%	11.62%	10.47%	12.36%
Dec-18	19.03%	18.24%	19.14%	16.91%	21.04%
Dec-19	24.19%	23.86%	24.23%	21.95%	26.32%
Dec-20	25.15%	24.91%	25.19%	22.91%	27.28%
% Change 2016-2020	496.86%	638.97%	481.40%	446.39%	544.61%

[117] *Id*. at 5-6. In all events, both the Commission (R.20-09-001) and the FCC (GN Docket No. 22-69) already have proceedings underway to address best practices to prevent what some have alleged to be digital redlining.

AT&T California's and Verizon's performance on service-quality measures, asserting the large ILECs have "persistent service quality and customer service problems" and Dr. Selwyn alleged that poor service quality (which he presumed to exist), requires more regulation, such as imposing new service-quality targets and "impos[ing] monetary penalties for failure to comply."[118] Similarly, in the Frontier-Verizon merger proceeding in 2015 (A.15-03-005), Dr. Selwyn, again testifying for ORA, opined that Verizon has failed to invest in its ILEC network and failed to maintain service quality and should be penalized for alleged failures.[119]

As shown by this testimony, Dr. Selwyn had already taken the position that the large ILECs' service quality and practices in California before overseeing the Network Exam, which establishes his bias against AT&T and Verizon. Additional evidence of Dr. Selwyn's bias is seen in his failure to question whether AT&T's and Frontier's consistent failure to meet the OOS metric could be attributed to a potential flaw in the metric itself, as would be expected of a neutral examiner. Furthermore, his testimony in the competition investigation relied on information provided under strict non-disclosure protections to the ORA. The inappropriateness of his access and use of the information was later struck from the record as part of a preliminary injunction issued by the U.S. District Court.[120]

Fourth, the Network Exam should be given little if any weight because providers have not been allowed to probe and respond to that report through discovery, responsive testimony,

[118] I.15-11-007, Direct Testimony of Dr. Lee L. Selwyn on behalf of ORA, at 81 (dated Mar. 15, 2016); Direct Testimony of Dr. Lee L. Selwyn on behalf of ORA in I.15-11- 007, at 116 (dated June 1, 2016). The Commission can take official notice of these past testimonies and others cited in these Comments under Rule 13.9.

[119] A.15-03-005, Reply Testimony of Lee L. Selwyn on behalf of ORA, at viii, 12 (dated July 28, 2015)

[120] Plaintiff CIC Members' Supplement to The Communications Industry Coalition's Motion to Strike, Addressing Federal Court Order, I15-11-007, Ex. A, dated Aug. 4, 2016 (attaching federal court decision).

and cross-examination. The right to respond is a core part of due process. If the Commission intends to consider the Network Exam in this proceeding, or any party relies on it, the Commission must allow parties the opportunity to thoroughly challenge its allegations.

C. At a Minimum, the GO 133-D Metric for Lines Out of Service More Than 24 Hours Should Be Removed

The Commission should remove the GO 133-D metric of Out of Service ("OOS") Repair Interval.[121] The OOS requirement that 90% of outages be repaired in 24 hours is based on a time when most consumers relied on the Plain Old Telephone Service ("POTS"). That requirement is now outdated and not appropriate or useful in today's competitive marketplace. The OOS metric also does not reflect whether customers receive a reasonable overall quality of service.

The OOS metric gives a skewed view of performance. A carrier that repairs eight outages in one hour and two outages in 30 hours (due to more complex issues like having to power down a pole or re-splice wires) will fail the metric, while a carrier that repairs all ten of its outages in 22 hours each would not.[122] Are the latter carriers' customers actually better off than the first carriers'? The OOS metric assumes they are, but without good reason.

The OOS metric also unfairly penalizes large carriers. Large carriers are better than small carriers at keeping the number of outages low (measured against total lines), which is part of overall service quality. However, they have a harder time meeting the OOS standard because there are diseconomies of scale in repairing specific outages when customers (and thus outages) are spread out over a large geographic area.[123]

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[121] GO 133-D, § 3.4.

[122] *See* Aron 2014 Decl., ¶¶ 50-51.

[123] *Id.*, ¶ 53.

Does that mean customers of smaller carriers actually experience better overall quality of service? No, because time to repair an outage, viewed in isolation, gives only a limited picture. In looking at outages, it is necessary to at least consider the number of outages and repair time together, as a composite measure of how likely a customer is to lose service in the first place and, if there is an outage, how long a repair is likely to take.[124] Such a measure would do a better job at mitigating the differences between large and small carriers and avoid the OOS measure's problem of overweighting repair times and underweighting the low number of outages.[125] The best approach is to rely on competition over metrics, since *any* metric inevitably distorts behavior and increases costs, with no measurable benefit.[126]

When the Commission first established the 90% I 24 hours OOS standard in GO 133-C, it did not indicate it intended to adopt a more stringent standard for AT&T than the 29.3-hour Mean Time to Repair ("MTTR") standard for initial OOS lines and 39.4-hour MTTR standard for repeat OOS lines that the Commission previously had adopted. Rather, the Commission concluded that the new standard was *comparable* to the previous one.[127] However, the 90% OOS repairs in 24 hours standard is not remotely comparable, as it imposes a far more stringent standard on larger companies, including AT&T. Under today's standard, AT&T would need to achieve a MTTR of eight to 12 hours, not 29.3 hours, to meet the OOS metric.[128] Hence, the fact that AT&T has failed to meet the current OOS standard does not mean outage repair intervals

[124] *Id.*, ¶¶ 54, 58.

[125] *Id.*, ¶ 54.

[126] *Id.*, ¶ 60. As noted above, there is no evidence that service quality is better in states with service-quality regulation than without.

[127] *2009 Service Quality Decision*, D.09-07-019 at 78-79.

[128] *Id.*, ¶ 56.

have deteriorated and it does not mean that AT&T's performance is inadequate by any meaningful measure.

Further, the Commission recognizes the importance of minimizing the number of outages in the first place by having carriers report on the number of trouble reports per 100 lines.[129] The problem is that it does not assess this metric together with the OOS metric (and its associated penalties), which results in a penalty mechanism that is irrationally skewed against carriers with large geographic footprints and spread-out customer bases, because the OOS metric does not account for overall performance nor take into consideration "access line density." AT&T California consistently meets the standards on trouble reports per 100 lines, which recognize access line density and the impact of geographic distribution on trouble reports.

Additionally, AT&T California's 2021 Quarterly Service Quality reports show that less than 1% of AT&T's customers are affected by the OOS metric each month. And more generally, published customer-contact data from the Commission's Consumer Affairs Branch ("CAB") shows a dramatic decline in the number of contacts from communications customers to CAB since 2014. While the reports have surmised that Commission consumer protections put in place have resulted in this decline,[130] a more reasonable conclusion is that, in an ever-growing and competitive marketplace, customers are more satisfied with their service today than in the past.

D. The Penalties in GO 133-D Should Be Removed.

The GO 133-D penalties should be removed for several reasons.

First, the GO 133-D penalties for service-quality metrics for TDM service should be removed for the same reason the metrics themselves should be removed. The market for

[129] GO 133-D, § 3.3.

[130] AT&T does not understand the basis for this surmise as the number was declining well before any Covid protections were put in place.

communications services in California is highly competitive, and in these circumstances competition, rather than regulation, should be used to ensure service quality and maximize consumer welfare. In a competitive market no penalties are needed to incent performance. As the Alliance for Telecommunications Industry Solutions ("ATIS") has stated:

> A communication provider's core business depends on the provision of reliable service and no regulatory mandate could be more effective than the incentive already created by the competitive marketplace. Even the [FCC] itself has noted that the communications industry spends billions of dollars annually to improve the capabilities of its networks. Clearly, this money is not spent because of regulatory mandates, but because of marketplace incentives.[131]

Second, the GO 133-D penalties influence have an anticompetitive and anti-consumer effect. As AT&T expert Dr. Debra Aron explained, "economic theory suggests that, if anything, penalties for regulator-set service-quality standards would distort behavior away from efficient and desirable configuration of the various aspects of service characteristics, to the detriment of consumers. Hence, imposing a penalty mechanism would not make consumers better off and could harm consumers."[132] Providers must devote resources to avoid penalties for metrics that have not been shown to have any relationship to consumers' views of quality service, thus diverting those resources from meeting actual consumer demands. And consumers ultimately bear those added costs.[133]

The fact is that "[i]f the benefit to consumers of the promise of a service guarantee is worth the cost, competitors will have an incentive to attract customers by offering one, regardless

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[131] Comments of the Alliance for Telecommunications Industry Solutions, submitted in *Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82, at 2, filed at FCC, Aug. 8, 2011 ("ATIS Comments").

[132] Aron 2014 Decl., ¶ 76.

[133] *Id.*, ¶ 78.

of existing regulations. If not, requiring it as a regulatory obligation harms consumers."[134] This is especially true for TDM service, which constitutes a dwindling sliver of the market. Imposing penalties on the TDM wireline sector only raises costs and prices for the ever-shrinking number of consumers of TDM service.

Third, the current penalty system is out-of-date and excessive. When the current penalty was first implemented, it used a $750,000 base monthly fine for the OOS Repair Interval Fine, spread across almost 4 million working lines from the URF ILECs.[135] This baseline has not been adjusted to account for the shrinking number of TDM customers. Thus, that same base fine is now applied to fewer than 2 million lines from the URF ILECs in California.[136] Effectively, then, the fine per line has *doubled* over four years of reporting (2017-2021) as a direct arithmetic consequence of the abandonment of the network by consumers – without the Commission finding doubled fines are appropriate. Rather than consider higher penalties, the Commission should remove the current penalties altogether for the OOS metric because, as explained above, the metric is fundamentally flawed. And it will become increasingly unmeetable as access line loss mounts for AT&T and the OOS metric becomes increasingly irrelevant to service quality.

If some form of penalty is retained for POTS lines, it should be tied to the appropriate service-quality metric, and the Commission should retain the option for carriers to invest in their networks rather than pay a fine. At the same time, it should continue to make that choice of penalty or investment at the carrier's discretion, to allow carriers more freedom to elect that path.

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[134] *Id.*, ¶ 78.

[135] The Commission's Communications Division's *Carrier Line Counts for June 30, 2017* counted 3,836,041 lines from the URF ILECs.

[136] The Commission's Communications Division's *Carrier Line Counts for June 30, 2021* counted 1,908,568 lines from the URF ILECs.

VI. RESPONSE TO OIR QUESTIONS REGARDING INTERCONNECTED VOIP AND WIRELESS SERVICES.

The OIR asks the following questions regarding interconnected VoIP and wireless services:

1. Are there any existing service quality metrics that should be extended to wireless and interconnected VoIP services? Specify which metrics should apply to each type of technology.

2. Should the Commission modify any of the existing service quality metrics and standards or develop new service quality standards and reporting requirements applicable to wireless and interconnected VoIP services? If so, how?

    a. for each type of technology, if applicable.[137]

AT&T Response. As explained below, service quality regulations should not be applied to interconnected VoIP or wireless services.

A. The Commission Has Twice Declined to Regulate VoIP or Wireless Service Quality and Nothing Has Changed to Warrant Such Regulation Now.

The Commission has twice declined to regulate VoIP or wireless service quality. In 2009, it exempted VoIP and wireless providers from the service-quality requirements of GO 133, relying on FCC actions, the availability of various reports to help consumers gauge service quality, and legal concerns.[138] In 2016, Staff, citing growth in VoIP service, proposed that interconnected VoIP providers be subjected to the GO 133 service-quality rules,[139] and others argued wireless providers should be subjected to those same rules.[140] But the Commission again declined.[141] As the Commission explained in denying rehearing:

> [F]rom a regulatory standpoint, non-traditional services such as wireless and VoIP have always been treated differently from wireline services. First, the Commission

[137] OIR at 16-17.

[138] *2009 Service Quality Decision*, D.09-07-019 at 5, 23, 57-58.

[139] *2016 Service Quality Decision*, D.16-08-021 at 4, 11.

[140] *2018 Service Quality Rehearing,* D.18-10-058 at 18-19.

[141] *2016 Service Quality Decision*, D.16-08-021.

> has taken a more hands-off approach for non-traditional services, with reliance on competition to ensure reasonable service and rates. This began when these non-traditional services were emerging. Second, issues of federal preemption and state prohibitions under section 710 have resulted in the Commission taking a more limited regulatory approach to these technologies. We do not think that section 2896 requires the Commission to apply the same type of regulations to wireless and VoIP that it applies to traditional wireline.[142]

Nothing has changed since then to justify a different decision in this proceeding. Interconnected VoIP is as or more competitive than it was in 2016 and is still subject to all of the pressures of a highly-competitive market, which yields high-quality service. Wireless services likewise is as or more competitive than it was in 2018, meaning providers have every incentive to offer high-quality service. Both services remain "non-traditional service[s]" for which the Commission has taken "a more hands-off approach … with reliance on competition to ensure reasonable service and rates." And federal preemption law and the "light-touch" policy for VoIP remain the same, as does Section 2896.

The OIR suggests that VoIP and wireless service-quality regulation should be considered because those services are used by a growing number of customers.[143] But that argument failed to convince the Commission in 2016, and it fares no better today. The original basis for service-quality regulation, *i.e.*, that traditional voice service was provided as a natural monopoly, is not the case now. Success in a highly-competitive market – which can come only by providing the price/quality mix consumers desire – should not be punished by having to face public utility-style service regulation and penalties, especially when there is absolutely no evidence of sub-par service quality today.

[142] *2018 Service Quality Rehearing,* D.18-10-058 at 21.

[143] OIR at 14.

The OIR does not point to *any* data showing service-quality regulation is needed for interconnected VoIP and wireless services. Imposing added regulation therefore would be the result of "regulatory overreach," not a demonstrated need. Further, such regulation is only likely to divert resources from investing in the California services and network coverage consumers actually desire, reducing consumer welfare. This premise underlies the FCC's policy limiting regulation of wireless and VoIP and the Commission's prior decisions, and it remains valid.

B. Interconnected VoIP and Wireless Services Face Stiff Competition, Which Ensures Reasonable Service Quality.

As discussed above in part III.A, interconnected VoIP and wireless services face strong competition from communications providers of all kinds. As a prerequisite to imposing burdensome regulations, the Commission has the obligation of showing the free market is not working, that regulations are needed to address a market failure, and that proposed regulations would in fact correct that failure. There is no evidence any of these criteria are met with regard to interconnected VoIP or wireless services.

C. TDM Metrics Cannot Realistically Be Applied to VoIP and Wireless.

1. It Would be Infeasible to Apply the Current GO 133-D Metrics to Interconnected VoIP Services.

GO 133-D metrics cannot feasibly be applied to interconnected VoIP services because AT&T's VoIP service is an "over-the-broadband service" and involves more complex technologies and protocols.

Trouble Reports and OOS. AT&T's interconnected VoIP service is an "over-the-broadband service" (one provided in conjunction with an underlying broadband network), which means any VoIP metrics could not necessarily be isolated to a particular carrier's network because calls traverse different carriers and PSTNs. As a result, AT&T would be unable to separately track many of the existing TDM GO 133-D service-quality standards for its VoIP

service, as it would be virtually impossible to determine in a timely fashion whether a customer-impacting issue or outage is specific to VoIP, or, instead, is a broadband-specific issue. And in many instances, a technician dispatch would be needed to specifically address and isolate the issue. Therefore, it would be impracticable to apply Customer Trouble Report or OOS Report metrics to interconnected VoIP services.

In addition, it is extremely rare for an AT&T customer to experience an AT&T VoIP-only outage. And in those instances when there is an outage only impacting VoIP service, it is normally at the regional or national footprint level and is reportable to the FCC.[144] Because the FCC has already imposed comprehensive outage reporting requirements for interconnected VoIP services, which address "the need for rapid, full, and accurate information on service disruptions that could affect homeland security, public health and safety, including the reliability of the Nation's 9-1-1 system," it is unnecessary for the Commission to adopt duplicative, or new, metrics.

Answer Time. The answer time metric should be eliminated and not extended to wireless or VoIP. Satisfaction of the needs of customers to contact providers is subject to the same competitive pressures as other aspects of the quality of service. It is not only the technical quality of the service that drives customer satisfaction, but also the customers' interactions with their provider. Consequently, the metric for answer time should not be dictated by the Commission. Additionally, there has been a seismic change in the way customers interact with their providers since this metric was adopted. Integrated Voice Response systems ("IVRs") have become more sophisticated by responding to spoken words instead of just punching buttons;

[144] 47 C.F.R. § 4.9.

online chats permeate customer interactions; and online access to common issues and questions is the norm. This metric is not useful or necessary in today's environment.

2. Current GO 133-D Metrics Are Unnecessary and Irrelevant to Wireless Voice Service.

As addressed below, many of the current GO 133-D metrics for URF carriers would be largely infeasible to operationally track or measure for wireless voice service and would also be largely irrelevant to network performance or consumer experience. Additionally, the Commission and FCC have imposed numerous reporting requirements on wireless carriers related to service affecting events and outages.[145] Consequently, subjecting wireless carriers to general service standards or metrics based on historic quality of service models, such as TDM, would be unfair, inefficient, impractical, and would serve no useful purpose for consumers.

First, given the mobile nature of wireless service, the location of the calling party cannot be determined by the area code alone. And because wireless calls can originate and terminate outside of the state of California (and to and from non-California residents with billing addresses outside of the state), these metrics would not only be impracticable to track, but would also inappropriately expand the jurisdiction of the Commission by imposing service-quality standards on wireless calls that traverse across states and throughout the world.

Second, the metrics are impracticable to track due to the complexity of wireless networks. For a customer to use wireless voice service, the customer must use equipment, such as a smart phone, that is owned and maintained by the customer and not the network provider, that is

[145] CPUC Decision D.20-07-011 and Resolution T-17706 require carriers to report % uptime on all RAN and Core locations, send text message and email notifications to customers, and post outage maps during Public Safety Power Shutoff (PSPS) events and disasters; SB 670 requires notices to local municipalities of impacts related to PSPS events; SB 670 requires outage reporting to Cal OES of community isolation events; and SB 341 requires public mapping of outages related to significant outages; and the FCC and CA requires reporting of significant outages that meet NORS requirements.

developed by a third party, and that is compatible with a specific provider's network. This makes it harder to identify and fix the cause of a problem. Additionally, the customer's service quality is highly dependent on their specific location and can be impacted by other factors. For example, a customer located in a basement or in an elevator may find their service quality impacted through no fault of the wireless network. Or the customer could be located within a cell sector that happens to have an extraordinary number of other customers seeking to use service at the exact same moment (*e.g.*, during a special event). Or the customer may be in an area, including another state or country, that requires the wireless service be provided by another provider through a roaming agreement. Quite simply, the service quality experienced by wireless customers is dependent on many variables that are outside the wireless carriers' direct control. This, in turn, makes application of the TDM metrics inappropriate for wireless voice service.

Third, wireless networks are designed with overlapping coverage provided by multiple sites and technologies. If there is an outage that affects customers, the FCC already has reporting requirements that provide the Commission with information on significant network outages.[146]

3. No New or Modified Metrics Could or Should Be Applied to VoIP or Wireless Services.

No modified or new metrics should be specially created and imposed on VoIP or wireless services. *First*, competition ensures service quality for VoIP and wireless more efficiently and effectively than static metrics ever could, as discussed above.[147] *Second*, the kind of metrics PAO's Petition proposed for VoIP and mobile broadband (such as latency, jitter, packet loss, etc.) are not operationally feasible for an interconnected VoIP or mobile broadband provider like

[146] *See supra*, n.143.

[147] *See supra*, part III.B.

AT&T to even measure, as explained in AT&T's Opposition to PAO's Petition.[148] *Third*, even if such metrics were feasible (though they are not), the Commission previously recognized that it should not impose service-quality metrics that are "duplicative of already available information, for wireless, VoIP and IP-enabled customers."[149] Yet that is what would happen here. Relevant service-quality data on performance of broadband services (upload speed, download speed, latency) is already publicly available to VoIP and mobile broadband users, as AT&T reports that data to the FCC. AT&T updates these results twice a year, and they are publicly available.[150] Additionally, commonly known third parties such as Speedtest by Ookla and RootMetrics measure broadband performance across different providers and make their results available to consumers.[151] Consumers can use this information to make educated decisions on the best provider for them, rendering service-quality regulation unnecessary.[152]

VII. FEDERAL AND STATE LAW BAR THE COMMISSION FROM IMPOSING SERVICE-QUALITY REGULATION ON INTERCONNECTED VOIP OR WIRELESS SERVICES.

Imposing state service-quality regulation on interconnected VoIP or wireless services would be unprecedented and contrary to the federal regime that has applied to such services for decades. Not surprisingly then, as shown below, federal law prohibits state service-quality regulation of these services for several reasons.

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[148] AT&T Opp. to PAO Pet. at 8-9.

[149] *2009 Service Quality Decision*, D.09-07-019 at 58.

[150] *Broadband Information, Performance Characteristics*, available at: https://about.att.com/sites/broadband/performance.

[151] *E.g.*, https://www.speedtest.net/global-index/united-states#mobile.

[152] *See*, *e.g.*, Ookla broadband reports for the US available at: https://www.speedtest.net/globalindex/united-states#mobile.

A. Service-quality Regulation of Wireless Services Is Expressly Preempted by Section 332 of the Communications Act.

Section 332(c)(3)(A) of the federal Communications Act provides that "no State or local government shall have any authority to regulate the *entry of* or the *rates charged* by any commercial mobile service or any private mobile service."[153] Imposing state service-quality requirements would violate both prohibitions.

1. Service-quality Regulation Constitutes Prohibited Rate Regulation.

Pricing and service quality are inextricably entwined, two sides of the same coin. In the Supreme Court's words, "a complaint that service quality is poor is really an attack on the rates charged,"[154] because "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."[155] Courts applying Section 332 have reached the same conclusion.[156] As one court put it, where a state's action "would directly alter the federal regulation of … quality of [wireless] service and hence rates for service," it would "tread directly on the very areas reserved to the FCC," namely "the modes and conditions" under which a wireless carrier may offer service in a given market – and therefore be preempted.[157] Another court similarly found that "insofar as they challenge the quality of service," the plaintiff's state-law claims "are, in actuality, attacks upon the rates charged for the service, or upon AT&T's entry into the wireless communications market, and are therefore preempted under § 332 of the Federal Communications Act."[158]

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[153] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[154] *Bastien v. AT&T Wireless Servs*., 205 F.3d 983, 988 (7th Cir. 2000), citing *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1988).

[155] *Central Office Telephone*, 524 U.S. at 223 (emphasis added).

[156] *Bastien v. AT&T Wireless Servs*., 205 F.3d 983, 988 (7th Cir. 2000).

[157] *Id*. at 989.

[158] *Naevus Intern., Inc. v. AT&T Corp.*, 724 N.Y.S.2d 721, 723, 283 A.D.2d 171, 172-73 (N.Y. App. 2001), citing 47 U.S.C. § 332(c)(3)(A).

As these cases establish, a tool to establish when "service quality is poor" – such as service-quality metrics and penalties – is likewise a tool to *de facto* regulate "the rates charged for the service."[159] Because adopting wireless service-quality standards would effectively constitute regulating rates, such action is preempted by Section 332(c)(3)(A).

2. Service-quality Regulation of Wireless Services Constitutes Prohibited Entry Regulation.

Service-quality regulation violates Section 332(c)(3)(A)'s prohibition on "[a]ny [state] requirement that functions as an entry regulation."[160] The FCC has interpreted Section 332(c)(3)(A) to mean that "local jurisdictions *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."[161] Yet that is precisely what state service-quality standards would do. For example, requirements regarding levels of latency and jitter, the number of packets lost, call failure and drop rates, or mandates as to network speeds would burden the entry of wireless services into California by requiring all wireless providers to offer particular levels of service. Such standards amount to regulation of wireless "entry" in the state, and therefore are preempted.[162]

Courts have reached the same conclusion. The Seventh Circuit held that, under Section 332(c)(3)(A), any state action to control "quality of service" or "the modes and conditions under

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[159] *Bastien*, 205 F.3d at 989; *Nauevus Intern.*, 724 N.Y.S.2d at 723 ("the substance of" a claim that wireless services were "unreliable" was "that the rates charged were unreasonable or that AT&T did not create a sufficient infrastructure before entering the market," and claim was therefore preempted).

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

[161] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088, n.84 (2018), citing 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[162] To be clear, the term "entry" in Section 332(c)(3)(A) refers to "entry of … *any* commercial mobile service or *any* private mobile service," – not just a "new" service. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

which" a wireless provider offers service in a given market is preempted.[163] Similarly, the Ninth Circuit applied that section to preempt an attempt to have a state determine whether a wireless operator's operation of FCC-licensed frequencies was "wrongful" under state law. As the court explained, FCC licensing of wireless carriers "directly involves agency determinations of public interest, safety, efficiency, and adequate competition, all inquiries specially within the expertise of the FCC," and a state cannot "substitute its judgment for the FCC's" on such a "core determination *regarding market entry*."[164]

3. The Narrow Exception Regarding "Terms and Conditions" for Commercial Mobile Services Does Not Apply.

Section 332(c)(3)(A) leaves room for states and localities to regulate the "other terms and conditions of commercial mobile services." Regulation of wireless service quality, however, would go well beyond the types of rules that have been upheld as regulation of the "other terms and conditions" of commercial mobile services.

The "terms and conditions" exception has been construed to allow states to regulate matters like "the use of line items in cellular bills"[165] and "deceptive description[s] of … rates in invoices and advertising."[166] Such classic consumer-protection regulation is a far cry from

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[163] *Bastien*, 205 F.3d at 989 (state-law complaint about quality of mobile services was preempted by Section 332 because it would require AT&T to "do more than required by the FCC," such as providing more cell towers); *Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d at 1071 (where state action would alter, among other things, "'the federal regulation of tower construction, location and coverage,' . . . the claims tread upon the FCC's role in regulating the 'modes and conditions under which [a wireless carrier] may begin to offer service in [a particular market].'") (quoting *Bastien*, 205 F.3d at 989) (brackets in original); *McKinney v,. Google, Inc.*, 2010 WL 11489027 (N.D. Cal. Nov. 16, 2010) (breach of warranty claim preempted by Section 332 where it effectively alleged carrier did not provide promised level of wireless service); *Naevus Intern.*, 724 N.Y.S.2d at 723.

[164] *Telesaurus VPC*, 623 F.3d at 1008 (citations omitted, emphasis added).

[165] *National Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006).

[166] *State ex rel. Nixon v. Nextel W. Corp.*, 248 F. Supp. 2d 885, 892 (E.D. Mo. 2003); *Fedor*, 355 F.3d 1069. 1074 (7th Cir. 2004); *Spielholtz v. Superior Court*, 86 Cal. App. 4th 1366 (2001). *See also*

directly regulating wireless service itself. For example, claims for failure to credit subscribers' bills properly or for making false statements or concealing material information would not be preempted because they do "not require an inquiry into the reasonableness of the rates charged or [the wireless provider's] entry into the market," whereas a claim effectively challenging the "quality of the [wireless] service" would be preempted.[167] Furthermore, the operative "presumption" is that the savings clause allowing states to regulate "other terms and conditions" must be read narrowly to avoid swallowing the preemptive rule.[168]

B. Service-Quality Regulation of Wireless Services Is Field-Preempted.

1. Title III of the Communications Act Field-Preempts Regulation of the Technical Aspects of Wireless Networks.

Under Title III of the Communications Act, the FCC has exclusive authority over technical standards for the construction and performance of radiofrequency networks.[169] Title III constitutes a "unified and comprehensive regulatory system for the industry,"[170] the purpose of which is "to maintain the control of the United States over all the channels of radio transmission."[171] Thus, courts have found that "regulation of technical and operational aspects of wireless telecommunications technology [is] a field that is occupied by federal law," "Congress intended the FCC to possess *exclusive authority* over *technical matters*" relating to

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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[.]'").

[167] *Naevus*, 724 N.Y.S.2d at 723.

[168] *See 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.").

[169] *See, e.g.*, *Cellco P'Ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012), quoting *NBC v. United States*, 319 U.S. 190 (1943) ("*NBC*").

[170] *NBC*, 319 U.S. at 214.

[171] 47 U.S.C. § 301.

use of radio frequencies (*i.e.*, spectrum), and "Congress's grant of authority to the FCC [in this area] was intended to be exclusive and to preempt local regulation."[172]

Relatedly, the Communications Act gives the FCC expansive authority over the operation of wireless infrastructure. Among other things, the FCC has exclusive authority to regulate "the nature of the services to be rendered" by the licensees, the times of operation, location, the "apparatus to be used . . . and the purity and sharpness of the emissions," and the "zones or areas to be served."[173] Thus, "[t]he [A]ct makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure," and "Congress has expressed its decision that these areas be reserved exclusively for federal adjudication."[174] The FCC has exercised its exclusive jurisdiction over the technical network aspects of wireless services in exhaustive fashion through a comprehensive set of regulations.

Although it remains to be seen what requirements parties may propose in this proceeding, the kind proposed in PAO's Petition – technical network-performance requirements involving latency, jitter, packet loss, call failure and drop rate, call setup time, and actual delivered network speeds – would fall within the FCC's "exclusive authority over technical matters" relating to use of radiofrequency spectrum,[175] and its related exclusive authority over wireless infrastructure design and deployment. Any such technical network-performance metrics would impinge on how wireless licensees use their federal spectrum licenses, and thus be field-preempted.

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[172] *New York SMSA Ltd. P'ship*, 612 F.3d at 97 (internal quotations omitted; citing *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000) (discussing radio frequency interference, and reaching the same conclusion)); *accord Johnson County Bd.*, 199 F.3d at 1193 ("Congress intended federal regulation of [radio frequency interference] issues to be so pervasive as to occupy the field.").

[173] 47 U.S.C. § 303(b)-(e) and (h).

[174] *Bastien*, 205 F.3d at 988, citing 47 C.F.R. §§ 24.103, 24,132, and 24.232.

[175] *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105 (2d Cir. 2010) (internal quotations omitted).

2. Mobile Broadband is an Interstate Service and Therefore Exempt from State Service-Quality Regulation.

States may not regulate (among other things) charges and practices in connection with interstate services.[176] The Communications Act grants the FCC "comprehensive authority" to "regulate all aspects of interstate communication by wire or radio."[177] Specifically, Section 152(a) states the Act "appl[ies] to all interstate . . . communication by wire or radio,"[178] while subsection (b) denies the FCC "jurisdiction with respect to . . . intrastate communication service by wire or radio." Section 152 thus "divide[d] the world . . . into two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction."[179] In light of this division of authority, "interstate communications service[s] are to be governed solely by federal law" because "Congress intended to occupy the field." Service-quality regulation of mobile broadband service, however, inevitably would apply to interstate communications services because mobile broadband is an interstate service,[180] and "[Internet]

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[176] *See, e.g.*, *New York State Telecommunications Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, 286-87 (E.D.N.Y. 2021) ("Congress set aside interstate communications as an area in which a uniform federal law governs 'standards of service'"); *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968); *see also California v. FCC*, 75 F.3d 1350, 1356 n.5 (9th Cir. 1996) (under the Communications Act, "state utilities [commissions], such as the CPUC, have authority over intrastate common carrier communications by wire or radio," while "[t]he FCC has authority over interstate common carrier communications by wire or radio."), citing 47 U.S.C. § 152(a) & 152(b).

[177] *Capital Cities*, 467 U.S. at 700.

[178] 47 U.S.C. § 152(a)-(b).

[179] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

[180] *See Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶¶ 199-200 (2018), *petitions for review granted in part and denied in part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) ("*Restoring Internet Fredom*")("[I]t is well-settled that Internet access is a jurisdictionally interstate service because "a substantial portion of Internet traffic involves accessing interstate or foreign websites; *see also Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601, 5803, ¶ 431 (2015) ("[W]e reaffirm the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes.") (citing numerous FCC orders).

traffic is 'interstate' for jurisdictional purposes."[181] Such state regulation of interstate service is preempted.[182]

C. State Service-Quality Regulation of Interconnected VoIP and Wireless Services Is Conflict-Preempted.

1. State Service-Quality Regulation Conflicts with Congress's Determination That VoIP and Mobile Broadband Service Are Not Subject to Common-Carrier Regulation.

Under the Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2), a state may not act in ways that conflict with or undermine federal law and regulations.[183] Congress limits common-carrier regulation to interstate telecommunications services and commercial mobile services, while precluding common-carrier regulation of interstate information services and private mobile services (mobile broadband). Congress's limitation of common-carrier regulation to interstate telecommunications services is in 47 U.S.C. § 153(51):

> A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .

Congress similarly exempted private mobile services from common-carrier regulation in 47 U.S.C. § 332(c)(2):

> A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter.

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[181] *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003); *accord*, *USTelecom v. FCC*, 825 F.3d 674, 730 (D.C. Cir. 2016); *Restoring Internet Freedom*, ¶ 199 (citing precedent); *USTelecom Ass'n v. FCC*, 825 F.3d 674, 730 (D.C. Cir. 2016) (same); Memorandum Opinion and Order, *NARUC Petition for Clarification or Declaratory Ruling*, 25 FCC Rcd 5051, ¶ 8 n.24 (2010) (broadband is "properly considered jurisdictionally interstate for regulatory purposes").

[182] *See* cases cited *supra*, n.175.

[183] Conflict preemption arises where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" the federal regime. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (emphasis added); *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941) (same).

VoIP is an interstate information service, and thus not a telecommunications service,[184] and mobile broadband service is a private mobile service under federal law. Both the D.C. Circuit and the FCC have long recognized that interstate information service and mobile broadband service are immune from common-carrier regulation.[185]

There can be no doubt that service-quality regulation is a type of common-carrier regulation normally applied to traditional public utilities. Service-quality regulation of interconnected VoIP or mobile broadband therefore conflicts with Congress's determination that interstate information services and private mobile services may not be subjected to common-carrier regulation, and therefore is preempted.

The Supreme Court has made clear that "when federal officials determine . . . that restrictive regulation of a particular area is not in the public interest" – as Congress did here – "States are not permitted to use their police power to enact such a regulation."[186] For example, in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*,[187] the Supreme Court held that Congress's decision to exempt certain gas sales from the Federal Energy Regulatory Commission's ("FERC") public-utility regulation preempted states from reimposing such regulation on those same sales. The Court rejected the argument that Congress's revision of the Natural Gas Act "to give market forces a more significant role" reflected Congress's "inten[t] to give the States the power it had denied FERC."[188] Similarly, in *Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc.*, the Ninth Circuit held that "conflict preemption applies" to prohibit "a state rule . . . that would interfere

[184] *Mozilla*, 940 F.3d at 19; 47 C.F.R. § 20.3
[185] *See*, *e.g.*, *Verizon*, 740 F.3d at 650; *Cellco P'ship*, 700 F.3d at 538.
[186] *Capital Cities*, 467 U.S. at 708.
[187] 474 U.S. 409, 422-23 (1986).
[188] *Id*. at 422.

with the method by which the [Federal Power Act] was designed to reach it[s] goals."[189] The court rejected the argument "that no actual conflict exists" between the federal decision not to engage in public-utility rate-setting for interstate electricity sales – instead permitting the market to set those rates – and using state law to "set a fair price" for those same interstate sales.[190] The conflict, and thus the preemption, were obvious because the state law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[191] The same reasoning applies here with respect to service-quality regulation of interconnected VoIP or private mobile services.[192]

2. Service-Quality Regulation of Interconnected VoIP Conflicts with Federal Policy.

As noted above, preemption arises from federal policy decisions not to regulate as well as from affirmative regulation. Service-quality regulation of interconnected VoIP service directly conflicts with a federal policy of non-regulation.

First, a federal appeals court and several district courts have held that interconnected VoIP service meets the federal statutory definition of an "information service."[193] The FCC has a longstanding policy precluding state economic or public utility-style regulation of information services.[194] Consequently, the Eighth Circuit held that "any state regulation of an information

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[189] 379 F.3d 641, 650 (9th Cir. 2004).

[190] *Id*.

[191] *Id*.

[192] Service-quality regulation of interconnected VoIP or wireless voice or broadband also would violate 47 U.S.C. 253, as explained in CTIA's Comments.

[193] *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018); *PAETEC Comms., Inc. v. CommPartners, LLC*, Civ. A. No. 08-0397(JR), 2010 WL 1767193, *2 (D.D.C. Feb. 18, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006); *Vonage Holdings Corp. v. Minn. Pub. Serv. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004).

[194] *Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. at 3317-20, ¶¶ 16-20 (2004)

service conflicts with the federal policy of nonregulation."[195] The court therefore struck down the Minnesota PUC's attempt to subject interconnected VoIP to public utility-style regulation.[196] This straightforward application of federal conflict preemption law[197] applies equally to any potential public utility-style regulation of VoIP here.[198] Indeed, the Commission has acknowledged it is preempted by federal policy from imposing public utility-style regulation on information services.[199]

Second, and similarly, the FCC filed an *amicus* brief in the Eighth Circuit case arguing that public utility-style regulation of interconnected VoIP service is preempted because it

("*Pulver Order*") ("federal authority [is] preeminent in the area of information services" and information services "should remain free of regulation."); *Restoring Internet Freedom*, ¶ 202 (noting FCC's "longstanding federal policy of nonregulation of information services"); FCC *Amicus* Brief in *Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290, filed Oct. 26, 2017 (8th Cir.), 2017 WL 4876900 at *10 ("Under the longstanding policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation.").

[195] *Charter Advanced Services*, 903 F.3d at 719-20.

[196] *Id.*

[197] *See*, *e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[W]hen federal officials determine … that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (citation and internal quotation marks omitted); *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate."); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978) ("[W]here failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation.") (cleaned up).

[198] Note that *Charter* did not involve an FCC classification of VoIP service, so there can be no argument, like that in *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022), that the FCC somehow abandoned authority over VoIP by classifying it as an information service. The FCC has exercised its authority over VoIP pursuant to its "ancillary" authority to implement the Communications Act, *see* FCC *Amicus* Brief in *Charter*, 2017 WL 4876900 at *14, and *ACA Connects* did not address VoIP service or the FCC's exercise of ancillary authority over VoIP service.

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

conflicts with and undermines the nationwide deregulatory policy for VoIP, regardless of whether interconnected VoIP is classified as an information service. As the FCC stated, public utility-type regulation of VoIP "threatens to disrupt the national voice services market" and "is likely to stifle competition and innovation in emerging VoIP technology and could deprive consumers of access to valuable new services."[200] The FCC went on to explain how one state's public utility-style regulation of VoIP could have external impacts in other states, thus defeating the national policy of a single national framework for VoIP and undermining competition: "[I]f the Minnesota PUC's efforts to regulate VoIP service were upheld, all 50 states could potentially seek to impose a patchwork of separate and potentially conflicting requirements on VoIP service,:" which "could throw the national voice services market into disarray."[201]

The FCC took this same position in preempting an earlier attempt by the Minnesota PUC to subject VoIP to public utility-style regulation, holding that regulation directly conflicted with the FCC's "pro-competitive deregulatory rules and policies" and "making clear that [the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [VoIP service]. For such services, comparable regulations of other states must likewise yield to important federal objectives."[202] Notably, the FCC's preemptive stance does not depend on interconnected VoIP being an information service.[203] Rather, it reflects the federal deregulatory policy toward VoIP service specifically, regardless of how it is classified.

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[200] FCC *Amicus* Brief in Charter, 2017 WL 4876900 at *19 (emphasis added).

[201] *Id*., citing *Vonage Order*, ¶ 37 ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations") and *Pulver Order*, ¶ 25 ("[I]f Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 states and other jurisdictions").

[202] *Vonage Order*, ¶¶ 1, 20.

[203] *Id*., ¶¶ 20-22.

The Eighth Circuit's and FCC's analyses apply with equal force to any state service-quality regulation of interconnected VoIP. In particular, like the preempted Minnesota regulations, opening the gates to 50 different service-quality regimes for interconnected VoIP would "threatens to disrupt the national voice services market" and be "likely to stifle competition and innovation in emerging VoIP technology," and thereby "deprive consumers of access to valuable new services."[204] Courts have made clear that "if the [federal] agency has determined that non-regulation advances the objectives of the governing statute" – as the FCC has with VoIP – "additional state regulation will conflict with federal regulatory policy, and federal policy will trump state restrictions."[205]

3. Service-Quality Regulation of Mobile Broadband Service Conflicts with Federal Policy.

The FCC has determined mobile broadband should be free of common-carrier regulation, and its policy judgment has been affirmed by the courts.[206] In addition, service-quality regulations poses a clear conflict with the FCC's decision to regulate broadband service quality through a transparency rule established under its rulemaking authority in 47 U.S.C. § 257.[207] The FCC's broadband transparency disclosures provide consumers with information the FCC determined to be relevant to consumers, including "the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications."[208]

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[204] FCC *Amicus* Brief in *Charter*, 2017 WL 4876900 at *19.

[205] *Murray v. Motorola, Inc.*, 982 A.2d 764, 779 n.21 (D.C. App. 2009).

[206] *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) ("We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.").

[207] *See* 47 U.S.C. § 257(a) (directing the FCC to "identify[] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services").

[208] *Restoring Internet Freedom*, ¶ 222.

The FCC's disclosures reflect a considered judgment *not* to impose conduct-based regulations on such aspects of broadband service quality, because "[t]ransparency, competition, antitrust laws, and consumer protection laws achieve similar benefits as conduct rules at lower cost."[209]

Mozilla confirmed that conflict preemption prevents states from imposing any requirements that "undermine[]" the FCC's rulings.[210] Because the FCC has imposed a specific form of regulation on mobile broadband service quality via the transparency rule, and further decided that no more extensive regulation is appropriate,[211] that decision preempts more prescriptive state regulation of mobile broadband service quality.[212]

4. The Ninth Circuit's Net Neutrality Decision Does Not Authorize Service-Quality Regulation of VoIP or Mobile Broadband Service.

Some commenters may argue that the reasoning of the Ninth Circuit's decision in *ACA Connects v. Bonta*, which upheld the California net neutrality statute (SB-822) against a preemption challenge, would similarly prevent any preemption of service quality rules for interconnected VoIP or mobile broadband service. That is incorrect.

First, the Ninth Circuit found that broadband internet access service can be regulated by states *if* there is a distinct and severable intrastate aspect of the service.[213] That decision, however, did not identify any actual, severable intrastate aspect of broadband service. Instead, it referred to a state net neutrality law regarding service provided to persons or entities in

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[209] *Id.*, ¶ 240; *see also Mozilla*, 940 F.3d at 18 (noting the FCC reasoned that "the benefits of a market-based, 'light-touch' regime for Internet governance outweigh those of common carrier regulation under Title II, resting heavily on the combination of the transparency requirements imposed by the Commission under Section 257 with enforcement of existing antitrust and consumer protection laws.")

[210] *Id*. at 85.

[211] *Restoring Internet Freedom*, ¶¶ 86-87, 101 (finding that imposing common carrier obligations on broadband results in "considerable social cost, in terms of foregone investment and innovation").; *see also Mozilla*, 940 F.2d at 49-55 (upholding FCC's decision).

[212] *See* cases cited *supra*, n.196.

[213] *ACA Connects*, 24 F.4th at 1247.

California,[214] without acknowledging that such persons or entities would be sending or receiving *interstate* communications. A communication is not intrastate to California just because one end of it touches California. Rather, what governs FCC exclusive jurisdiction over interstate service is whether "the service is used for the completion of interstate communications."[215]

Communications using broadband service are routinely used to complete interstate communications.[216] Consequently, the proponent of any service-quality regulation for mobile broadband service here will need to show there is an actual, severable intrastate activity that can be regulated separately, which, given the inherently interstate nature of mobile broadband service, is likely impossible.

Second, the Ninth Circuit ruled that California's net-neutrality law did not conflict with the FCC's national policy of keeping broadband free from common-carrier regulation.[217] In doing so, however, the court conflated the concepts of express and conflict preemption. Specifically, it said there could be no *conflict* preemption of a state net-neutrality law because *Mozilla* said the FCC could not *expressly* preempt such regulation.[218] But express and conflict preemption are different. *Mozilla* specifically left the door open for courts to find *conflict* preemption where state rules would undermine federal policy, as would be the case here. That court even took pains to clarify that its ruling on express preemption did *not* open the door

[214] *Id*.

[215] *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984).

[216] *See Pac. Bell v. Pac-West Telecomm, Inc*., 325 F.3d 1114, 1126 (9th Cir. 2003); *accord, USTelecom v. FCC*, 825 F.3d 674, 730 (D.C. Cir. 2016) ("broadband service … falls with [the FCC's] jurisdiction as an interstate service").

[217] 24 F.4th at 1241-44.

[218] *See id.* at 1242.

for 50 states to each start regulating broadband service in ways that undermined the FCC's national "light-touch" policy.[219] The logic in *ACA Connects* is therefore a *non sequitur*.

The Ninth Circuit also found that the FCC's transparency rule did not preempt a state's rules on net neutrality.[220] The court's rationale, however, was that *Mozilla* "did not hold that the Transparency Rule had any effect on the states' ability to regulate net neutrality."[221] But *Mozilla* specifically said it was not even addressing conflict preemption,[222] and therefore had no reason to say anything about whether the FCC's transparency rule conflict-preempts anything. Rather, each instance of conflict preemption must be addressed on its own facts, and state rules that conflict with the FCC's decision to rely on the transparency rule are subject to such preemption.

Third, the Ninth Circuit found that 47 U.S.C. §§ 153(51) and 332(c)(2), which preclude common-carrier regulation of interstate information services and private mobile services, did not preempt California's net neutrality law. It reasoned that because Congress exempted interstate information services and private mobile services from common-carrier regulation only "under this chapter" of the federal Communications Act, it meant to exclude only the FCC, not states, from imposing common-carrier regulation on such services."[223] But that reasoning again conflates implied and express preemption. Only the latter requires "explicit[]" statutory

[219] *Mozilla*, 940 F.3d at 81, 85-86; *New York State Telecomms. Ass'n*, 544 F. Supp. 3d at 283 ("*Mozilla*'s holding does *not* preclude or revoke the 2018 Order's implicit preemptive effect.").

[220] 24 F.4th at 1244-45.

[221] *Id*.

[222] *Mozilla*, 940 F.3d at 81, 85-86.

[223] 24 F.4th at 1245-46.

language.[224] The Ninth Circuit's refusal to find conflict preemption absent express preemptive language thus improperly "subsum[ed] conflict preemption into express preemption analysis."[225]

Further, Section 153(51) codified decades of FCC decisions that enhanced (now, information) services are exempt from common-carrier regulation.[226] By enacting § 153(51), Congress merely prevented the FCC from reversing course and subjecting information services to common-carrier regulation. Congress did not alter the structure of the Communications Act and invite states to regulate interstate information services as common-carrier services, and thereby countermand its own decision to codify the prior FCC decisions.[227]

It is equally implausible that, when Congress included "under this chapter" in Section 332(c)(2), it opened the door for states to impose common-carrier regulation on private mobile services. In 1993, Congress created two statutorily-defined categories of mobile services: commercial mobile services and private mobile services. Congress then required that any

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[224] *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1203 (9th Cir. 2002); *accord*, *PLIVA*, 564 U.S. at 618 n.5 ("[T]he absence of express pre-emption is not a reason to find no conflict pre-emption"); *Farina v. Nokia Inc*., 625 F.3d 97, 130 (3d Cir. 2010) (because "the lack of an express preemption provision … does not necessarily mean Congress intended to preserve conflicting state law.").

[225] *Farina*, 625 F.3d at 130. The Ninth Circuit panel also relied on the presence of express preemption clauses elsewhere in the Communications Act to support its conclusion that SB-822 did not conflict with the Communications Act. 24 F.4th at 1246. The reasoning again was that if Congress wanted to preempt states from treating information service and private mobile services as common-carrier services, it would have explicitly said so. But this yet again conflates express and conflict preemption, and is incorrect for the reasons just discussed. It is well-established that the existence of an "express pre-emption provision[] does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869; *see National Fed'n of the Blind v. United Airlines Inc*., 813 F.3d 718, 731 (9th Cir. 2016) ("[T]he inclusion of either a saving clause or an express preemption clause within a statutory scheme does not foreclose the application of ordinary implied preemption principles.").

[226] *See USTelecom*, 825 F.3d at 691; *City of Portland*, 216 F.3d at 877-78.

[227] Such an understanding of Congress's intent would also be inconsistent with the simultaneously enacted 47 U.S.C. § 230(b)(2), which states that federal "policy [is] . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation." The Ninth Circuit previously and correctly read § 230(b)(2) as evidence that Congress meant to continue the FCC's pre-1996 treatment of interstate enhanced services as minimally regulated, non-common-carrier services. *See Howard*, 208 F.3d at 753.

provider of commercial mobile services "shall . . . be treated as a common carrier," while a provider of private mobile services "shall not . . . be treated as a common carrier for any purpose under this chapter."[228] Where Congress intended to permit states to exercise limited authority over mobile services, it was explicit, preserving state authority to regulate certain "other terms and conditions of commercial mobile services."[229] Congress did not preserve *any* state authority over private mobile services.[230]

D. Service-Quality Regulation of Wireless and Interconnected VoIP Services Violates the Dormant Commerce Clause.

State regulation of wireless service quality violates the dormant Commerce Clause of the Constitution for both voice and mobile broadband service, because it would have the extraterritorial effect of regulating commerce entirely outside California. Such regulation would force wireless providers to adhere to California service-quality requirements nationwide, even on calls that have no relationship to California.

The Commerce Clause gives Congress the authority "[t]o regulate Commerce ... among the several States."[231] This power includes a negative aspect, referred to as the dormant Commerce Clause, which limits the power of the states to regulate commerce.[232] The dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[233] Thus, "[a] state law that has the 'practical effect' of regulating commerce occurring

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[228] 47 U.S.C. § 332(c)(2).

[229] *Id.* § 332(c)(3)(A).

[230] *See id*.

[231] U.S. CONST. Art. I, § 8, cl. 3.

[232] *See Piazza's Seafood World, LLC v. Odom,* 448 F.3d 744, 749 (5th Cir. 2006).

[233] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) (internal quotation marks omitted) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds

wholly outside that State's borders is invalid under the Commerce Clause."[234] This is known as the extraterritoriality principle.

State service-quality regulation of wireless voice service violates the dormant Commerce Clause's extraterritoriality principle. For example, the requirements proposed by PAO in its Petition would require a wireless voice provider to ensure it meets those service-quality standards *everywhere*, not just in California. Modern technology has made it impossible for an originating wireless voice provider to know with certainty whether a call actually physically originates in or will terminate in California. This is the result of several factors, including that many wireless customers have mobile numbers associated with an area code other than the one where they live. Consequently, a cell phone with a California area code could originate calls from anywhere in the country or world, and a call recipient with a California area code and cell phone could actually be anywhere in the country or world. The only way to avoid risking liability for violating California wireless voice service-quality rules would be for a wireless provider to meet those rules everywhere in its network. State regulation of wireless voice service quality therefore could easily have "the 'practical effect' of regulating commerce occurring wholly outside [California's] borders," in violation of the dormant Commerce Clause.[235]

In addition, for both interconnected VoIP and wireless voice service, the sort of service-quality measures that PAO proposed, such as call setup, would require the interconnected VoIP

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the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)).

[234] *Id*. at 332.

[235] *Healy*, 491 U.S. at 332. Moreover, such service-quality regulation would be both overinclusive (affecting calls that never touch California) and underinclusive, because the rules would not apply to calls that actually originate and/or terminate in California but are to or from phones with area codes not assigned to California.

or wireless voice provider to alter their networks to meet those measures everywhere. That is because, given the nature of the services, providers cannot alter their networks to meet such requirements only in California. The type of requirements PAO has proposed would therefore have an impermissible extraterritorial effect.

A similar analysis applies to mobile broadband service, which is inherently interstate, and is impossible or impracticable to separate into intrastate and interstate activities.[236] There is no indication or likelihood that any service-quality regulation of mobile broadband service could be exclusively limited to intrastate activity only. To the contrary, the kind of requirements proposed in PAO's Petition involve regulation of things like jitter, latency, and other matters that could not possibly be limited to a purely intrastate service.[237] This means such regulation of mobile broadband service would have precisely the kind of extraterritorial effects – forcing providers to comply with California's rules everywhere, with burdens that outweigh any possible benefits – that the dormant Commerce Clause forbids. Simply put, "state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause."[238]

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[236] *See, e.g., Restoring Internet Freedom*, ¶¶ 199-200 (citing prior FCC orders). "[I]t is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States.'" *Publius v. Boyer-Vine,* 237 F. Supp. 3d 997, 1024 (E.D. Cal. 2017), quoting *Am. Booksellers Found. v. Dean,* 342 F.3d 96, 103 (2d Cir. 2003), which invalidated a state statute regulating certain Internet activities because the "[I]nternet's geographic reach . . . makes state regulation impracticable."

[237] The FCC has rejected the idea that there could be a separate and distinct intrastate component to Internet service. *See Restoring Internet Freedom*, ¶ 200; *Pulver Order*, ¶¶ 20-24.

[238] *American Libraries Ass'n*, 969 F. Supp. at 169, citing *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886); *see id*. at 181 ("The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level."); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999).

E. State Law Does Not Permit Service-Quality Regulation of Interconnected VoIP and Wireless Services.

1. Interconnected VoIP.

In proposing service-quality regulation of interconnected VoIP service, the OIR relies on a prior finding that VoIP providers are "telephone corporations" under the Public Utilities Code.[239] But the Commission is not bound by that prior finding.[240]

Further, none of the other statutes relied on in the OIR (at 15) grants authority to regulate VoIP service quality. Public Utilities Code Section 2896 does not require the Commission to ensure service quality through the promulgation of regulations.[241] Similarly, Sections 275.6, 280, and 275.6 direct the ways in which the Commission may administer specific public purpose programs,[242] but none in fact confer on the Commission the *authority* to adopt service-quality standards.

The OIR also relies on Public Utilities Code Section 451, which directs that "[e]very public utility shall furnish such adequate, efficient, just and reasonable service, instrumentalities, equipment and facilities . . . as are necessary to promote the safety, health, comfort and convenience of its patrons, employees and the public." However, the best way to ensure "adequate, efficient, just and reasonable service" is to rely on the competitive marketplace.

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[239] OIR at 15, citing D.19-08-025 at 55 (Conclusion of Law 17).

[240] *2018 Service Quality Rehearing,* D.18-10-058 at 22 ("[T]he Commission cannot bind itself to act in a certain manner in the future.").

[241] *See 2018 Service Quality Rehearing,* D.18-10-058 at 20 (noting that the statute "does not explicitly require the Commission to develop regulations.").

[242] Section 275.6 relates to the High Cost A Fund; Section 280 relates to the California Teleconnect Fund; and Section 281 relates to the California Advanced Services Fund. The OIR also cites Section 871, which deals with Universal Telephone Service.

2. Wireless Services

Even apart from the limitations on the Commission's authority under federal law, the California Constitution limits the Commission's mandate to regulating "public utilities."[243] This structure is mirrored in the Public Utilities Code, which defines a "telephone corporation" as the owner or operator of a line or system for transmitting telephone messages, and a telephone corporation as a type of "public utility."[244]

Nothing in the Public Utilities Code gives the Commission authority over mobile broadband service. To the contrary, the OIR's reliance on certain statutes and reference to general police powers and past decisions[245] fares no better for mobile broadband service than it did for VoIP.

VIII. CONCLUSION

For the reasons stated, the Commission should remove the GO 133-D requirements for TDM service, and again decline to impose any such requirements on interconnected VoIP or wireless services.

[Signature page to follow]

[243] CAL. CONST. Art. XII § 6.

[244] Pub. Util. Code §§ 216, 233, 234.

[245] OIR at 15.

Respectfully submitted,

Dated: May 9, 2022

By: /s/

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ATTACHMENT A

AT&T'S PROPOSED SCHEDULE

Prehearing Conference	
Final Scoping Memo	Day 0
Opening Testimony	Day 60
Reply Testimony	Day 90
Workshops Workshop Report Prehearing Conference	Day 110 Day 140 Day 160
Evidentiary Hearing	Day 180 TBD Days of hearings
Initial Post-Hearing Briefs	Day 210 + No. of Days of Hearings
Reply Post-Hearing Briefs	Day 230 +
Proposed Decision	Day 320 +