

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

EXECUTIVE DIVISION

**RESOLUTION M-4848
December 17, 2020**

RESOLUTION

**Resolution M-4848 - Approval of Moratorium on Disconnection for
Non-Payment and Fees Late Payment for Telephone Service During the
Governor's Declared State of Emergency Due to the COVID-19
Pandemic**

SUMMARY

The California Public Utilities Commission (Commission or CPUC) issues this Resolution on its own motion in response to Governor Gavin Newsom's declaration of a state of emergency and the request in executive orders due to the novel coronavirus (COVID-19) pandemic. Specifically, this Resolution orders telephone corporations in California to file a Tier 2 Advice Letter notifying the Communications Division (CD) of their implementation of a moratorium on disconnections for non-payment and on late-payment fees for voice service for residential and small business¹ customers for the duration of the Governor's declared State of Emergency due to the COVID-19 pandemic.

BACKGROUND

In 2017, the Commission issued two resolutions, M-4833 and M-4835 adopting emergency customer protections for residential and small business customers of utilities

¹ The definition of small business customers shall be the same definition used in D.19-08-025, which relies on General Order (GO) 133-D, Section 1.3 (Definitions), (g): "A customer is a separate account number for voice service, or bundle of services, including voice, and includes small business (5 lines or less)."

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affected by major fires in California.² Both resolutions based their authority to adopt customer protections on Governor Brown's emergency proclamations regarding the October 2017 and December 2017 fires.³

On March 4, 2020, Governor Newsom declared a State of Emergency in California related to COVID-19.⁴ The Governor took additional actions, including issuing an Executive Order requesting that the Commission monitor the measures undertaken by public and private utility providers to implement customer service protections in response to COVID-19.⁵

On March 17, 2020, based on the holdings of Decision (D.) 19-08-025, a decision issued in the Emergency Disaster Relief proceeding, Rulemaking (R.) 18-03-011 CPUC Executive Director Alice Stebbins sent a letter to utilities outlining customer protection measures to prevent disconnections for unpaid bills during the pendency of the state of emergency due to the Covid-19 pandemic.⁶

² <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M221/K550/221550832.pdf>

³ Subsequently, the Commission opened a new proceeding, R.18-03-011, regarding an emergency disaster relief program. In R.18-03-011, the Commission issued D.18-08-004, which affirmed that the emergency customer protections adopted in Resolutions M-4833 and M-4835 to support residential and small business customers of utilities affected by disasters and which affect utility service shall go into effect in the event of a state of emergency declared by the Governor of California. D.18-08-004 held that the protections adopted in Resolutions M-4833 and M-4835 are controlling, interim authority while the Rulemaking 18-03-011 remains ongoing and until it concludes.

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M221/K552/221552166.PDF>

⁴ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>

Governor Newsom also issued a Proclamation of a State of Emergency regarding Covid-19 on March 17, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>

⁵ Executive Order N-28-20, available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>

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https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2020/Exec%20Director%20Letter%20to%20Communications%20Companies%20re%20COVID-19%20March%2017,%202020.pdf

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CPUC Resolution M-4842, issued on April 16, 2020, followed the Executive Director's letter. Consistent with the directives in D.19-08-025, Resolution M-4842 ordered electric, gas, communications, and water and sewer corporations in California to file a Tier 2 Advice Letter describing all reasonable and necessary actions to implement the Emergency Customer Protections contained in this resolution to support California customers; and authorized the electric, gas, communications, and water and sewer corporations to establish memorandum accounts to track incremental costs associated with complying with this resolution. The Emergency Customer Protections apply to customers for up to one year from the date of this resolution.⁷

The Commission took specific steps in Resolution M-4842,⁸ in response to the Governor's emergency proclamation and executive orders, to provide continuity and consistency between all utility actions resulting from the COVID-19 pandemic. The customer protections included in that Resolution did not cover telephone customer disconnections for non-payment and fees for late payment, because those protections were included in the voluntary Keep Americans Connected Pledge, issued by the Federal Communications Commission, (FCC) which began on March 13, 2020 and ended on June 30, 2020.⁹ The Keep Americans Connected Pledge was a promise for broadband and telephone service providers to do the following for residential and small business customers:

- Not terminate service to any residential or small business customers because of their inability to pay their bills due to the disruptions caused by the coronavirus pandemic.
- Waive any late fees that any residential or small business customers incur because of their economic circumstances related to the coronavirus pandemic.
- Open Wi-Fi hotspots to any American who needs them.¹⁰

⁷ Emergency Authorization and Order Directing Utilities to Implement Emergency Customer Protections to Support California Customers During the CoVID-19 Pandemic, April 16, 2020. <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M333/K482/333482381.docx>

⁸ *Id.*

⁹ <https://www.fcc.gov/keep-americans-connected>

¹⁰ *Id.* The CPUC referenced the Keep America Connected Initiative on its website (<https://www.cpuc.ca.gov/covid19protections/#Telco>).

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Because the Keep Americans Connected Initiative has expired, residential and small business customers could lose voice service, and late fees could be placed back on residential and small business customers' bills.

By the middle of December 2020, more than 1,585,044 Covid-19 cases had been confirmed in California, and over 21,046 deaths were reported¹¹ from the disease in this state. On November 16, 2020, Governor Newsom announced that 41 of the state's 58 counties, encompassing about 37 million people, will remain in or roll back to the purple tier, the strictest tier of the state's four-part, color-coded reopening roadmap.¹² On December 3, 2020, Governor Newsom announced a regional stay at home order, which prohibits private gatherings of any size, closes sector operations except for critical infrastructure and retail, and requires 100% masking and physical distancing in all others.¹³ The regional stay at home order was triggered in two counties in California, covering nearly 85% of the state's population.¹⁴

In addition, the Bay Area opted into the regional stay at home order early, and it went into effect on or around December 6, 2020. The overwhelming majority of the people of California have already been directly impacted by this new order. The regional stay at home order may be triggered in other regions in California as well, and it is unclear when it will lift since the trigger is tied to intensive care unit capacity in a particular region. The situation continues to evolve, with the number of confirmed cases rising at a rapid rate and predicted to continue to rise. Many small businesses remain closed, and the unemployment rate is at a record high.

From an economic perspective, a \$600 weekly federal supplement for unemployed workers expired at the end of July, and a \$300 replacement for some workers ran out in October. An emergency benefit for the self-employed and for independent contractors,

¹¹ California Department of Public Health website, data as of Nov. 18, 2020.

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers>

¹² <https://covid19.ca.gov/safer-economy/>; <https://www.gov.ca.gov/2020/11/16/governor-newsom-announces-new-immediate-actions-to-curb-covid-19-transmission/>

¹³ The Regional Stay at Home Order is triggered whenever the intensive care unit (ICU) capacity in one of the 5 regions of California is at 15% or lower. Once triggered, these orders will remain in effect for at least 3 weeks. That period, they will be lifted when a region's projected ICU capacity meets or exceeds 15%. This will be assessed on a weekly basis after the initial 3 week period.

¹⁴ <https://www.npr.org/2020/12/06/943630749/nearly-85-of-california-residents-to-be-under-stay-at-home-orders-through-christ>

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who do not qualify for state unemployment aid, is slated to end in December. To the extent that the federal CARES Act¹⁵ provided relief to American small businesses with the emergency small business loan program, that money is exhausted.¹⁶ And it appears increasingly unlikely that Congress will pass federal legislation that will significantly help the people and small businesses of this country as a whole, and California, in particular.¹⁷

The Commission's Consumer Affairs Branch continues to receive calls from residential and small business voice customers who have been disconnected for non-payment or have been charged late fees.

DISCUSSION

The public health response to COVID-19 has been extremely disruptive to all Californians and has impacted many Californians' ability to work. The Commission has dealt with highly disruptive events, most recently with the devastating wildfires in Northern and Southern California. In response to reoccurring natural and manmade disasters, the CPUC initiated an emergency disaster relief Rulemaking, R.18-03-011 and adopted a series of requirements for utility companies (electric, gas, water, and sewer) and communications providers, culminating in customer protection measures adopted in D.19-07-015 and D.19-08-025).¹⁸

¹⁵ The Coronavirus Aid, Relief, and Economic Security (CARES) Act is a \$2.2 trillion stimulus package signed into law on March 27, 2020.

¹⁶ <https://www.google.com/amp/s/www.nytimes.com/2020/04/09/business/smallbusiness/small-business-disaster-loans-coronavirus.amp.html>

<https://www.google.com/amp/s/www.forbes.com/sites/sarahhansen/2020/04/16/the-350-billion-small-business-loan-program-is-officially-out-of-money-lawmakers-cant-agree-on-what-happens-next/amp/>

¹⁷ Even if Congress does pass legislation in the next week, most economists have stated that it will contain far less relief than is needed. <https://www.cnbc.com/2020/11/23/economists-want-second-1200-stimulus-checks-where-the-relief-stands.html>; <https://www.brookings.edu/research/more-economic-relief-and-stimulus-why-and-how/>; <https://www.nbcnews.com/politics/politics-news/coronavirus-surges-countries-spend-more-economic-aid-not-u-s-n1250411>

¹⁸ Other issues related specifically concerning backup power for communications providers have also been considered in this proceeding.

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The customer protection measures adopted in R.18-03-011 apply in cases where a gubernatorial or presidential declared emergency relates to the disruption or degradation of service. The COVID-19 pandemic represents a different type of emergency, one where the threat -- in this case, a virus -- necessitates a response that impacts Californians' ability to pay for utility service. Social distancing, shelter-in-place requirements, executive and county orders, and proclamations have required the closure of non-essential businesses including bars, dine-in restaurants, and shops. Subsequent employee layoffs have created a risk that customers may fall behind on utility payments due to the COVID-19 pandemic at the same time that shelter-in-place orders will likely cause increased usage of utility services resulting in higher utility bills.

Having access to essential utility voice services is critical to maintaining Californians' health and safety during the COVID-19 pandemic. Therefore, because of the COVID-19 pandemic, the Commission, through this resolution, imposes a moratorium on telephone corporations¹⁹ from disconnecting voice service for non-payment and from charging fees for late payment of voice services.²⁰ This moratorium on disconnections and late fees will begin after a 30-day implementation period, and will last for 90 days, unless the Executive Director authorizes one or more extensions not to exceed an additional 90 days. The Commission takes this action in response to extraordinary circumstances and the current state of emergency to ensure continuity of essential service to customers during this health and safety crisis for customers facing financial hardship. This Resolution does not establish a precedent for standard Commission ratemaking or customer protection processes, nor does it relieve customers of their financial obligations following the conclusion of the moratorium.²¹

¹⁹ A "telephone corporation" includes "every corporation or person owning, controlling, operating, or managing any telephone line for compensation in this state." (Pub. Util. Code § 234.) A "telephone line" includes "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, or controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." (*Id.* at § 233.) California's Constitution specifically extends the Commission's jurisdiction to companies engaged in "the transmission of telephone and telegraph messages."¹⁹ (Cal. Const., Art. XII, § 3.)

²⁰ The definition of "telephone corporations" includes Voice over Internet Protocol (VoIP) providers and wireless service providers, consistent with D.18-08-004, D.18-09-025, and D.20-07-011. The moratorium does not apply to prepaid wireless carriers at this time.

²¹ Customers will still be financially responsible for paying any unpaid balances, including late fees, at the conclusion of the moratorium.

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All residential and small business customers who receive voice service from telephone corporations and are facing financial hardship in California are eligible for the emergency customer protections set forth in this Resolution. Telephone corporations shall only require a verbal or written (either via email, traditional mail, or fax) affirmation from customers that they are experiencing financial hardship in order to be eligible for the moratorium. Telephone corporations shall be flexible in how they administer this requirement, giving customers the option of how to self-certify that they are eligible for the moratorium program because that are experiencing financial hardship.

Since the conclusion of the FCC's Keep Americans Connected Pledge, telephone corporations have, in many cases, allowed customers flexibility in extending payment for overdue balances to avoid disconnection. Building on the success of these voluntary programs, the moratorium will be offered proactively as an option to customers facing financial difficulty. We agree with the parties' comments that they should also offer customers who face financial hardship flexible payment plan options; however, this should not supplant the option for customers who face financial hardship to instead choose the moratorium.

In order to avoid rate shock, following the conclusion of the moratorium, telephone corporations will offer flexible payment plans for customers to repay what is owed for services rendered during the moratorium.

These customer protections are a floor, not a ceiling.²² As we stated in D.19-07-015 and D.19-08-025, we support and encourage telephone corporations to do more to help Californians in this time of need.²³ Telephone corporations have the discretion to add additional customer relief efforts that are unique to their customers' experience, or the specific type of damage a customer may suffer from as a result of COVID-19.²⁴ While we do not mandate it here, we strongly encourage telephone corporations subject to this resolution to waive all late fees for customers facing financial hardship during the pendency of this moratorium.

This moratorium on disconnections for non-payment and fees for late payment of voice services does not replace the customer protections put in place with D.19-07-015 and D.19-08-025, but rather, supplements those customer protections.

²² D.19-07-015 at 24-25; see also D.19-08-025 at 34.

²³ *Id.*

²⁴ *Id.*

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ADVICE LETTER FILING

The telephone corporations subject to this Resolution shall take the following immediate actions and file a Tier 2 Advice Letter no later than 20 days after this Resolution's approval demonstrating compliance to the Commission's Communications Division

COMMENTS ON DRAFT RESOLUTION

Public Utilities Code section 311(g)(1) provides that this Resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived "in an unforeseen emergency." Rule 14.6 of the Commission's Rules of Practice and Procedure (Rules) also state that public review and comment may be waived or reduced in an "unforeseen emergency situation" such as when there are "[a]ctivities that severely impair or threaten to severely impair public health or safety,"²⁵ "[c]rippling disasters that severely impair public health or safety,"²⁶ or "[r]equests for relief based on extraordinary conditions in which time is of the essence." The 30-day comment period was reduced pursuant to Public Utilities Code section 311(g) and Rule 14.6(a) due to the extraordinary nature of the pandemic. Opening comments were due on December 7, 2020 days and reply comments were due on December 14, 2020. This resolution shall be served on the service list of R.18-03-011, the proceeding that developed the customer protection measures discussed herein. Interested persons may participate in the forthcoming Advice Letter processes.

Several parties claim that the CPUC is preempted from regulating Voice over Internet Protocol (VoIP) service.²⁷ VoIP service providers fall within the definition of "Telephone Corporation" under Public Utilities (PU) Code § 234, and their facilities fall within the definition of "Telephone Line" pursuant to PU Code § 233.²⁸ Thus, the

²⁵ Rule 14.6(a)(1).

²⁶ Rule 14.6(a)(2).

²⁷ See, e.g., CTIA Opening Comments at 4-9; AT&T Opening Comments at 13. In the past, the Legislature placed limits on the CPUC's ability to regulate VoIP providers by enacting Public Utilities Code section 710. That code section expired on January 1, 2020, nearly a year ago and no longer applies.

²⁸ This is contrary to what many parties have argued in R.18-03-011, e.g., Comments of Comcast on ACR and Proposal at 14-16, April 3, 2020; CCTA Comments on ACR and Proposal at 6-7,

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Commission’s jurisdiction extends to VoIP carriers as well as to traditional landline carriers, and the Commission has clear authority to apply the moratorium in this resolution to VoIP carriers. Some parties claim that an 8th Circuit decision to the contrary, *Charter Advanced Servs., LLC v. Lange*,²⁹ prevents the Commission from exerting its authority over VoIP carriers under California Law.³⁰ This is incorrect, as this Commission, located in the 9th Circuit, is not bound by the 8th Circuit’s decision.³¹ In D.19-08-025, the Commission stated that “VoIP providers clearly fit within the plain language of the definition of a public utility ‘telephone corporation.’”³² Several parties challenged this determination in applications for rehearing of D.19-08-025.³³ On September 15, 2020, we issued D.20-09-012, modifying D.19-08-025, denying the applications for rehearing, and upholding our finding that VoIP providers are public utility “telephone corporations.” No party timely challenged D.20-09-012.

AT&T and Joint Cable Providers also reference the FCC’s *Vonage*³⁴ decision to argue that states are preempted from imposing common carrier regulations on VoIP services.³⁵ The *Vonage* decision is inapposite here as it only applies to nomadic VoIP³⁶ and not to fixed VoIP, which is what is at issue in this resolution. The FCC has never expanded its finding in the *Vonage* decision to include all VoIP, and indeed, the FCC has

April 3, 2020; Cox Comments on ACR and Proposal at 32, April 3, 2020; Charter Comments on ACR and Proposal at 17, April 3, 2020; AT&T Comments on ACR and Proposal at 7, April 3, 2020.

²⁹ 903 F.3d 715 (2018), finding that VoIP is an “information service.”

³⁰ Joint Cable Providers Opening Comments at 12; AT&T Opening Comments at 12-13.

³¹ See D.20-09-012. Further, the 8th Circuit’s reliance on the federal policy of nonregulation of information services as the basis for preempting state regulation of VoIP services is questionable. (See, e.g., *Mozilla v. FCC* 940 F.3d 1, 78-80 (rejecting the FCC’s reliance on a “policy of nonregulation” as a basis for preempting state law); see also *Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (2019) (Thomas, J., joined by Gorsuch, J., concurring in denial of certiorari) (“It is doubtful whether a federal policy—let alone a policy of nonregulation—is ‘Law’ for purposes of the Supremacy Clause.”). On October 21, 2019, the U.S. Supreme Court denied the Minnesota PUC’s Petition for Writ of Certiorari, so the Court of Appeals decision still stands, and all appeals have been exhausted.

³² D.19-08-025, COL 27.

³³ AT&T, VoIP Coalition, and CTIA timely filed applications for rehearing of D.19-08-025.

³⁴ Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 32 (2004,) *aff’d*, *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007).

³⁵ AT&T Opening Comments at 12; Joint Cable Providers Opening Comments at 10-11.

³⁶ Nomadic VoIP is usually a VoIP phone installed in a portable computer which can be taken with the subscriber.

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never taken action to block states from imposing regulations on VoIP providers.³⁷ For example, in 2011, well after the *Vonage* case issued, the California Legislature enacted assembly bill (AB) 841, codified as Section 285 of the PU Code, which reads in relevant part, "[t]he commission shall require interconnected VoIP service providers to collect and remit surcharges to ensure that end-use customers of interconnected VoIP service providers contribute to the funds enumerated in this section....". No VoIP provider challenged the legality of that section on the grounds that "interconnected VoIP" was a purely interstate service exempt from state regulation. Nor did any VoIP provider challenge AB 841 on any other grounds.

CTIA, AT&T, and other parties argue that the moratorium constitutes prohibited market entry regulation of commercial mobile service (i.e., wireless service) pursuant to 47 U.S.C. § (c)(3)(A),³⁸ which states:

no State or local government shall have any authority to regulate the entries of or the rates charged by any commercial mobile service or any private mobile service, except this paragraph *shall not prohibit a State from regulating the other terms and conditions of commercial mobile service.*³⁹

The legislative history of § 332(c)(3)(A) of the Budget Act indicates what Congress meant by the language "other terms and conditions," and reemphasizes the role Congress saw for the States:

It is the intent of the Committee that the State still will be able to regulate the terms and conditions of these services [CMRS]. By "terms and conditions" the Committee intends to include such matters as customer billing information and packaging and billing disputes and other such consumer protection matters; facility siting issues (*e.g.* zoning); transfers of control; bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis and such other matters as fall within the State's lawful authority. This list is intended to be illustrative

³⁷ In the lead-up to the decision by the 8th Circuit, the FCC did oppose Minnesota's attempt to regulate VoIP that was at issue in the case.

³⁸ CTIA Opening Comments at 4-10; AT&T Opening Comments at 12-13.

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

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only and not meant to preclude other matters generally understood to fall under “terms and conditions.”⁴⁰

The FCC has also confirmed the CPUC’s jurisdiction over “other terms and conditions.”⁴¹

After Congress enacted the revised 47 U.S.C. § 332, the CPUC issued multiple decisions implementing the change in federal law and harmonizing those changes with existing Commission oversight of wireless telephony.⁴² In so doing, the Commission affirmed that wireless providers are “telephone corporations” and therefore, “public utilities” under Public Utilities Code §§ 216, 233, and 234. Accordingly, the Commission exercises broad authority over wireless service.⁴³ This is evidenced by the fact that the CPUC has successfully asserted jurisdiction over “other terms and conditions” of wireless service

⁴⁰ H.R. Rep. No. 103-111, 103d Con. 1st Sess. (1993), at 251, reprinted in 1993 U.S.C.C.A.N. 378, 588.

⁴¹ The FCC stated that the “CPUC retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state.” (*See* May 19, 1995 Report and Order *In re Petition of the People of the State of California ... to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Record 7486.) Moreover, the Federal Communications Act contains “savings clauses” which are “fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field.

⁴² *See, e.g.*, D.95-10-032, *Investigation on the Commission’s Own Motion into Mobile Telephone Service and Wireless Communications*; see also D.94-10-031, *supra* (wireless providers subject to the Commission’s jurisdiction, including “the requirement to file tariffs” other than rate tariffs); upheld on rehearing in D.94-12-042. Shortly after passage of the Budget Act, the Commission instituted an investigation of the wireless industry in order “to develop a comprehensive regulatory framework consistent with the Federal Budget Act and our own statutory responsibilities.” I.93-12-007, *Investigation on the Commission’s Own Motion into Mobile Telephone Service and Wireless Communications*, 1993 Cal. PUC LEXIS 836.) A year later the Commission adopted “interim procedures” (including a registration requirement for wireless carriers) to ensure that the Commission retained “the ability to provide a forum for the resolution of consumer problems when they may arise and continued regulation of other terms and conditions for all CMRS carriers.” (D.94-10-031, 56 CPUC 2d 578, 579.)

⁴³ In D.94-10-031, the CPUC found that wireless providers remain fully subject to its authority in all respects aside from the requirements to obtain operating authority (entry regulation) or rate regulation. In D.96-12-070, the CPUC reiterated its intent to exercise its jurisdiction over “other terms and conditions” of cellular carriage. D.96-12-070 provided: “Given the dynamic and changing nature of the CMRS market, we cannot anticipate all possible consumer issues or industry concerns that may arise over time, and the resulting scope of ‘terms and conditions’ which we will actively supervise.” (70 CPUC 2d at 77 (Finding of Fact No. 21).)

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in numerous cases.⁴⁴ The “protection of the lives limbs, health, comfort, and quiet of all persons ... within the State” has been considered part of the States’ essential “police power” since the inception of our federal form of government.⁴⁵ The Tenth Amendment to the U.S. Constitution provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Police power, including the authority to protect the health and safety of its citizens, is unquestionably an area of traditional state control.⁴⁶ The moratorium promulgated in this resolution is a consumer safeguard intended to protect the health and safety of utility customers who are affected by the devastating impact of a global pandemic.

The Commission’s recent decision in this proceeding, D.20-07-011, in which the Commission adopted backup power requirements for wireless providers, responded to and rejected similar preemption arguments from wireless carriers.⁴⁷ Like the backup power rules adopted in D.20-07-011, the moratorium in today’s decision falls under the Commission’s police powers pursuant to the Tenth Amendment of the U.S. Constitution and Public Utilities Code §§ 233, 451, 701, et al.⁴⁸ Further, numerous cases recognize the consumer protection and other police power interests reserved to the States pursuant to § 332(c)(3)(A).⁴⁹

⁴⁴ For example, the Commission has reviewed merger agreements between wireless carriers pursuant to Public Utilities Code §§ 851-857, (T-Mobile/AT&T proposed merger, I.11-06-009; T-Mobile/Sprint proposed merger, A.18-07-011, A.18-07-012), enforced consumer protection measures against wireless carriers in the Consumer Protection Initiative Decision (D.06-08-030) and Cramming Reporting Decision (D.10-10-034), and applied outage reporting requirements to wireless carriers (D.16-08-021). The Commission also adopted D.18-08-004 and D.19-08-025 in R.18-03-011 adopting rules addressing disaster relief emergency customer protections, which apply to wireless carriers.

⁴⁵ *Slaughter-House Cases* (1873) 83 US 36, 62, quoting *Thorpe v. Rutland & Burlington Railroad Co.* (1855) 27 Vermont 149.

⁴⁶ *Raich v Gonzalez*, 500 F3d 850, 866-67 (9th Cir., 2006). The U.S. Supreme Court also recognized this principal in *Medtronic v Lohr*, 518 U.S. 470, 475 (1996).

⁴⁷ D.20-07-011 at 22-24. The Commission affirmed this exercise of the Commission’s police powers authority in D.20-09-012

⁴⁸ D.20-09-012 at 44-47.

⁴⁹ See, e.g., *Ting v. AT&T Corp.* (9th Cir. 2003) 319 F.3d 1126, cert. denied, *AT&T Corp. v. Ting* (2003) 124 S.Ct. 53.); *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366; *Fedor v. Cingular Wireless*, (7th Cir. 2004) 35 F.3d 1069; *Phillips v. AT&T Wireless* (S.D. Iowa July 29, 2004) 2004 U.S. Dist. LEXIS 14544); *Brown v. Washington/Baltimore Cellular, Inc.* (D. Md. 2000) 109 F. Supp. 2d 421, 423; *Iowa v. US Cellular Corp.* (S.D. Iowa 2000) 2000 U.S. Dist. LEXIS 21656; *Communications Telesystems Int’l v. Calif. Pub. Util. Comm’n* (9th Cir. 1999) 196 F.3d 1011.

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On its face, 47 U.S.C. § 332(c)(3)(A) preempts only state attempts to prevent new mobile service carriers from entering the market or to regulate rates charged for wireless service; any other state regulation of mobile services providers remains unaffected.⁵⁰ In this resolution, the CPUC does not regulate wireless carrier's rates. Rather, based on our authority pursuant to the California Constitution, the Public Utilities Code, and our state police powers, we are directing all public utilities providing voice services in California to offer a moratorium on disconnections and late payment fees for those Californians in financial distress due to this unprecedented state of emergency. The moratorium does not constitute rate regulation.⁵¹ Rather, consistent with applicable law, including properly exercising our state police powers, the CPUC is discharging its duty to protect consumers in California while ensuring that the telephone corporations it regulates will be made whole.⁵²

Some parties also claim that the moratorium constitutes an impermissible taking in violation of the Fifth Amendment because it “would interfere with wireless carriers’ expectations regarding their ability to collect their rates for their services, undermining their ability to recover their significant investments in their networks.”⁵³ CTIA further claims that under the U.S. Supreme Court case *Penn Central Transportation Co. v. City of N.Y.*,⁵⁴ the moratorium constitutes a taking in violation of the Fifth Amendment to the U.S. Constitution.⁵⁵ These arguments have no merit. The regulated industry is not

⁵⁰ *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd.*, 634 F.3d 17 (1st Cir.), cert. denied 565 U.S. 826 132 S.Ct. 119, 181 Ed. 2d 42 (2011). Late fees are not considered rates under 47 U.S.C. § 332(c)(3)(A). (*Ruwe v. Cellco Partnership*, 613 F. Supp. 2d 1191 (N.D. Cal. 2009).)

⁵¹ See *Pacific Bell Wireless, LLC v. CPUC* (2006) 140 Cal. App. 4th 718 (citing *Spielholz v. Superior Court*, *supra*, 86 Cal.App.4th at pp. 1374–1375) where Pacific Bell Wireless challenged a CPUC order requiring refund of early termination fees as “rate regulation.” The Court said, “A judicial act constitutes rate regulation only if its principal purpose and direct effect are to control rates... If the principal purpose and direct effect of a remedy are to prevent false advertising and compensate an aggrieved customer, any prospective or retrospective effect on rates is merely incidental.” See also *Gellis v. Verizon Communs., Inc.*, 2007 U.S. Dist. LEXIS 99087 (holding that late fees do not constitute “rates”).

⁵² See, e.g., Pub. Util Code §§ 216, 233, 234; Article 10 of the U.S. Constitution; California Constitution, Art. XII, §§ 2, 4, 6. We note that a case that CTIA references (*California v. FCC*, 905 F.2d 1217, 1225 (9th Cir. 1990)) is not applicable to the facts presented here as it predates the 1996 Telecommunications Act and does not concern mobile devices or wireless technology.

⁵³ CTIA Opening Comments at 11.

⁵⁴ *Penn Central Transportation Co. v. City of N.Y.*, 438 U.S. 104 (1978) (“*Penn Central*”).

⁵⁵ CTIA Opening Comments at 11-12.

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entitled, as a matter of right, to realize a particular rate of return or a profit, and thus any taking claim based solely on loss of profit should fail.⁵⁶

It is well established that necessary government regulation is not a taking. The Commission recently issued D.19-08-040,⁵⁷ restating these principles and laying out the three significant factors for a takings claim, providing:

The Fifth Amendment prohibits the government from taking private property for public use without just compensation.⁵⁸ As a general rule, the government is not required to pay for the incidental effects of its laws and regulations. (*Pa. Coal Co. v. Mahon* (“*Mahon*”) (1922) 260 U.S. 393, 413.) “To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*.” (*Andrus v. Allard* (“*Andrus*”) (1979) 444 U.S. 51, 65 [emphasis in original].) “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” (*Ibid.* quoting *Mahon*, at p. 413.) However, when a governmental regulation goes too far, the government must compensate those it harms. (*Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1014.) How far is too far depends on the facts and circumstances of each case. (*Ibid.*) In determining whether a governmental regulation constitutes a “taking” under the Fifth Amendment, the Commission applies the test articulated in *Penn Central Transportation Co. v. City of N.Y.* (“*Penn Central*”) (1978) 438 U.S. 104.⁵⁹ In *Penn Central*, the United States Supreme Court acknowledged that there is no “set formula” for determining whether a governmental regulation constitutes a “taking.” (*Id.* at p. 124.) The Court

⁵⁶ D.97-04-090, 1997 Cal. PUC LEXIS 363 at p. 33 (“a regulated entity neither has a constitutional right to a profit nor a constitutional right against a loss,” quoting *20th Century Ins. V. Garamendi*, 8 Cal. 4th at 293).

⁵⁷ The Commission affirmed this takings analysis in D.20-09-012 at 17-18.

⁵⁸ U.S. Const., 5th Amend.; Cal. Const., art. I, § 19; see also *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (1897) 166 U.S. 226, 234 (the federal takings clause applies to the states via the Fourteenth Amendment to the federal Constitution.)

⁵⁹ *Bottini v. City of San Diego* (2018) 27 Cal.App.5th 281, 312 (“the *Penn Central* test...applies to regulatory takings causes of action arising under the California Constitution.”)

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explained that the inquiry into whether a taking has occurred is essentially an “ad hoc, factual inquir[y].” (*Ibid.*) The Court, however, identified three factors of significance: (1) the “economic impact” of the regulation on the claimant; (2) the extent to which the regulation has interfered with the claimant’s reasonable investment-backed expectations of confidentiality; and (3) the character of the governmental action. (*Ibid.*) The Commission may dispose of a takings claim on the basis of one or two of these factors....^{60 61}

Applying the *Penn Central* factors to this resolution, Joint Cable Provider’s and CTIA’s takings claims fail. As noted above, the wireless carriers will have the opportunity to be made whole; the Commission here is merely adopting a requirement that the wireless carriers offer customers experiencing financial hardship the option to have a moratorium on disconnections and late fees for telephone service for a finite period. We are in uncharted waters in an unprecedented time. It is vital for the CPUC to take steps to protect the public health and safety of the people of California. For example, if a customer who has lost her job and is experiencing financial hardship also loses her phone service, the customer might not receive an evacuation warning, a contact tracer’s call to inform her that she may have been exposed to Covid-19, or may be unable to call 911 when her son experiences a serious injury.

Other issues raised by parties’ comments, including clarifying an end date for the moratorium, offering customers flexible payment plans, only allowing customers that are experiencing financial hardship to opt into the moratorium, and First Amendment concerns have been addressed in the revisions to this resolution.

⁶⁰ *Allegretti & Co. v. County of Imperial* (“*Allegretti*”) (2006) 138 Cal.App.4th 1261, 1277, citing *Bronco Wine Co. v. Jolly* (“*Bronco*”) (2005) 129 Cal.App.4th 988, 1035 (where the nature of the governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations); *Monsanto, supra*, 467 U.S. at p. 1005 (disposing of trade secret takings claim based upon the absence of reasonable investment-backed expectations in confidentiality of the disputed data.)

⁶¹ D.19-08-040, *In re Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online Enabled Transportation Services, Order Modifying Decision 16-01-014 and Denying Rehearing of the Decision, as Modified, Slip. Op.*, at 30-31.

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FINDINGS

1. On March 4, 2020, Governor Newsom declared a State of Emergency in California related to COVID-19.
2. On March 19, 2020, Governor Newsom ordered Californians to shelter in place except to meet essential needs.
3. On November 16, 2020, Governor Newsom announced that 41 of the state's 58 counties, encompassing about 37 million people, will remain in or roll back to the purple tier, the strictest tier of the state's four-part, color-coded reopening roadmap.
4. On December 3, 2020, Governor Newsom announced the Regional State at Home Order, which severely limits economic activity in California.
5. Around December 6, 2020, the Regional State at Home Order affected the overwhelming majority of Californians
4. Social distancing and shelter-in-place requirements have required the closure of non-essential businesses and resulted in layoffs.
5. Employee layoffs due to the COVID-19 pandemic have created a risk that residential customers may fall behind on utility payments through no fault of their own.
6. Some companies have already implemented customer protections in response to the COVID-19 pandemic, including observing moratoria on disconnections for nonpayment and lifting broadband data caps.
7. In order to assist Californians affected by the COVID-19 pandemic, it is reasonable to provide continuity and consistency between all utility actions related to the pandemic.
8. The Commission has previously issued Resolutions and opened Rulemakings to address highly disruptive events, most recently in response to the devastating wildfires in Northern and Southern California.
9. In response to the reoccurring natural and manmade disasters, the Commission opened Rulemaking (R.) 18-03-011 and adopted customer protection measures adopted in decisions (D.) 19-07-015 and D.19-08-025.
10. Having access to essential utility services is critical to maintaining Californians' health and safety during the COVID-19 pandemic.
11. In order to expeditiously assist Californians affected by the COVID-19 pandemic, it is reasonable to apply the emergency customer protections adopted in D.19-07-015 and D.19-08-025 during the pendency of the pandemic.
12. Public Utilities Code section 311(g)(2) and Rule 14.6(a)(1) allow the Commission to reduce or waive the public review and comment period in an unforeseen emergency.

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THEREFORE, IT IS ORDERED that:

1. Telephone corporations subject to this Resolution shall apply the moratorium on telephone disconnections for non-payment and fees for late payment for residential and small business voice services customers facing financial hardship following 30 days after the date of this resolution.
2. Telephone corporations must allow customers electing to utilize the moratorium to self-certify, either via telephone, email, or mail, that they are experiencing financial hardship, and are therefore eligible for the relief set forth in this resolution.
3. To avoid confusion and lengthy customer service inquiries from affected customers who elect into the moratorium program, telephone corporations subject to this Resolution are encouraged not to send residential and small business voice services customers late fee or disconnection notices during the pendency of this moratorium. However, billing notices indicating flexible payment plans or the amount that is accruing to a customer's account may be useful, so long as the notices are clear that the telephone corporations are only providing information to customers, not requiring customers to pay in full or at all during the pendency of the moratorium program.
4. Telephone corporations subject to this Resolution shall file a Tier 2 Advice Letter describing all reasonable and necessary actions to implement the moratorium to support California residential and small businesses voice services customers.
5. The moratorium will go into effect 30 days from the date of approval, and will last for 90 days, unless the Executive Director authorizes one or more extensions not to exceed an additional 90 days.
6. The moratorium does not relieve customers of their financial obligations.
7. The moratorium will be offered proactively as an option to customers facing financial difficulty who are unable to enter an extended payment plan.
8. This order is effective today.

I certify that the foregoing resolution was adopted by the California Public Utilities Commission at its regular meeting of December 17, 2020, and the following Commissioners approved favorably thereon:

/s/ RACHEL PETERSON
Rachel Peterson
Acting Executive Director

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MARYBEL BATJER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

Commissioners