Decision 21-10-015 October 7, 2021

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Emergency Disaster Relief Program.	Rulemaking 18-03-011

ORDER DENYING REHEARING OF DECISION (D.) 20-07-011

In this Order, we dispose of the Application for Rehearing of Decision (D.) 21-101-015 filed by "Wireless Carriers". We have determined that good cause has not been demonstrated to grant rehearing of the Decision.

I. INTRODUCTION AND BACKGROUND

Wildfires and other natural disasters and emergencies are becoming more destructive and recurring more frequently in California. In response to increasing numbers of wildfires and natural disasters in California, the California Public Utilities Commission (CPUC or Commission) opened Rulemaking (R.) 18-03-011 to establish a permanent disaster relief program for customers that utilities could implement more expeditiously than programs implemented through the resolution process each time a wide-spread public emergency occurs. To avoid gaps in consumer protection during our consideration of the issues in R.18-03-011, we issued Decision (D.) 18-08-004, which made the protections adopted in Resolutions M-4833 and M-4835 controlling, interim authority until we concluded the Rulemaking. In D.21-06-020, we denied the Applications for Rehearing and Petition for Modification of D.18-08-004.

Following an extensive stakeholder participation process that included workshops, we issued D.19-08-025, which adopted a permanent emergency disaster relief program for communications customers. This Decision carried over the same landline consumer protections adopted in D.18-08-004 and added consumer protections for wireless customers, referenced collectively as the "Telephone Requirements." We modified and denied rehearing of D.19-08-025 in D.20-09-012.

We determined in D.19-08-025 that Phase II of R.18-03-011 would focus on having a resilient and dependable communications network that aids first responders and communicates with the public in a timely manner. On January 21, 2020, the assigned Commissioner's Scoping Memo and Ruling was issued, adopting a schedule for Phase II in this proceeding, with the goal of adopting communications service provider resiliency and disaster response requirements in advance of the 2020 wildfire season.

On March 6, 2020, the assigned Commissioner set forth an Assigned Commissioner's Proposal for maintaining resilient and dependable communications networks that aid first responders and to allow the public to communicate reliably during catastrophes such as wildfires or during public safety power shutoff (PSPS) events.[1] We issued a draft decision on June 11, 2020, and after considering comments on the proposed decision, issued D.20-07-011 on July 16, 2020. Decision 20-07-011 (or "Decision") adopted consumer protection resiliency and emergency backup health and safety requirements ("Health and Safety Rules") for wireless carriers operating in California. This Decision requires California's facilities-based wireless providers (wireless providers) to develop comprehensive resiliency strategies to prepare for catastrophic disasters and power outages.

In their application for rehearing filed on August 19, 2020, CTIA, AT&T Mobility, Cellco Partnership d/b/a Verizon Wireless and T-Mobile (collectively, "Wireless Carriers") claim that the Health and Safety Rules adopted in D.20-07-011 are preempted on three grounds. First, Wireless Carriers contend that the Health and Safety Rules are expressly preempted by Section 332 of the Communications Act.[2] Second, Wireless Carriers assert that the Health and Safety Rules are preempted because they conflict with the policy decision of the Federal Communications Commission ("FCC") to adopt a voluntary and cooperative framework offered by the wireless industry.[3] Wireless

[1] R.18-03-011, Assigned Commissioner's Ruling and Proposal, March 6, 2020.

[2] App. for Rehearing at 5; 47 USC § 332(c)(3)(A).

[3] *Id.* at 5-6.

Carriers further claim that to the extent that D.20-07-011 seeks to regulate wireless providers' provision of broadband Internet access service and text messaging services, wireless carriers claim that those are "information services" subject to a federal deregulatory policy that is not compatible with common carrier or utility-style regulation.[4] Third, Wireless Carriers assert that the Health and Safety Rules are subject to "field preemption" under Title III of the Communications Act, which vests the FCC with broad and exclusive authority to regulate the operation of wireless networks, as the Decision impermissibly attempts to do.[5] Notably, Wireless Carriers do not challenge the fact that the Commission has jurisdiction over them. Rather, they claim that the Commission's jurisdiction to enact the Health and Safety Rules is preempted by federal law.[6] As discussed below, Wireless Carriers' arguments are without merit.

On September 3, 2020, the Public Advocates Office at the California Public Utilities Commission, The Utility Reform Network, the Center for Accessible Technology, and the Greenlining Institute (hereafter collectively referred to as "Joint Consumer Parties") filed a response to the Wireless Carriers' Application for Rehearing of D.20-07-011, which has been considered here.

II. DISCUSSION

A. The Decision is Not Expressly Preempted by Section 332 of the Communications Act

Wireless Carriers claim that the Health and Safety Rules are expressly preempted by Section 332 of the federal Communications Act. They state that 47 U.S.C. Section 332(c)(3)(A) "'completely preempts' state regulation of wireless 'entry'"[7] and that "courts have specifically held that Section 332(c)(3)(A)'s prohibition on state entry

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[4] *Id.* at 6.

[5] *Id.*

[6] *Id.* at 3 (citations omitted). Wireless Carriers also make sweeping statements that we erred in not leaving "a voluntary disaster response framework in place and [not] refrain[ing] from adopting prescriptive rules in this highly technical and dynamic area." (App. for Rehearing at 7 (citations omitted).)

[7] *Id.* at 7 (citing *Matter of Petition of the State of Ohio for Auth. To Continue to Regulate Mobile Radio Servs.*, 10 FCC Rcd 7842, 7853 ¶ 45 (1995) (emphasis added)).

regulation bars state efforts to regulate the adequacy of wireless network facilities or the level or quality of wireless service."[8]

Wireless Carriers also assert that Section 332(c)(3)(A) "bars state efforts to regulate the adequacy of wireless network facilities of the level or quality of wireless service.[9] Wireless Carriers continue to erroneously rely on the *Bastien*[10] case to support their position.[11] Wireless carriers essentially claim that states may not take any measures to regulate wireless carriers, even those that fall under "other terms and conditions of wireless service."[12] Wireless Carriers have made these same arguments in nearly every proceeding where the Commission has attempted to adopt and implement consumer protection measures.[13] As in every other case, the wireless carriers' express preemption argument is without merit.

In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993 (Budget Act), which amended Section 332(c)(3)(A) as follows:

> 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.*[14]

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[8] *Id.*

[9] *Id.*

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

[11] App. for Rehearing at 7.

[12] App. for Rehearing at 10-11.

[13] *See, e.g.,* I.11-06-009 (T-Mobile/AT&T proposed merger); A.18-07-011, A.18-07-012 (T-Mobile/Sprint proposed merger,); D.04-09-062, D.04-12-058, *Pacific Bell Wireless (Cingular) v CPUC,* 140 CA4th 718 (2005) (jurisdiction over AT&T Wireless' corporate predecessor, Cingular); D.12-02-032 (jurisdiction over a mobile reseller, TracFone); D.10-10-034 (Cramming Reporting Decision); D.20-09-012, Modifying and Denying Rehearing of D.19-08-025 (adopting an emergency disaster relief program for customers of communications service providers in this proceeding, R.18-03-011).

[14] Codified at 47 USC § 332(c)(3)(A) (emphasis added). The Budget Act was part of a national redistribution of regulatory authority which continued with the 1996 Telecommunications Act and resulted in what has been referred to as a system of "cooperative federalism." *See, e.g., Core Communications, Inc. v. Verizon Pennsylvania, Inc.* 493 F.3d 333, 335 (3d Cir. 2007) ("[T]he Act provides that various responsibilities are to be divided between the state and federal

(*footnote continued on next page*)

On its face, Section 332(c)(A)(3) preempts only state attempts to prevent new mobile service carriers from entering the market or to regulate rates charged for wireless services; any other state regulation of mobile services providers remain unaffected.[15] Whether a particular regulation falls under the meaning of "market entry," "rates," or "other terms and conditions" is fact-specific, requiring a case-by-case determination.[16] As discussed below, D.20-07-011's Health and Safety Rules are consumer protection and public safety requirements that fall under "other terms and conditions of commercial mobile service" pursuant to Section 332(c)(3)(A), and therefore, they are not subject to preemption.

The backup power and other requirements in the Health and Safety Rules do not constitute rate regulation. Although states may not regulate the entry of or rates charged by wireless providers, not all matters that may indirectly affect wireless providers' rates constitute the rate regulation as contemplated by Section 332. The scope of Section 332's preemptive language is limited to regulations that directly and explicitly control rates, prevent market entry, or require a determination of the reasonableness of rates.[17] The CPUC still retains the clear authority to regulate "other terms and conditions of service."

To support an express preemption argument, Wireless Carriers must cite an express Congressional intention to prohibit states from regulating wireless providers

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governments, making it 'an exercise in what has been termed cooperative federalism.' (Internal citation omitted) . . . The 'intended effect' of such regime was to 'leave[e] state commissions free, where warranted, to reflect the policy choices made by their states'").

[15] *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). *See also* Joint Consumers Response to App. for Rehearing at 7.

[16] *Telesaurus VPC, LLC v Power* (9th Cir., 2010) 623 F.3d 998, 1007 ("the FCC rejected this per se approach, adopting instead a case-by-case analysis for preemption of state tort actions"); *Shroyer v AT&T* ("the FCC rejected this per se [preemption] argument in *In re Wireless Consumers Alliance*, and so do we.")

[17] *Spielholz v. Superior Court* (2001) 86 Cal. App. 4th 1366; *Fedor v. Cingular Wireless* (7th Cir. 2004) 355 F.3d 1069, 1074. (*Phillips,* 2004 U.S. Dist. LEXIS 14544 at *24-25; *see also, 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, *5 (*US Cellular*).)

where such regulation might be necessary to safeguard the health and safety of their populations.[18] Wireless Carriers have failed to do so. Nowhere has Congress expressly stated or clearly manifested any intention to prohibit all state public safety regulations that apply to wireless providers.

As we stated in D.20-07-011, the legislative history of Section 332(c)(3)(A) indicates what Congress meant by the language "other terms and conditions" (also referred to as the "savings clause"), 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 only and not meant to preclude other matters generally understood to fall under "terms and conditions."[19]

The FCC has also confirmed our jurisdiction over "other terms and conditions" when it stated that it anticipated the CPUC would continue to conduct appropriate complaint proceedings and to monitor the structure, conduct, and performance of wireless providers.[20]

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[18] *Napier v Atlantic Coast Line,* 272 US 605, 611 (1926) (Justice Brandeis stating: "[t]he intention of Congress to exclude States from exerting their police power must be clearly manifested.").

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

[20] 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" (described by the Court in *Farina v*

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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 authority to protect health and safety of its citizens, is unquestionably an area of traditional State control.[21] The California Constitution and California statutory law designate the CPUC as the principal body through which the State exercises its police power in the case of essential utility network services.[22]

Pursuant to the police power authority vested in it by the California Constitution and the Public Utilities Code, and acting as the State's expert agency in matters of public utility infrastructure, the Commission articulated Health and Safety Rules that apply in whole or in part to wireless networks, and to the wired networks on which wireless networks depend.[23] Both state and federal courts repeatedly have upheld the Commission's authority and that of other state agencies acting pursuant to the States' police power.[24]

Nokia, infra) and discussed further below, which are "fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field . . . there would be nothing . . . to 'save,' and the provision would be mere surplusage." (*Farina v. Nokia Inc* (3d Cir. 2010) 625 F.3d 97, 117 (3d Cir. 2010) 121-22).

[21] *Raich v Gonzalez,* 500 F3d 850, 866-67 (9th Cir., 2006).

[22] Public Utilities Code § 451 gives the Commission broad authority to regulate public utility services and infrastructure as necessary to ensure they are operated in a way that provides for the health and safety of Californians.[22] Protections for Californians as consumers of telecommunication services are set forth in Public Utilities Code §§ 2890-2896. Our public health and safety police powers are further reflected in our oversight of 9-1-1 service, referenced in several sections of the Public Utilities Code.[22] Public Utilities Code § 2898 prohibits mobile throttling of first responders, upon request, during emergencies. Each of these requirements deepens the state's reliance on advanced, IP-enabled services to maintain the public's safety. The state's ability to maintain the public's safety is inseparably intertwined with these services.

[23] The Commission's iterations of that authority include General Order (GO) 52 (Construction and operation of power and communication lines for the prevention or mitigation of inductive interference); GO 95 (Overhead electric [and communications] line construction); GO 128 (Construction of underground electric supply and communication systems); and GO 159-A (Construction of cellular radiotelephone facilities in California); among other such Commission orders and guidelines.

[24] Consumer protection and safety statutes are sometimes referred to as public welfare or police power laws, as they involve protection of the public at large. (*Cf. Investigation on the*

(*footnote continued on next page*)

Wireless Carriers ignore the many cases that recognize the consumer protection and other police power interests reserved to the States pursuant to Section 332(c)(3)(A).[25] We have successfully asserted jurisdiction over "other terms and conditions" of wireless service.[26] Wireless Carriers also disregard *Pacific Bell Wireless (Cingular) v CPUC,* 140 CA4th 718 (2005), the *Cingular* case. In *Cingular*, the California Court of Appeal upheld the Commission's assertion of jurisdiction in a case relying on the "other terms and conditions" language of Section 332(c)(3)(A), where we penalized a wireless carrier for providing "unjust and unreasonable service."[27] Wireless Carriers wish to ignore the clear legislative intent of what falls under the rubric of "other terms and conditions" and decades of caselaw supporting this legislative intent. Instead, by relying on the *Bastien* case, Wireless Carriers erroneously contend that our interpretation of Section 332(c)(3)(A) is too narrow.

Commission's own motion into ... Communication Telesystems [CTS], D.97-10-063 (1997) 1997 Cal. PUC LEXIS 912 at *10-11, *16, and Conclusion of Law 6 (slamming of long distance customers); see also D.97-05-089, 1997 Cal. PUC LEXIS 447 at *39-40; *see also Donald v. Cafe Royale, Inc*. (1990) 218 CA3d 168, 180 (failure to provide wheelchair access in restaurant*); Drewry v. Welch* (1965) 236 CA2d 159, 175-76 (trespass in removing timber), discussed in D.97-10-063, 1997 LEXIS 912 at *11).

[25] *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.

[26] For example, we have 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).

[27] We issued D.04-09-062, concluding an investigation into the sale of cellular telephone equipment and Early Termination Fee (ETF) practices of Cingular Wireless (Cingular). There, the CPUC determined that Cingular's ETF policy "constituted an unjust and unreasonable rule and resulted in inadequate, unjust, and unreasonable service in violation of both Pub. Util. Code § 451" and a prior Commission decision, D.95-04-028 and ordered Cingular to pay customer reparations and a penalty. (D.04-12-058 at 1.) In 2006, the Court of Appeal upheld our assertion of jurisdiction over Cingular Wireless and denied Cingular's Petition for Writ of Review. (*Pacific Bell Wireless (Cingular) v CPUC,* 140 CA4th 718 (2005). The California Supreme Court and U.S. Supreme Court summarily denied Cingular's ensuing petitions for review.

In *Bastien*, the plaintiff filed a lawsuit challenging AT&T's rates and an FCC-mandated radio tower build-out plan.[28] The Seventh Circuit rejected plaintiff's consumer class action because the plaintiff explicitly requested that AT&T build out more cell towers, which conflicted with a specific FCC market buildout plan for that area.[29] There is no FCC approved plan for California at issue with regard to the our Health and Safety Rules. Furthermore, while the Seventh Circuit stated in *Bastien* that states are preempted from regulating rates and market entry for wireless service, the Court also found that "the savings clause continues to allow claims that do not touch upon the areas of rates and market entry."[30]

Wireless Carriers' reliance on *Johnson v. Am. Towers, LLC*, 781 F.3d 693 (4th Circ. 2015) is also misplaced. In *Johnson*, the Fourth Circuit Court of Appeals found that the plaintiffs' state law tort claims were preempted by Section 332(c)(3)(A).[31] State law tort claims are a far cry from requirements adopted by a California state administrative agency meant to protect the health and safety of the people of California during times of public emergency.[32]

Notwithstanding our clear authority to regulate "other terms and conditions" of wireless service, Wireless Carriers further contend that the Health and Safety Rules constitute "impermissible regulation of market 'entry' and [are] therefore barred by Section 332(c)(3)(A)."[33] Contrary to these claims, the Health and Safety Rules have nothing to do with regulating radio frequencies and spectrum, which are matters that fall under the FCC's licensing authority, nor do these Rules impact rates.[34]

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[28] *Bastien*, 205 F.3d at 989.

[29] *Id*.

[30] *Id.* at 987. *See also* Joint Consumers Response to App. for Rehearing at 8.

[31] *Johnson*, 781 F.3d at 707. The *Johnson* court also found that conflict preemption applied to plaintiffs' claims as a state law conflicted with 47 USC § 333. (*Johnson*, 781 F.3d at 707-708.)

[32] *See* Joint Consumers Response to App. for Rehearing at 8.

[33] App. for Rehearing at 5.

[34] See *id.*, at 9, citing 47 U.S.C. §§ 301, 303(c), 308(b), and 319(a); see also *id*., at 11.

Finally, Wireless Carriers claim that "the presumption against preemption" does not apply here because it does not apply in cases of express or conflict preemption (discussed below) "in cases such as this one."[35] As previously noted, the Health and Safety Rules are not subject to express preemption, and as discussed below, they are not subject to conflict preemption.[36] We have the authority to adopt these rules under the savings clause of Section 332(c)(3)(A), and state police powers reserved to the states pursuant to the Tenth Amendment to the U.S. Constitution. In fact, the presumption against preemption where the state is exercising traditional health and safety police powers is particularly strong.[37] It has been applied in cases involving state police power and the health and safety aspects of wireless telecommunications networks, where Courts have pointed out that Congress expressly did not occupy the field of wireless regulation.[38] As the Third Circuit noted: "we start[] with the basic assumption that Congress did not intend to displace state law."[39] The U.S. Supreme Court has also asserted that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."[40]

For all of the aforementioned reasons, the Wireless Carriers' argument that the Health and Safety Rules adopted in D.20-07-011 are subject to express preemption has no merit.

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[35] App. for Rehearing at 12.

[36] *See* Joint Consumers Response to App. for Rehearing at 9-10.

[37] *See, e.g.,* Farina *v. Nokia Inc, supra,* 625 F.3d at 121-22.

[38] *Id.*

[39] *Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)*.

[40] *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996).

B. The Decision is Not Preempted on the Ground that it Conflicts with Federal Policy

Wireless Carriers also claim that the Decision is preempted on the grounds that the rules it adopted conflict with federal policy.[41] The federal policy the wireless carriers refer to is the federal policy to not adopt backup power requirements at a federal level. Wireless Carriers further argue that D.20-07-011 is preempted "to the extent it seeks to regulate wireless carriers' provision of broadband Internet access service and text messaging services, both of which are 'information services' subject to a federal deregulatory policy that is incompatible with common carrier or utility-style regulation."[42]

Wireless Carriers' argument that a backup power regime runs afoul of Section 332(c)(3)(A) because it would require the utilities to do more than required by the FCC lacks merit.[43] As Wireless Carriers admit, the FCC has no current battery backup rules.[44] Wireless Carriers' claim that the Health and Safety Rules are subject to conflict preemption because they "frustrate[] the accomplishment of a federal objective" also misses the mark.[45]

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[41] With regard to field or conflict preemption, there remains "a strong presumption against preemption when the federal government regulates in areas traditionally left to the states." (*Pinney v Nokia, Inc.* (4th Cir. 2005), 402 F3d 430, 457).

[42] *Id.*

[43] App. for Rehearing at 14-17.

[44] *Id.* In the wake of Hurricane Katrina, June 2006, the FCC released an order that imposed backup power requirements for wireless facilities, in the context of ensuring access to 911emergency calls. *See In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, EB Docket No. 06-119, WC Docket No. 06-63, Order on Reconsideration, 22 FCC Rcd 18013, 18035, App. B (2007). The wireless industry immediately challenged these rules in the D.C. Circuit, and the Court held the rules "in abeyance" because the Office of Management and Budget had not yet approved the FCC rules. (*CTIA – the Wireless Assn. v FCC* (D.C. Cir., 2008) 530 F.3d 984, 987. The FCC stipulated to the dismissal of CTIA's appeal, and it was dismissed in 2009. (*CTIA-The Wireless Assn. v FCC*, July 31, 2009 Order, at 2009 U.S. App. LEXIS 17031). The FCC has subsequently taken no action on this issue.

[45] App. for Rehearing at 14 (citations omitted).

The FCC had the opportunity to adopt backup power and resiliency rules in response to the FCC's Katrina Panel.[46] While the FCC got close to adopting rules, the FCC ultimately abandoned its effort.[47] In a subsequent rulemaking, *Improving the Resiliency of Mobile Wireless Communications Networks* issued after Superstorm Sandy and Hurricane Isaac, the FCC declined to adopt backup power or resiliency rules.[48] Instead, the FCC adopted a voluntary framework put forward by CTIA and wireless providers to enhance coordination and communication to advance wireless service continuity and information sharing during and after emergencies and disasters.[49]

Wireless Carriers cite to *Geier v. Am. Honda Motor Co.,* 529 U.S. 861 (2000) in support of their argument that the Health and Safety Rules conflict with an explicit federal policy to not adopt regulations to improve wireless network resiliency. However, *Geier* does not discuss how conflict preemption applies to the FCC's approach to public health and safety. Rather, *Geier* provides that a District of Columbia tort law "posed an obstacle to the accomplishment of the objectives to" federal laws and

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[46] The Katrina Panel was set up to review the impact of Hurricane Katrina on the telecommunications infrastructure to improve disaster preparedness, network reliability and communications among first responders. The Katrina Panel released its report on June 12, 2006, and among numerous other findings, found that power outages contributed heavily to the failure of wireless network operations. On June 19, 2006, the FCC issued a Notice of Proposed Rulemaking inviting comments on what actions it should take regarding the Katrina Panel's recommendations.

[47] *See In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, EB Docket No. 06-119, WC Docket No. 06-63, Order on Reconsideration, 22 FCC Rcd 18013, 18035, App. B (2007); *CTIA - The Wireless Assn. v FCC*, July 31, 2009 Order, at 2009 U.S. App. LEXIS 17031. On November 28, 2008, the White House Office of Management and Budget found that the FCC failed to obtain sufficient public comment before passing the backup power regulations, did not prove that the information required from wireless carriers would be useful, and also did not prove that it would have enough staff to analyze all of the documentation the telecommunications providers said they would need to provide to comply with the regulation. With the rules stayed by the Court of Appeals, the FCC decided it would not override the Office of Management and Budget's decision, and instead abandoned the rules. The FCC stipulated to the dismissal of CTIA's appeal, and it was dismissed in 2009.

[48] Notice of Proposed Rulemaking, *In the Matter of Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Dockets Nos. 13-29, 11-60, Sept. 26, 2013.

[49] *In the Matter of Improving the Resiliency of Mobile Wireless Communications Networks*, PS Docket No. 13-239, etc., Order, Adopted December 14, 2016, at ¶ 11.

regulations regarding car safety.[50] Wireless Carriers fail to explain how D.20-07-011's Health and Safety Rules prevent or frustrate specific federal objectives. There is no specific federal objective to prevent or frustrate, and therefore, conflict preemption does not apply. Furthermore, conflict preemption analysis must be conducted on a case-by-case basis and is dependent on the specific facts of the case.[51] Wireless Carriers have not performed a fact-specific analysis of their conflict preemption claims.

Wireless Carriers further claim that D.20-07-011 is "preempted to the extent it imposes obligations concerning 'information services' … that are governed by a federal policy of deregulation."[52] Wireless Carriers argue that "the Decision violates federal law to the extent it requires service providers to maintain basic Internet browsing functionality and the ability to receive emergency alerts and notifications via text message during a disaster or commercial power outage."[53]

Wireless Carriers ignore the language in the District of Columbia (DC) Circuit's decision *Mozilla Corp., et al. v. Federal Communications Commission, et al*., 940 F.3d 1 (D.C. Cir. 2019). In *Mozilla,* the D.C. Circuit held that the FCC may preempt state law "only when and if it is acting within the scope of its congressionally delegated authority."[54] In the 2018 Order[55] under review in Mozilla, the FCC "meant for that preemptive effect to wipe out a broader array of state and local laws than traditional conflict preemption principles would allow." The D.C. Circuit determined that the FCC had exceeded its authority and decided to "vacate the portion of the 2018 Order that expressly preempts any state or local requirements that are inconsistent with [its]

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[50] *Geir*, 529 U.S. 861. *See also* Joint Consumers Response to App. for Rehearing at 11.

[51] *Telesaurus VPC, LLC v. Power* (9the Cir., 2010) 623 F.3d 998, 1007.

[52] App. for Rehearing at 18.

[53] *Id.* (citations omitted).

[54] *Mozilla Corp., et al. v. Federal Communications Commission, et al*., 940 F.3d 1, 63 (D.C. Cir. 2019) (citing *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)).

[55] The 2018 Order is the FCC's Declaratory Rule, Report and Order issued on January 4, 2018 in WC Docket No. 17-108, *In the Matter of Restoring Internet Freedom*.

[55] *Comcast Corp. v. FCC*, 600 F.3d 642 at 658 (D.C. Cir. 2010).

deregulatory approach."[56] The D.C. Circuit's holding remains in effect and applies to the Health and Safety Rules we adopted in D.20-07-011.

Wireless Carriers can cite to no express delegated authority that would prevent the CPUC from adopting a requirement that wireless carriers provide their customers with basic Internet browsing functionality during a power outage.[57] Accordingly, this aspect of the Health and Safety Rules is not subject to conflict preemption.

C. The Decision is Not Subject to Field Preemption

Lastly, Wireless Carrier briefly claim that the Health and Safety Rules adopted in D.20-07-011 are subject to field preemption under Title III of the Communications Act.[58] Wireless Carriers state that "[t]he FCC has exclusive jurisdiction to regulate (among other things) the use of radio spectrum in terms of the nature of service to be offered, spectrum to be used, transmission power, times of operation, location, areas, or zones of operation, and apparatus stations may use."[59] Wireless Carriers claim that D.20-07-011 "dictates the nature of service to be offered and the times of operation" and would establish "zones of operation."[60]

Wireless Carriers' field preemption argument suffers the same legal infirmities as its express and conflict preemption claims. The licensing Congress delegated to the FCC pertains to the allocation of spectrum, where Congress foresaw the FCC administering a unitary national spectrum plan.[61] As we stated in D.20-07-011, nothing in the Decision relates to spectrum, nor does it bar the door to market entry.[62] No

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[56] *Mozilla*, 940 F.3d at 74. *See also* Joint Consumers Response to App. for Rehearing at 12.

[57] *Comcast Corp. v. FCC*, 600 F.3d 642 at 658 (D.C. Cir. 2010).

[58] App. for Rehearing at 20.

[59] *Id.* (citations omitted).

[60] App. for Rehearing at 20-21.

[61] D.20-07-011 at 25.

[62] The three large facilities-based wireless carriers all already offer service in California, all have a statewide footprint, and all have stated that they already have backup power at a substantial number of their cell sites.

FCC regulation has preempted the field of wireless consumer protection rules encompassed by the Health and Safety Rules adopted in D.20-07-011.[63]

The regulatory measures promulgated in D.20-07-011 are consumer safeguards intended to protect the health and safety of utility customers, particularly those encountering wildfires and related public emergencies triggered by historic climate change. A great benefit of owning a phone, and particularly a mobile phone, is to be able to receive warnings about possible dangerous situations. A wildfire growing uncontrollably nearby constitutes a potentially dangerous, indeed, life-threatening, situation. We have the authority to adopt the Health and Safety Rules, and these rules are not subject to express, conflict, or field preemption pursuant to Section 332(c)(3)(A).

III. CONCLUSION

For the reasons explained above, the application for rehearing of D.20-07-011 filed by Wireless Carriers should be denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.20-07-011 is denied.
2. Rulemaking (R.) 18-03-011 remains open.

This order is effective today.

Dated October 7, 2021 at San Francisco, California.

MARYBEL BATJER
President
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
DARCIE L. HOUCK
Commissioners

[63] *See* Joint Consumers Response to App. for Rehearing at 15-17.