

**COMMONWEALTH OF PUERTO RICO
BUREAU OF TELECOMMUNICATIONS**

In Re:

**Consumer Code for Landline Telephone,
Mobile Telephony, Cable TV, IPTV, and
Satellite Companies**

CASE NO. JRT-2018-ARP-0003

Matter: Proposed Regulation Announcement

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

To The Honorable Members of the Bureau of Telecommunications (“the Bureau”):

CTIA¹ appreciates the opportunity to file comments in response to the Bureau’s August 28, 2018 Notice of Proposed Rulemaking proposing a “Consumer Code for Wireless Telephone, Mobile Telephony, Cable TV, IPTV, and Satellite Companies” (the “Proposed Code”).²

I. INTRODUCTION AND SUMMARY

The wireless market is vibrant, innovative, and highly competitive. Consumers today have unparalleled choice among wireless providers, services, plans, and devices. Puerto Rico’s consumers have benefited from this competition, and will continue to do so. Furthermore, the wireless industry is actively and consistently accommodating consumers’ needs across all income and usage levels. The industry response to ever-changing consumer demands is exemplified by CTIA’s Consumer Code for Wireless Service, which has been an integral part of delivering

¹ CTIA – The Wireless Association (“CTIA”) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable consumers to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. Some of its members with presence in Puerto Rico are AT&T, Sprint, Telrite, Tracfone Wireless and T-Mobile. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² Proposed Adoption of Regulations (notified on September 4, 2018).

superior customer service to wireless consumers since 2003.³ New principles have been added to the Consumer Code for Wireless Service as consumer demands have evolved. In the absence of prescriptive regulations, strong competition in Puerto Rico’s wireless marketplace has acted as a powerful incentive for providers to improve service quality, lower prices, and expand service offerings.

The Bureau’s Proposed Code would impose a number of new regulatory requirements on wireless carriers operating in Puerto Rico, including the following:

- Network requirements, including staffing requirements, work completion requirements, and notification requirements for service interruptions;
- Informational requirements about mobile broadband Internet access Service (“BIAS”) (described as “data” or “data service” in the Proposed Code) use and service remaining;
- Billing and dispute management requirements;
- Number portability requirements; and
- Privacy requirements, among others.

As explained below, a number of the requirements of the Proposed Code are unnecessary, legally impermissible, and would discourage investment by carriers targeting consumer demands in a competitive market.

First, under Puerto Rico law, the Bureau’s authority is limited to telecommunications only, precluding it from regulating information services such as BIAS (mobile or fixed) or text messaging. Second, the Bureau is also federally preempted from imposing a number of the requirements in the Proposed Code, including those regarding network regulation and billing.

³ See Consumer Code for Wireless Service, available at <https://www.ctia.org/the-wireless-industry/industry-commitments/consumer-code-for-wireless-service> (last accessed October 1, 2019) (“Consumer Code”).

Other requirements, such as marketing, privacy, and numbering requirements, are already addressed by existing federal regimes. Additionally, a number of the requirements in the Proposed Code are impermissibly vague or ambiguous. Finally, a number of the Proposed Code's requirements are unnecessary, as they are already carried out voluntarily by wireless carriers, and therefore countermand Puerto Rico's stated public policy goals of less and more efficient regulation.

The Bureau's Proposed Code comes as wireless carriers are poised to deploy their next generation of networks ("5G") in Puerto Rico. 5G deployment in Puerto Rico is estimated to add another \$2.0 billion in GDP and over 12,000 jobs to the island's economy.⁴ The Bureau should seek to foster an environment conducive to 5G deployment instead of placing regulatory hurdles in front of wireless carriers poised to make tremendous infrastructure investments in Puerto Rico.

For these reasons, the Bureau should not adopt the Proposed Code, and instead, should continue to support voluntary carrier efforts to promote competition, which have proven successful in Puerto Rico.

II. THE BUREAU'S STATUTORY AUTHORITY IS LIMITED TO TELECOMMUNICATIONS SERVICES AND BOUNDED BY THE FEDERAL COMMUNICATIONS ACT

The bounds of the Bureau's authority were set in 1996 when the Puerto Rico legislature adopted Act 213, codified in 27 L.P.R.A. §265 *et seq.* ("Law 213").⁵ Law 213 gives the Bureau "primary jurisdiction over all telecommunications services," subject to further delineation in

⁴ See accenturestrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (February 2017), available at <https://api.ctia.org/wp-content/uploads/2017/02/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>.

⁵ See 27 L.P.R.A. §265 *et seq.*

Law 213.⁶ Specifically, under the statute, “telecommunications” means “the transmission of information ... without changing the format or content of the information sent and received.”⁷ Importantly, while Law 213 vests the Bureau with jurisdiction over telecommunications services, neither it nor any other statute endows the Bureau with any authority over *information services*, which, as the Federal Communications Commission (“FCC”) has clearly held, are mutually exclusive from telecommunications services.⁸

Further, Law 213 mandates that “all the actions, regulations, and determinations of the board shall be governed by the Federal Communications Act [...],”⁹ reaffirming the federal primacy of jurisdiction over telecommunications where such jurisdiction has been preempted by Congress and the FCC. The definition of “telecommunications” in the Communications Act clearly provided the basis for the definition in Law 213, as it defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received.”¹⁰ The Communications Act also clearly pre-empts state jurisdiction over information services, as discussed *infra* in Section III.

⁶ See 27 L.P.R.A. §267e (a).

⁷ 27 L.P.R.A. §265a (jj).

⁸ Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11523 para. 43 (1998) (“*Report to Congress*”) (“[T]elecommunications services and information services are mutually exclusive categories.”); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 para. 34 n. 50 (1998) (“Under the 1996 Act, any service with a communications component must be either a ‘telecommunications service’ or an ‘information service’ (but not both).”)

⁹ 27 L.P.R.A. §267f (f).

¹⁰ 47 U.S.C. §153(50).

III. THE PROPOSED CODE CANNOT APPLY TO INFORMATION SERVICES SUCH AS MOBILE BIAS OR TEXT MESSAGING, WHICH THE BUREAU HAS NO AUTHORITY OVER

The distinction between telecommunications services and information services is crucial because the Proposed Code purports to apply to “companies that offer landline, mobile telephone, cable television, internet protocol television (IPTV), and satellite services.”¹¹ At least with regard to wireless carriers, this would apply the Proposed Code over-broadly to a number of information services - which the Bureau has no authority over.

Wireless consumers use a mix of telecommunications services, such as voice, and information services, such as mobile BIAS and text messaging. However, as discussed above, the Bureau only has jurisdiction over “telecommunications services.”¹² This does not include information services such as mobile BIAS or text messaging, which are mutually exclusive from telecommunications services, as previously noted.¹³

In the *Restoring Internet Freedom Order*, the FCC clearly held that broadband internet access, including mobile BIAS, is an information service.¹⁴ Also, text messaging is an information service because it bears all the hallmarks of an information service under federal law; *i.e.*, “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁵

Text messaging is an “asynchronous” information service because it makes use of storage resources that permit users to send messages, regardless of whether the recipient is

¹¹ Proposed Code, at 1.

¹² See n. 7 and n. 8, *supra*.

¹³ See n. 9, *supra*.

¹⁴ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, 33 FCC Rcd 311, 431 paras. 21 *et seq.* (rel. Jan. 4, 2018) (“*Restoring Internet Freedom Order*”).

¹⁵ 47 U.S.C. §153 (24).

contemporaneously available.¹⁶ Text messaging messages are routed to carrier or third-party short message service centers ("SMSCs"), where they are stored until they can be delivered to their ultimate destinations. If the intended recipient is not connected to a mobile network because his or her device is deactivated, in an area subject to a network outage, or out-of-range of a compatible wireless network, the message will be stored at the SMSC for hours, days, or even weeks, during which time the SMSC will periodically attempt to deliver the message to the recipient device.¹⁷ Even when sender and recipient devices are active and connected to a compatible network, enabling both users to communicate in "close-to-real-time," the essential text messaging technology remains store-and-forward, and hence asynchronous. This asynchronous, store-and-forward capability is at the core of the information service definition. In this respect, text messaging is analogous to e-mail¹⁸ and voice storage and retrieval services, all of which have long been held to be information services.¹⁹

SMSCs' handling of text messages also involves "processing" and "transforming" information, including dividing, truncating, or converting messages into a different formats or

¹⁶ Because "one can send a message to another person ... without any need for the other person to be available to receive it at that time," text messaging constitutes an "asynchronous" information service under existing Commission precedent. *Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Comments of T-Mobile, FCC, WC Docket No. 06-122, at 6 (June 6, 2011) ("T-Mobile FCC Comments").

¹⁷ For example, Verizon Wireless stated in FCC comments that it keeps messages on its servers for ten days, *see Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Comments of Verizon, FCC, WC Docket No. 06-122, at 4 (June 6, 2011) ("Verizon FCC Comments"), whereas T-Mobile told the FCC it stores messages for up to 72 hours, *see* T-Mobile FCC Comments at 6.

¹⁸ This is a central reason why e-mail is an information service. Report to Congress, 13 FCC Rcd at 11501 para. 78 n. 162, (1998) ("[I]t is central to the service offering that electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be available to receive it at that time").

¹⁹ Report to Congress, 13 FCC Rcd at 11538-39 (concluding that e-mail is an information service); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21975 (1996) (subsequent history omitted) ("*Non-Accounting Safeguards Order*") (concluding that telemessaging is an information service); *United States v. Western Electric Co., Inc.*, 627 F. Supp. 1090, 1110 n. 89 (D.D.C. 1986) (subsequent history omitted) (noting that voice storage services are features that allow subscribers to store, retrieve, and send messages).

protocols. In terms of the information service definition, text messaging "offer[s] ... a capability for ... transforming [and] processing" messages, which "change[s]" the messages' "form or content."²⁰

Different wireless carriers use different text messaging protocols. For this reason, when carriers first deployed text messaging capabilities, customers could send messages only to other customers of the same carrier.²¹ Later, carriers and third-party vendors developed techniques to convert messages among the disparate messaging protocols. Nowadays, mobile subscribers may exchange messages not only with other mobile subscribers but also with users of e-mail services, over-the-top applications, or computer-based IM accounts.²² This advanced cross-platform interoperability likewise requires significant protocol processing and conversion. As T-Mobile explained²³ in response to an FCC request for public comment regarding the assessment of certain services for USF contributions:²⁴

When users send SMS messages from their ... mobile devices to an e-mail or instant messaging account, the short message service center ("SMSC") routes the message to an Internet gateway, which translates the message into the appropriate protocol. SMS messages generally originate or terminate on the mobile device in short message peer-to-peer protocol ("SMPP") or MM7 (a protocol associated with [multimedia] messaging service ("MMS")). E-mail messages are generally formatted in simple mail transfer protocol ("SMTP") and IMs are generally formatted in Transmission Control Protocol/Internet Protocol ("TCP/IP").

²⁰ 47 U.S.C. §153 (24) (2016); T-Mobile FCC Comments at 4.

²¹ *Id.*

²² T-Mobile FCC Comments at 4.

²³ *Id.*

²⁴ *Wireline Competition Bureau Seeks Comment on Request for Guidance Filed by the Universal Service Administrative Company*, Public Notice, 26 FCC Rcd 6745 (2011), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-11-853A1_Rcd.pdf; Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireless Competition Bureau, FCC, WC Docket No. 06-122 (Apr. 26, 2011), available at <https://ecfsapi.fcc.gov/file/7021346734.pdf>.

Therefore, messages exchanged between an SMS platform and an e-mail or IM platform must be translated from one protocol to another.²⁵

Decades of federal precedent affirm that services offering protocol conversion are "information services"²⁶ or, as they were known before the Communications Act was amended in 1996, "enhanced" services.²⁷ That year, the FCC concluded that the pre-1996 definition of "enhanced services" involving protocol conversion was equivalent to the newly-defined "information services" - despite apparent differences in wording - because such conversion involved the "transforming" of information.²⁸ Indeed, the protocol conversion involved in translating a text message across platforms is exactly the sort contemplated by the FCC in defining an information service: "'Protocol conversion' refers specifically to the specific form of protocol processing that is necessary to *permit communications between disparate terminals or networks*."²⁹

Text messaging also enables 'retrieving ... of available information.' Like other information services, text messaging also enables users to query electronic databases and retrieve

²⁵ T-Mobile FCC Comments at 4 (internal citations omitted).

²⁶ 47 U.S.C. §153(24) (defining "information service").

²⁷ The FCC has determined that "the differently-worded definitions of 'information services' and 'enhanced services' ... should be interpreted to extend to the same functions." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56, para. 102 (1996) (subsequent history omitted). *See also id.* at 21956-58, paras. 104-07; Report to Congress, 13 FCC Rcd at 11527, para. 51; *Vonage Holdings Corporation v. FCC*, 489 F.3d 1232, 1241(D.C. Cir. 2007).

²⁸ *See, e.g., Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956-58, paras. 104-07 (1996) (finding that services involving protocol conversion are "enhanced", *i.e.*, information services because they perform the transforming and processing of information) (emphasis added); *Report to Congress*, 13 FCC Rcd at 11527 (noting that "services employing protocol processing were treated as information services under the MFJ").

²⁹ The FCC first enunciated this definition in the 1995 *Frame Relay Order*. *See Independent Data Communications Manufacturers Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13717-18 n.5 (1995) ("*Frame Relay Order*") (emphasis added). The FCC has since employed that definition in several orders. *See, e.g., Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 n.229 (1996); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14435 n. 134 (1999).

data.³⁰ To the end user, this functionality offers the capability for acquiring or "retrieving" information in text message form; to the content provider, it offers the capability for "making available information."³¹ By way of illustration, a user can send a text message containing search terms to short code 46645 - or "GOOGL" - and will receive in response a text message from Google containing the top hits for that search. Using other five- or six-digit short codes, a user might also query databases to retrieve information on sports scores, weather reports, movie times, or other information, receiving in return a standard text message containing information from the queried database. The FCC has long considered such information-retrieval capabilities to be one hallmark of an enhanced or information service.³²

These three fundamental characteristics of text messaging – storing information, processing and transforming information, and retrieving and making available information - make clear that text messaging is an information service, not a “telecommunications service.” In turn, that means that text messaging, much like mobile BIAS and other information services, falls outside of the Bureau’s authority to regulate. The Bureau therefore does not have the authority to apply any provisions of the Proposed Code to such information services.

³⁰ *Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Comments of Sprint, WC Docket No. 06-122 at 6 (filed June 6, 2001) ("Sprint FCC Comments"), available at <https://ecfsapi.fcc.gov/file/7021685859.pdf>.

³¹ 47 U.S.C. §153(24) (defining "information service").

³² Sprint FCC Comments at 3. See, e.g., *U.S. WEST Communications, Inc.*, Petition for Computer III Waiver, 11 FCC Rcd 7997, 8003, para. 12 (CCB 1996) (finding that providing "access to a database for purposes other than to obtain the information necessary to place a call will generally be found to be an enhanced service"). The FCC also found that a "Talking Yellow Pages" service that permitted users to place a call and hear a recorded advertisement "involves 'subscriber interaction with stored information,' and falls neatly within the definition of 'enhanced service.'" *Northwestern Bell Tel. Co.*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988, para. 20 (1987).

The FCC has also made clear that state regulation of an information service “would almost certainly pose a conflict with our policy of nonregulation.”³³ The FCC noted in the same decision that “federal authority has been recognized as preeminent in the area of information services,” and therefore concluded that the assertion of exclusive federal authority over an information service “is consistent with – and supported by – the states’ already-limited role with regard to information services.”³⁴ More recently, in its order determining that broadband internet access is an information service, the FCC found the authority to preempt state regulation of that information service “in accordance with the *longstanding federal policy of nonregulation of information services*.”³⁵ This preemption was recently reaffirmed by the Eighth Circuit: “Any state regulation of an information service conflicts with the federal policy of nonregulation.”³⁶ Thus, because text messaging meets the statutory definition of an information service, not a telecommunications service, “any state regulations that seek to treat [it] as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with [the FCC’s] policy of nonregulation.”³⁷

Some of the requirements of the Proposed Code apply explicitly to mobile BIAS and text messaging (*i.e.* Article 5.A §§ 16, 19, 21, and 24), but a number of others (*i.e.* Article 4 §§ I and J, and Articles 5 through 8) would apply to mobile BIAS and text messaging insofar as nearly all consumer plans contain such services in bundled service offerings. The Proposed Code contains

³³ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum, Opinion, and Order, Fed. Comm’n Comm’n, 19 FCC Rcd 3307, 3316 ¶ 15 (2004) (“*Pulver Order*”).

³⁴ *Id.* at 3316-17 ¶¶ 15-16 (emphasis added).

³⁵ *Restoring Internet Freedom Order*, para. 202 (emphasis added).

³⁶ *Charter Advanced Services v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018).

³⁷ *Pulver Order*, 19 FCC Rcd at 3316 ¶ 15.

no language excluding application of these provisions to mobile BIAS and text messaging, and it would be impracticable for carriers to apply these requirements only to voice services, not to mention confusing to consumers when confronted with different requirements applicable to their voice services, but not their mobile BIAS and text messaging services. For example, the requirements under the Proposed Code in Article 13 governing disputes would only apply to voice service, leaving consumers with different dispute resolution processes depending on the type of service.

Accordingly, the Proposed Code exceeds the Bureau's jurisdiction over "telecommunications services" only and therefore should not be adopted.

IV. THE BUREAU IS FEDERALLY PREEMPTED FROM IMPOSING MANY OF THE REQUIREMENTS OF THE PROPOSED CODE

Beyond the jurisdictional limitations of the Bureau's authority over telecommunications services and lack of jurisdiction over information services, the Bureau is also federally preempted from imposing many of the requirements of the Proposed Code on telecommunications services as well.

A. Under Both the Communications Act and Law 213, the Bureau May Not Impose Requirements In Conflict with Federal Statute or Rule

Under Law 213, the Bureau's jurisdiction is limited to items "not in conflict with federal statutory or regulatory provisions, especially those that correspond to the Federal Communications Commission, as well as those preemptive federal norms."³⁸ Law 213 also holds that "[i]t shall be the public policy of the Commonwealth of Puerto Rico to ... ensure that no law or regulations of the Commonwealth of Puerto Rico or municipal ordinance limits, prohibits or has the effect to

³⁸ 27 L.P.R.A. §267e (b).

limit or prohibit the capacity of a telecommunications company to provide competitive telecommunications services at intrastate or interstate level.”³⁹

To that end, Section 332(c)(3)(A) of the Communications Act expressly preempts most state and local regulation of commercial mobile radio service (“CMRS”). This provision reads, in pertinent part: “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile [radio] service or any private mobile [radio] service.”⁴⁰ Section 332(c)(3)(A) leaves room for states and localities to regulate only “the other terms and conditions of commercial mobile [radio] services.”⁴¹

B. The Network Regulations in the Proposed Code are Preempted by the Communications Act

A number of provisions in the Proposed Code impermissibly attempt to regulate wireless networks. Article 4.B mandates service quality, requiring wireless networks to offer ubiquitous levels of “efficiency and high quality.” Further, Article 11 imposes a number of staffing requirements regarding network maintenance and upkeep: “the company must keep sufficient personnel available to repair and correct service outages and interruptions and other problems requiring repairs” (Article 11.B), “representatives of the company must be available 24 hours a day, 7 days a week to respond to outages and interruptions” (Article 11.D), “the company must respond to consumers’ calls related to service outages or interruptions and other problems within” delineated time periods (Article 11.E), and “under normal operating conditions, the company must complete the work within 72 hours from when the call requesting service was received, not

³⁹ 27 L.P.R.A. §265(w).

⁴⁰ 47 U.S.C. §332(c)(3)(A).

⁴¹ *Id.*

including weekends and situations where the consumer is not available during said period of 72 hours” (Article 11.F).

These regulations are prohibited under Section 332(c)(3)(A) of the Communications Act. Precedent demonstrates that Section 332(c)(3)(A) preempts state or territorial regulation of CMRS carriers’ use of spectrum and the placement and density of their facilities. Indeed, the Seventh Circuit, in its seminal *Bastien* decision, held that Section 332(c)(3)(A) preempts state (and by extension, territorial) regulation of wireless carriers’ transmitter locations, density, and use of frequencies.⁴² As the *Bastien* court stated, the Communications Act “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.”⁴³

While *Bastien* itself makes obvious that substantial portions of the Proposed Code are preempted under Section 332(c)(3)(A), in conjunction the rest of Title III of the Communications Act and Law 213 require the same conclusion. In its entirety, Title III of the Communications Act assigns to the FCC plenary jurisdiction over radio spectrum and all aspects of its use and operation. Because Law 213 limits the Bureau to act in a manner “not in conflict with federal statutory or regulatory provisions, especially those that correspond to the Federal Communications Commission, as well as those preemptive federal norms,”⁴⁴ and Title III assigns plenary jurisdiction to the FCC, there is no room for the Proposed Code’s network and service quality regulations.

⁴² *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983 (7th Cir. 2000).

⁴³ *See id.* at 988 (citations omitted); *see also* 47 U.S.C. § 309(j)(4) (with regard to licensed spectrum, the FCC “shall ... include performance requirements ... [and] prescribe area designations.”).

⁴⁴ 27 L.P.R.A. § 267e (b).

Title III of the Communications Act assigns to the FCC exclusive “control ... over all the channels of radio transmission [and] ... the use of [radio spectrum].”⁴⁵ The “use or operat[ion of] any apparatus for the transmission of energy or communications or signals by radio” must be “under and in accordance with this chapter and with a license in that behalf granted under the provisions of [Title III].”⁴⁶ The FCC is empowered to prescribe performance requirements,⁴⁷ “the nature of service to be rendered,”⁴⁸ the time of operation and power used,⁴⁹ the “purity and sharpness of the emissions from each station,”⁵⁰ among many other powers. The provisions of the Proposed Code that attempt to regulate the availability or quality of service intrudes upon each of these exclusively assigned powers. Only the FCC is authorized to make such determinations under federal law.

The Proposed Code’s requirements regarding service quality and network staffing fall outside the boundary of “other terms and conditions” jurisdiction preserved for state regulation under Section 332 and are otherwise preempted by reading Title III of the Communications Act and Law 213 in conjunction. Per the *Bastien* court, and as acknowledged by multiple circuits,⁵¹ these are matters that Congress has assigned to the FCC’s exclusive jurisdiction and cannot be regulated by the Bureau.

C. The Billing Regulations in the Proposed Code Are Preempted by the Communications Act

⁴⁵ 47 U.S.C. 301.

⁴⁶ *Id.*

⁴⁷ 47 U.S.C. §309(j)(4) (regarding licensed spectrum, the FCC “shall ... include performance requirements....”).

⁴⁸ 47 U.S.C. §303(b).

⁴⁹ 47 U.S.C. §303(c).

⁵⁰ 47 U.S.C. §303(e).

⁵¹ *See also Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010); *Telesaurus VPC*, 623 F.3d at 1008, 1011 (9th Cir. 2010).

Similarly, a number of provisions in the Proposed Code constitute preempted rate regulation:

- Article 7 addresses billing, including a 20-day notice requirement, limits on late fees, notification of rate changes, and bill dispute provisions, among others.
- Article 8 addresses forms of payment, including cooperation with “any bank or financial institution chosen by the consumer to make payments,”⁵² and a provision barring wireless companies from using the consumer credit card to charge amounts other than the monthly invoice amount.⁵³
- Article 13 sets further bill dispute provisions, including allowing customers to withhold disputed charges until final resolution.

In so far as these requirements constitute rate regulation, they are explicitly barred by Section 332(c)(3)(A) of the Communications Act. For example, Article 7.F requires wireless carriers to notify the Bureau of rate changes 30 days in advance of the effective date, directly restricting carriers from implementing rate changes. Some of the other requirements also run afoul of Section 332(c)(3)(A)’s prohibition of rate regulation, as well. For example, the provisions in Article 13 that require deferral of disputed charges would effectively constitute an obligation on the carrier to accept a lower rate while the dispute is pending. This is so because money has a non-zero time value.⁵⁴ Accordingly, these provisions are preempted because they conflict with Section 332(c)(3)(A)’s prohibitions against rate regulation of wireless, further militating against adoption of the Proposed Code.

⁵² CTIA also notes that this requirement is overbroad, insofar as the Commission does not have authority over such financial institutions, and there is no guarantee of their good faith dealing or cooperation with a wireless carrier.

⁵³ CTIA also notes that Article 8.1, which would bar wireless companies from using the consumer credit card to charge amounts other than the monthly invoice amount, would have a negative impact on consumers, as it would seemingly bar a consumer’s choice to either pre-pay future invoices or pay less than a monthly invoice, on a payment plan. It may also prevent wireless carriers from accepting credit card payments from customers for purchases in addition to their monthly service charges.

⁵⁴ See, e.g., *Till v. SCS Credit Corp.*, 541 U.S. 465, 487 (2004), citing *Rake v. Wade*, 508 U.S. 464, 472 (1993).

V. OTHER REQUIREMENTS IN THE PROPOSED CODE ARE EITHER PREEMPTED, PROPERLY ADDRESSED BY FEDERAL REGULATORY REGIMES, OR BOTH

A number of the other requirements in the Proposed Code are either preempted, already addressed by federal regulation, or both.

For example, Article 4.H of the Proposed Code sets not only a guarantee of number portability, but a one-day limit for number porting within Puerto Rico. However, the FCC has plenary jurisdiction over numbering under Section 251 of the Communications Act,⁵⁵ and already set a one-day interval for simple, local porting in 2009.⁵⁶ As such, this requirement is both outside the Bureau’s jurisdiction and properly addressed by the FCC.

Article 4.I of the Proposed Code states that “the consumer is entitled to have his/her provider keep any personal information and information related to his/her call history strictly confidential.” There is a strong legal regime at the federal level protecting consumers’ privacy and personal information, including FCC rules regarding CPNI⁵⁷ and Section 5 of the FTC Act,⁵⁸

⁵⁵ 47 U.S.C. §251(e)(1) (“The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.” Although this section notes that “[n]othing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction,” no such delegation has been made here.

⁵⁶ See *Local Number Portability Porting Interval and Validation Requirements*, Report and Order and Further Notice of Proposed Rulemaking, Fed. Comm’n Comm’n, 24 FCC Rcd 6084 (2009), available at <https://docs.fcc.gov/public/attachments/FCC-09-41A1.pdf>.

⁵⁷ See, e.g., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, Fed. Comm’n Comm’n, 31 FCC Rcd 13911 (2017), available at https://docs.fcc.gov/public/attachments/FCC-16-148A1_Rcd.pdf. It also bears noting that CPNI rules are applicable to telecommunications services only.

⁵⁸ The Federal Trade Commission (“FTC”) brings enforcement actions under Section 5 of the FTC Act against companies that violate their own privacy policies. See, e.g., *In re Goldenshores Technologies, LLC*, F.T.C. No. C-4446 (Mar. 31, 2014) (Order) (finding that the developer of a flashlight app for mobile phones violated its privacy policy by failing to disclose adequately that it collected users’ precise geolocation information and transmitted it to third parties); *In re Epic Marketplace, Inc.*, F.T.C. No. C-4389 (Mar. 19, 2013) (Order) (finding that company violated its privacy policy by incorrectly claiming that it would collect only information about

bolstered by industry adherence to robust self-regulatory codes of conduct and best practices, including CTIA’s Consumer Code which requires signatories to abide by a specific set of practices for the protection of customer privacy, including complying with applicable federal and state laws, and to make publicly available signatories’ privacy policies regarding information collection online.⁵⁹

Article 4.J states “the customer is entitled not to receive unwanted advertising calls from marketing companies if he/she has registered for the federal database.” But again, this provision is addressed by federal statute. In 2003, Congress passed the Do-Not-Call Implementation Act, which mandated the FTC and FCC work together to implement a national “Do Not Call” registry.⁶⁰ The Federal Trade Commission is the appropriate body to address complaints on such issues. Indeed, the Telemarketing Sales Rule requires telemarketers to make specific disclosures of material information, prohibits misrepresentations, sets limits on the times telemarketers may call consumers, prohibits calls to a consumer who has asked not to be called again, and sets payment restrictions for the sale of certain goods and services.⁶¹ And in its implementation of the Telephone Consumer Protection Act, passed by Congress in 1991,⁶² the FCC set comprehensive prohibitions on telemarketers using automated dialers to call mobile numbers without prior consent.⁶³

consumers’ visits to sites in its network when in fact it used a “history sniffer” to collect information about sites a consumer had visited in the past).

⁵⁹ CTIA Consumer Code, Point 10 “Each wireless carrier will abide by a policy regarding the privacy of customer information in accordance with applicable federal and state laws, and will make available to the public its privacy policy concerning information collected online. Each wireless carrier will abide by the CTIA Best Practices and Guidelines for Location-Based Services.” (<https://www.ctia.org/the-wireless-industry/industry-commitments/consumer-code-for-wireless-service>)

⁶⁰ Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101 (stating in Section 3, in relevant part, that the FCC shall consult and coordinate with the FTC to maximize consistency with the rule promulgated by the Federal Trade Commission.)

⁶¹ *See* 16 C.F.R. § 310.4.

⁶² *See* 47 U.S.C. §227.

⁶³ *See* 47 CFR 64.1200 *et seq.*

Furthermore, the Bureau itself has a comprehensive local regulation to address telemarketing enforcement that expressly describes practices that are prohibited, provides for a local do-not-call registry for consumers, outlines a complaint procedure, and calls for administrative sanctions for any violations.⁶⁴ Accordingly, this provision of the Proposed Code is unnecessary and better addressed by the existing regimes rather than additional regulation.

Given the existing regulatory regimes, the provisions of the Proposed Code establishing Bureau regulation of the listed issues would be superfluous at best, and would conflict with federal authority (in violation of Law 213), or be expressly preempted by federal law, at worst. This also militates in favor of the Bureau rejecting the Proposed Code.

VI. SOME REQUIREMENTS IN THE PROPOSED CODE ARE IMPERMISSIBLY VAGUE OR AMBIGUOUS

Beyond the irreconcilable conflicts with the Bureau's jurisdiction and federal law, some of the requirements in the Proposed Code are impermissibly vague or ambiguous. For example:

- Article 4.K requires that consumers be notified in advance of changes to “terms and conditions of its contract that would have an adverse effect on the service conditions,” without defining what “adverse effect on service conditions” means.
- Article 5.A.3 requires companies to inform consumers, prior to signing a service agreement at the point of sale, of “signal coverage in the person’s most commonly used areas” without defining what such areas are or what information must be provided.
- Article 5.A.24 requires companies to provide consumers, prior to signing a service agreement at the point of sale, “information about channel line-ups, including access to such channels through applications,” without defining what a “channel” is as pertains to wireless providers or what “access to such channels through applications” means. Furthermore, insofar as this requirement pertains to third-party application providers, the Bureau has no jurisdiction over such and wireless carriers cannot vouch for what information is included in those applications, given the millions of applications available on app stores worldwide.

⁶⁴ See Puerto Rico Telecommunications Regulatory Board Regulation No. 7479, *Reglamento Sobre el Registro de Personas que no interesan Promociones Telefónicas*, March 12, 2008.

- Article 11.C requires companies to “notify the Board of any significant service outage within 2 hours of the outage” without defining what constitutes a “significant” outage.

The courts have routinely held that “[a] regulation is constitutionally void on its face when, as a matter of due process, it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.”⁶⁵ The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement.⁶⁶ Accordingly, the lack of detail in the provisions of the Proposed Code listed above would leave carriers unclear on what compliance requires and would not withstand judicial review. The Proposed Code should therefore not be adopted.

VII. THE REQUIREMENTS OF THE PROPOSED CODE ARE UNNECESSARY IN LIGHT OF CTIA’S VOLUNTARY CONSUMER CODE, WHICH HAS PROVEN EFFECTIVE IN A COMPETITIVE MOBILE MARKETPLACE

According to Law 213, “[i]t shall be the public policy of the Commonwealth of Puerto Rico to ... govern its regulation process by the so-called forbearance process, as the Federal Act has established for providers of telecommunications service, performing its duty as guardian of the competitive environment *and allowing for said environment to indeed regulate, in the first instance, the conduct of participating companies.*”⁶⁷

As previously noted, CTIA’s voluntary Consumer Code, which arose from the competitive wireless marketplace, addresses a wide variety of consumer concerns, and has continued to evolve over time as technology and consumer needs have changed. In fact, the Consumer Code already addresses or goes beyond many provisions within the Proposed Code, including disclosure of rates and terms of service to consumers, confirmation of changes in service, provisions of service maps,

⁶⁵ See, e.g., *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

⁶⁶ See, e.g., *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

⁶⁷ 27 L.P.R.A. §265(p) (emphasis added).

an early termination fee grace period for changes to contract terms, ready access to customer service, free notifications, consumer privacy protection, and more.⁶⁸ The FCC has acknowledged the effectiveness of the Consumer Code. For example, wireless carriers seeking designation as an Eligible Telecommunications Carrier (“ETC”) can certify compliance with the Consumer Code to demonstrate that they satisfy the consumer protection obligations of an ETC.⁶⁹

The large amount of duplication between the Consumer Code and the Proposed Code renders a large number of provisions in the Proposed Code unnecessary and superfluous. As put succinctly in the Explanatory Vote dissenting against the Proposed Code⁷⁰, “the Board should follow the public policy established in [Law 213], of abstaining from adopting unnecessary regulations, and to foster a competitive environment that would move companies to innovate, invest and provide better customer service ... we cannot continue imposing regulatory barriers that discourage market entry, investment and innovation; nor should we impose regulatory burdens that would make telecommunications services in Puerto Rico more expensive, thus making this essential service financially inaccessible to the most needy.”⁷¹

In light of the Consumer Code, the Bureau has not demonstrated the necessity of any of the provisions of the Proposed Code, making only a brief statement in the NPRM that companies be required “to offer the residents of Puerto Rico informed options when selecting their provider for any of these services and to assure us that they are offering consumers excellent and high-

⁶⁸ See n. 3, *supra*.

⁶⁹ See 47 C.F.R § 54.202(a)(3); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, 6383, para. 28 (2005) (“*ETC Designation Order*”). States that certify ETCs for participation in federal programs have followed the FCC in reaching this conclusion.

⁷⁰ See Explanatory Vote of [former] Associate Member Maldonado Rodríguez, *Voto Explicativo de la Miembro Asociada Maldonado Rodríguez*, August 10, 2018.

⁷¹ *Id.* at 1-2.

quality services.”⁷² Yet wireless companies already do so in Puerto Rico, and will continue to do so, making regulation inefficient, unnecessary, and contrary to Law 213. Further, as mentioned in the Explanatory Vote, Governor Rosselló Nevares has implemented an initiative known as “*Dale Tijera*” to reduce unnecessary regulation and bureaucracy, and has issued Executive Order OE-2018-009 to create a committee to simplify, expedite, facilitate, and standardize the *Regulations Registry* of the Government of Puerto Rico.⁷³

CTIA agrees that the Proposed Code is unnecessary and counter to the sound public policy set both in Law 213 and in the Governor’s “*Dale Tijera*” initiative. Accordingly, the Bureau should continue to favor the voluntary actions carriers have taken demonstrating the importance of consumer protection and reject the prescriptive and unnecessary regulations contained in the Proposed Code.

VIII. CONCLUSION

In the absence of prescriptive regulation by the Bureau, strong competition in the wireless marketplace has acted as a powerful incentive for providers to improve service quality, lower prices, and expand service offerings. CTIA and its members have and will continue to be proactive about addressing consumer issues; indeed, given the choice consumers have for their wireless service, such responsiveness is necessary for wireless carriers in the marketplace. However, the Proposed Code would exceed the Bureau’s statutory authority, conflict with federal law, be unnecessary in light of existing regimes, and countermand Puerto Rico’s state public policy goals. Accordingly, the Bureau should not adopt the Proposed Code.

⁷² Proposed Code, at 2.

⁷³ Explanatory Vote of Associate Member Maldonado Rodriguez, at 2.

RESPECTULLY SUBMITTED.

In San Juan, Puerto Rico, this 19th day of October 2018.

Jeanne Habib, Esq.
T.S. 11571
jhabib@melendeztorreslaw.com

MELÉNDEZ TORRES LAW, PSC
MCS Plaza, Suite 1200
255 Ponce de León Ave.
San Juan, Puerto Rico 00917
(787) 281-8100 (desk)
(787) 281-8310 (fax)
Counsel for
CTIA – The Wireless Association®

Benjamin J. Aron, Esq.
Matthew DeTura, Esq.
CTIA
1400 16th Street NW, Suite 600
Washington, DC 20036
(202) 736-3683
baron@ctia.org | mdetura@ctia.org

Counsel for CTIA – The Wireless Association®