

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Regarding
Emergency Disaster Relief Program.

Rulemaking 18-03-011
(Filed March 22, 2018)

**CTIA'S RESPONSE TO THE PUBLIC ADVOCATES
OFFICE'S MOTION FOR AN IMMEDIATE ORDER**

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CTIA respectfully submits this response to the Public Advocates Office’s (“PAO’s”) Motion for an Immediate Order (“Motion”),¹ pursuant to California Public Utilities Commission (“Commission”) Rule 11.1(e).²

I. INTRODUCTION AND SUMMARY

As CTIA and its members have explained in multiple filings throughout this proceeding (and in a range of other proceedings before the Commission), California’s wireless carriers provide vital communications services and other relief before, during, and in the wake of natural disasters. The record is replete with evidence to this effect. For instance (and as the Commission previously acknowledged), before, during, and after the wildfires that struck California in 2017 wireless carriers undertook significant *voluntary* measures that supported and benefited impacted consumers.³ Wireless carriers’ comprehensive support efforts included: (a) devoting all resources necessary to restore wireless service to the impacted areas as quickly as possible; (b) deploying mobile equipment, including Cells on Wheels (“COWs”) and Cells on Light Trucks (“COLTs”), to supplement service in areas that needed additional capacity; (c) deploying trucks outfitted to provide device charging stations, Wi-Fi access, “loaner” mobile phones as needed, and supplies like bottled water, food, and respiratory masks; (d) waiving overage charges for data, talk, and text during these emergencies; and (e) extending payment dates for service for impacted customers. Notably, *none* of these measures were mandated by the Commission or any other agency, statute, or regulatory requirement.⁴

¹ Motion of the Public Advocates Office for an Immediate Order Requiring Communication Providers to Complete Calls and Deliver Data Traffic and Provide Other Post-Disaster Consumer Protection Relief, R.18-03-011 (filed May 21, 2019) (“Motion”).

² CAL. CODE REGS. tit. 20, § 11.1(e) (2018).

³ See, e.g., Comments of CTIA on Order Instituting Rulemaking, R.18-03-011 at 3-4 (filed May 2, 2018).

⁴ See generally *id.*

Nor was 2017 an outlier as regards wireless carriers' disaster relief engagement. CTIA's member companies continue to work with the California Governor's Office of Emergency Services ("CalOES") and the California Department of Forestry and Fire Protection ("CalFIRE") to ensure that these agencies are provided the information that they need,⁵ and have taken a wide-ranging number of additional actions to further public safety, including:

- AT&T has "invested billions of dollars in [its] network to help plan and prepare for emergencies"⁶;
- Sprint "maintains significant resources to help respond to disasters, including on-the-ground, trained technicians, portable diesel generators, specialized repair vehicles, COWs, and predesignated strategic locations for staging equipment and other resources"⁷;
- T-Mobile "pre-stages assets (including mobile generators, COWs, and COLTs), temporary microwave/satellite communications, and supplies (including fuel)" and "mobilizes expert recovery and restoration teams, completes internal preparedness checklists to ensure readiness, and coordinates with vendors that may be used in the recovery process" in advance of natural disasters⁸;
- And Verizon continues to "prepar[e] for disasters before they hit; communicating with [its] customers and government [stake]holders before, during, and after such disasters; and restoring and repairing [its] networks as quickly and safely as possible."⁹

As these examples (and the broader record) demonstrate, the wireless industry shares and supports the goal of ensuring that consumers have access to vital services in the wake of natural

⁵ *Order Instituting Rulemaking Regarding Emergency Disaster Relief Program, Decision Affirming the Provisions of Resolutions M-4833 and M-4835 as Interim Disaster Relief Emergency Customer Protections*, R.18-03-011, D.18-08-004 at 5 (issued Aug. 20, 2018).

⁶ Letter from Joseph P. Marx, Assistant Vice President, AT&T Services, Inc., to Lisa M. Fowlkes, Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission ("FCC"), FCC PS Docket No. 11-60 at 1 (filed Nov. 26, 2018).

⁷ Letter from Charles W. McKee, Vice President, Government Affairs, Sprint, to Lisa M. Fowlkes, Bureau Chief, Public Safety and Homeland Security Bureau, FCC, FCC PS Docket No. 11-60 at 2 (filed Nov. 26, 2018).

⁸ Response of T-Mobile USA, Inc., FCC PS Docket No. 11-60 at 7 (filed Nov. 26, 2018).

⁹ Response to Letter from Lisa M. Fowlkes, Chief, Public Safety and Homeland Security Bureau, to William H. Johnson, Senior Vice President, Verizon, FCC PS Docket No. 11-60 at 1 (filed Nov. 26, 2018).

disasters. CTIA and its members look forward to continuing constructive engagement with the Commission and other stakeholders to ensure that consumers and public safety entities have access to communications services in emergencies.

However, effective disaster recovery must be grounded in facts, and cabined by engineering and by legal realities. The Motion falls short on all three of these fronts. By its own language, the Motion requests the Commission order a range of entities—including CTIA’s members—to: “(1) Complete calls and deliver data traffic, without delay, at all times, including during emergency response operations” (“Request 1”); “(2) Provide backup generators and/or battery power at wireless facilities located in the Tier 1 and 2 High Fire Threat Areas and Federal Emergency Management Agency (FEMA) designated flood plains” (“Request 2”); “(3) Increase route diversity to support 9-1-1 service by identifying the public safety answering points (PSAPs) and backhaul facilities that depend upon only one route and submitting implementation plans for secondary routes” (“Request 3”); and “(4) Take immediate steps to test and ensure reliable distribution of the emergency alert and warning system messaging” (“Request 4”) (collectively, the “Requests”).¹⁰

Insofar as factual accuracy and engineering realities are concerned, the Motion is highly problematic—in part because it is not grounded in the record assembled by the Commission in this proceeding, as discussed further in Section II.A, *infra*.

Even outside its lack of support in the record, however, as a factual matter the Motion is incorrect to assert that “[s]ome states, such as Colorado, already require diverse routing for 9-1-1 facilities,” at least insofar as the PAO is suggesting that such requirements are imposed in

¹⁰ Motion at 1. For clarity, this filing refers to these Requests using the Motion’s own numbering. While the Motion also includes a quartet of proposals in its Appendices not discussed in the body of said document proper, each of these is cut from the same cloth as the (actually proposed) Requests, and therefore are invalidated procedurally and substantively by the same law and logic.

Colorado on commercial mobile radio service (“CMRS”) providers.¹¹ To the contrary, no such obligation exists in Colorado regarding originating service providers such as CTIA’s members.¹² And the Motion omits the fact that PSAPs procure facilities from their own *wireline* 9-1-1 or NG911 providers, not wireless providers, as well as the fact that a wireless provider’s 9-1-1 call routing is largely dependent on a PSAP’s own 9-1-1 network configuration.

The Motion also ignores both the realities of network engineering and the manner in which disaster events unfold. For example, the Motion fails to acknowledge the range of issues that influence the logistics and deployment of networks (*i.e.*, the “where” and “how” behind network architecture decisions).¹³ The PAO also problematically cites an example from Mendocino County where a wildfire destroyed 400 feet of a local provider’s aerial fiber optic cable, and the 2017 Redwood Complex Fire, which destroyed a cell tower.¹⁴ Further, the PAO ignores a report that the heat generated by the fires was such that even backhaul fiber in underground conduit was melted and rendered inoperable.¹⁵ These examples actually undercut the PAO’s call for increased facility and routing diversity. In these examples, and in others involving cell sites, redundant facilities would also likely have been destroyed—because they would of necessity have been located at the same sites, in the same geographic areas, or in the

¹¹ Motion at 13, n. 48.

¹² 9-1-1 diversity requirements apply only to Basic Emergency Services Providers. *See* 4 COLO. CODE. REGS. §§ 723-2-2143, -2131(h), -2136(g) (2019). “Basic Emergency Service” as defined specifically excludes “the portion of a 9-1-1 call provided by an originating service provider.” 4 COLO. CODE. REGS. § 723-2-2131(h) (2019).

¹³ Such authorities include, but are not limited to, federal laws, the FCC, the Environmental Protection Agency (“EPA”), California agencies, California laws, local jurisdictions (*e.g.*, rights-of-way access and noise ordinances), and private property owners’ requirements. All of these factors, including many others unrelated to authority, influence how and where network architecture is deployed.

¹⁴ *See* Motion at 12-13.

¹⁵ November 1, 2018 Workshop, Transcript (“Workshop Transcript”) (Statement of Mallone) at 76 (“We found some incidents where it was reported that the fiber was buried in the ground and melted in the conduits.”).

very same rights-of-way, exposed to the very same fires. The notion inherent in the PAO's Motion (*i.e.*, that providers can, and should be made to, harden their networks against any and all natural disasters) is simply not realistic.

Nor do the Motion's shortcomings regarding engineering practicalities stop there. The reality that "[i]ncreasing battery capacity or fuel supplies at network facilities will not produce a significant reduction in risk" during "massive events" such as natural disasters has been known to the Commission for over a decade, based on the *Reliability Standards Report* prepared by the Commission's Communications Division in conjunction with an independent expert (SAIC/Telcordia) and subsequently adopted by the Commission.¹⁶ The *Reliability Standards Report* found that, in 2008, 88 percent of California cell sites had back-up battery power—a percentage that has almost certainly increased over the subsequent decade.¹⁷ Regulatory mandates of the variety proposed in the Motion would accordingly be an ineffective misallocation of the finite resources that must be maximized in disaster relief scenarios. As the *Reliability Standards Report* recognized, it is unfortunate but inevitable that "communications

¹⁶ See *Decision Addressing Standards for Telecommunications Emergency Backup Power Systems and Emergency Notification Systems Pursuant to Assembly Bill 2393*, R.07-04-015 (September 8, 2008), Appendix A (incorporating *Reliability Standards for Telecommunications Emergency Backup Power Systems and Emergency Notification Systems*, Final Analysis Report (May 9, 2008), <http://docs.cpuc.ca.gov/PUBLISHED/GRAPHICS/84115.PDF> (last visited June 19, 2019) ("*Reliability Standards Report*"). The *Reliability Standards Report* was commissioned in compliance with CAL. PUB. UTIL. CODE § 2892.1 to assess reliability standards for telecommunications backup power systems. CAL. PUB. UTIL. CODE § 2892.1 provides in applicable part that "the [C]ommission, in consultation with the Office of Emergency Services, shall open an investigative or other appropriate proceeding to identify the need for telecommunications service systems not on the customer's premises to have backup electricity to enable telecommunications networks to function and to enable the customer to contact a public safety answering point operator during an electrical outage [...]."

¹⁷ *Reliability Standards Report* at 57; see also, *e.g.*, *Feasibility Study*, Conn. Siting Council, D.432 at 15 (Jan. 2013), https://www.ct.gov/csc/lib/csc/pendingproceeds/docket_432/432feasibilitystudyfinal.pdf (last visited June 19, 2019) ("Virtually all cell sites in Connecticut employ a bank of batteries for short-term back-up."); FCC, *Report and Recommendations, October 2018 Hurricane Michael's Impact on Communications: Preparation, Effect, and Recovery*, FCC PS Docket 18-339 at 10 (May 2019) ("... [the wireless carrier] maintains battery backup power at all cell sites ...").

will be severely disrupted” during massive natural events, and “[i]ncreasing battery capacity or fuel supplies will not produce a significant reduction in risk in these massive events.”¹⁸

These significant shortcomings in the Motion are sufficient to warrant its denial. Further, the Motion is procedurally deficient on several grounds and seeks unlawful Commission action. Accordingly, while CTIA and its members support the goal of optimizing disaster recovery, the Commission should deny the Motion—which will not further that goal—in its entirety.

II. THE MOTION LACKS VALID EVIDENTIARY RECORD SUPPORT, AND IS PROCEDURALLY FLAWED

A. The PAO’s Assertion That the Record in This Proceeding Is Sufficient for the Commission to Provide the Relief Requested Is Not Supported by the Motion or the Record Itself.

The Motion notes that the Commission held workshops and “received comments from a broad array of parties responding to detailed questions issued through multiple Assigned Commissioner and Administrative Law Judge rulings.” Based upon this “thorough” record, the Motion contends that the Commission can grant the requested relief.¹⁹ Notably, however, the Motion never references any of the information placed on the record by the wireless industry—nor, in fact, by any party to the proceeding. Rather, to support its Requests, the PAO focuses on three sources of information. But none of these sources, individually or taken together, comprise sufficient evidence for the Commission to act in the manner requested.

The Motion relies substantially on statements made at the Workshop held in this proceeding on November 1, 2018.²⁰ That Workshop provided a forum for public safety representatives to discuss the sufficiency of communications networks during emergencies. However, the Workshop Transcript provides no documentation regarding the participants’

¹⁸ *Reliability Standards Report* at 60.

¹⁹ Motion at 7-8.

²⁰ *See id.* at 4, 5, 6, 8 and 14 (citing to Workshop Transcript).

claims, or the efficacy, feasibility, or legality of any network operations measures requested by the PAO. Indeed, there has been no opportunity to offer such information in this proceeding.²¹

Moreover, to the extent that the Commission previously addressed the feasibility and effectiveness of network measures encompassed in the Requests, it has found these measures lacking. For example, compliance with Request 1 can be interpreted as seeking to establish a standard of near-perfection for communications networks that the Commission has already acknowledged is not possible. Specifically, the Commission-approved *Reliability Standards Report* referenced above, conducted in compliance with California Public Utilities Code Section 2892.1²² to consider reliability standards for telecommunications backup power systems, determined that the destructive nature of disaster events will *inevitably* result in the physical loss of communications facilities.²³ Given this finding, it was concluded that rather than enhance the already existing level of network facilities' redundancy, the focus for resiliency should be placed on robust network recovery and restoration plans,²⁴ which, as documented on the record of this proceeding, wireless carriers have implemented and continue to improve upon.²⁵

In addition, having found that increasing battery capacity at network facilities will not significantly enhance overall resiliency during and following disasters, the *Reliability Standards*

²¹ See Section II.B, *infra*, discussing the fact that the Motion's Requests are outside the scope of this proceeding.

²² See n. 16, *supra*.

²³ See *Reliability Standards Report* at 60 ("Increasing battery capacity or fuel supplies at network facilities will not produce a significant reduction in risk in these massive events.").

²⁴ See *id.* at 74; see also *id.* at 79 ("The [Commission] should strongly consider providing flexibility to service providers to allow for software engineering and network re-configuration as a response to [an] emergency.")

²⁵ See, e.g., Comments of CTIA and the Carrier Parties, R18-03-011 (filed Feb. 22, 2019); Opening Comments of MCI/metro Access Transmission Services (U 5253 C) and Cellco Partnership (U 3001 C) dba Verizon Wireless, R.18-03-011 (filed Feb. 22, 2019); AT&T Comments in Response to Assigned Commissioner and Administrative Law Judge's Ruling Seeking More Information on Emergency Disaster Relief Program, R.18-03-011 (filed Feb. 22, 2019).

Report also identified a number of impediments to providing backup generators and/or battery power at wireless facilities, the very relief that appears to be sought by Request 2. These impediments include regulatory compliance conflicts with EPA rules, local fire codes, hazardous materials restrictions, building safety codes (such as rooftop loading restrictions), right-of-way restrictions, noise ordinances, prohibitions in lease agreements, and/or other restrictions that limit or bar the addition of heavy batteries with toxic compounds to wireless sites.²⁶

In all, the data-driven results of the *Reliability Standards Report*²⁷ and the breadth of the analysis undertaken therein underscore the deficiencies in the Motion, and with the record that the PAO wrongly contends is adequate for the Commission to grant the Motion’s requested relief.

Besides extensive citation to the Workshop Transcript, the Motion makes liberal use of news articles,²⁸ none of which are part of the record of this proceeding—and none of which are the type of documents of which the Commission can take official notice.²⁹ Even ignoring these legal realities *arguendo*, the PAO also selectively cites to certain elements of each news article, while ignoring the portions not aligned with the Motion’s errant narrative, creating a misleading

²⁶ Cf. *Reliability Standards Report* at 57-59.

²⁷ See *id.* at 21 and Appendices C through G (documenting the data gathering steps taken and the results thereof).

²⁸ See e.g., Motion at 2 (citing Lisa M. Kriger, *Camp Fire Created a Black Hole of Communication*, MERCURY NEWS (Dec. 16, 2018), <https://www.mercurynews.com/2018/12/16/camp-fire-created-a-black-hole-of-communication/>); *id.* at 3 (citing *Anxious Mendocino County Residents Feeling Cut Off By Redwood Complex Fire*, CBS 5 KPIX (Oct. 10, 2017), <https://sanfrancisco.cbslocal.com/2017/10/10/anxious-mendocino-county-residents-feeling-cut-off-by-redwood-complex-fire/>); *id.* at 9 (citing Paige St. John & Joseph Serna, *Camp Fire Evacuation Warnings Failed to Reach More Than A Third of Residents Meant to Receive Calls*, SAN DIEGO UNION-TRIBUNE (Nov. 30, 2018), <https://www.sandiegouniontribune.com/news/california/la-me-ln-paradise-evacuation-warnings-20181130-story.html>); and *id.* at 14 (citing Kevin Nida, *Serving Those on the Frontlines of the West Coast Wildfires*, FIRSTNET (Aug. 23, 2018), <https://firstnet.gov/newsroom/blog/serving-those-frontlines-west-coast-wildfires>) (all last visited June 19, 2019).

²⁹ CAL. CODE REGS. tit. 20, § 13.9 (2018) (“Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 *et seq.*”).

summary of the articles' content.³⁰ Regardless, the statements made in these news articles cannot provide any basis for the Commission to provide the requested relief.³¹ As the Commission has acknowledged, it cannot take official notice in situations where the parties did not have an opportunity for rebuttal.³² The PAO's reliance on newspaper articles as support for its Motion is thus irreparably inappropriate and procedurally invalid.

The third source of information cited by the PAO in support of its Requests are two staff papers: (1) *Safety Principles for Communications Providers* ("Principles Paper"), and (2) *Analysis of Major Communication Outages in California during the 2017 January-February Storms* ("Analysis of Communications Outages"). Neither of these staff papers are official reports of the Commission and both suffer from substantial procedural deficiencies. As a result, neither can be relied upon as a basis to grant the Requests.

The *Principles Paper*, which was entered into the record of this proceeding by way of an Administrative Law Judges' ruling,³³ suffers from several procedural and factual deficiencies as highlighted in the *Motion of AT&T, CTIA, Sprint, T-Mobile and Verizon Wireless to Strike Safety Principles for Communications Service Providers from the Record* filed in this proceeding on

³⁰ For example, the Motion (at 9) cites articles in the *San Jose Mercury News* and the *San Diego Union Tribune* as supporting the assertion that "the failure of communications interfered with evacuation warnings during the Camp Fire." While no one is contesting that downed communications facilities could have impacted certain evacuation efforts, the *Mercury News* article also highlighted the fact that "many residents didn't sign up for the [alert] system," and "officials didn't trigger warnings for every neighborhood"—and the *Tribune* article noted that that the "county did not use the federal Wireless Emergency Alert system that employs a separate frequency to send an Amber Alert-style tone, buzz and message to all cellphones in a specific area simultaneously."

³¹ See *In the Matter of the Investigation and Suspension on the Commission's Own Motion of Tariff Filed by Advice Letters Nos. 287 and 287-A of San Jose Water Company in Santa Clara County*, R.97-08-004, D.98-09-044 (Sept, 3, 1998) ("[W]e require due process in the exercise of our broad powers of official notice. This includes affording both notice and a hearing to the parties. The Commission has not taken official notice in situations where the parties did not have an opportunity for rebuttal.")

³² See *id.*

³³ See Joint Administrative Law Judges' Ruling Entering Safety Principles For Communications Service Providers Into The Records Of Rulemaking 18-03-011 and Rulemaking 18-12-005 (April 8, 2019).

May 6, 2019. In short, the inclusion of the *Principles Paper* in the record without giving parties notice and an opportunity to be heard violates fundamental principles of due process,³⁴ as well as the Commission’s evidentiary and procedural rules. Inclusion in the record infringes upon the “substantial rights of the parties,” is not properly a subject of official notice, and constitutes hearsay that cannot support the Commission’s ultimate findings in this matter or the Requests.³⁵ Even the PAO has acknowledged that this paper should not have been admitted into the record absent an opportunity for comment.³⁶

As for the *Analysis of Communications Outages*, that paper, too, is not part of the record in this proceeding or an official report of the Commission as it was never approved or adopted thereby. Accordingly, the *Analysis of Communications Outages* cannot be relied on by the Commission in acting on the PAO’s Motion. The *Analysis of Communications Outages* also suffers from some of the same procedural deficiencies of the *Principles Paper*, primarily the lack of due process afforded interested parties—*i.e.*, notice and an opportunity to be heard regarding the content of the report. In this regard, both the *Principles Paper* and *Analysis of Communications Outages* stand in stark contrast to the *Reliability Standards Report*, a final version of which was approved and adopted by the Commission after affording parties an opportunity to comment. Neither the *Principles Paper* nor the *Analysis of Communications Outages*, either alone or in conjunction, provide valid grounds upon which to grant the PAO’s Requests.

³⁴ See generally U.S. CONST. amend. XIV; CAL. CONST. art. 1, § 7(a).

³⁵ CAL. CODE REGS. tit. 20, § 13.9 (2018); *Mangini v. R. J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063-64 (1994), *overruled on other grounds by In re Tobacco Cases II*, 41 Cal. 4th 1257 (2007); see, e.g., *Util. Reform Network v. Public Utils. Comm’n*, 223 Cal. App. 4th 945, 961 (2014) (citing *In re Comm’n TeleSystems Int’l*, 66 C.P.U.C.2d 286, 292 n. 8 (1996)).

³⁶ See Response of the Public Advocates Office to the Motion of AT&T, CTIA, Sprint, T-Mobile, and Verizon Wireless to Strike Safety Principles for Communications Providers from the Record, R.18-03-011 at 4 (filed May 21, 2019).

Finally, CTIA notes that the Motion requests that the Commission grant “other and further relief as the Commission deems necessary.”³⁷ In support of this “other and further relief,” the PAO cites Appendix A to the Motion—a one-page document entitled “List of Necessary Safety Measures for Communications Providers.” While the first four listed items are repetitious of Requests 1-4 set forth above, the remainder are not discussed within the Motion. The PAO provides no support for these additional requests and, more importantly, does not even attempt to tie this additional relief to the record in this proceeding. Simply stated, the PAO’s Motion offers nothing upon which the Commission can properly rely as basis to grant these additional requests.

B. The PAO’s Claim that the Relief Requested in its Motion Is Appropriately Part of the Scope of this Proceeding Is Not Supported by its Motion or the Commission’s OIR and Subsequent Scoping Memo.

The PAO’s claim that the relief requested in its Motion is appropriately part of the scope of this proceeding is not supported by its Motion or the Commission’s Order Instituting Rulemaking³⁸ and the subsequent Scoping Memo in this proceeding.³⁹ Accordingly, the relief requested must be denied.

The PAO’s argument that the relief requested is within the proceeding’s scope is comprised of: (1) a quote from the OIR that the rulemaking was initiated to “adopt comprehensive *post-disaster consumer protection measures* for all utilities...including electric, gas, telephone, water, and sewer utilities under the *Commission’s jurisdiction*,”⁴⁰ and (2) the assertion that the rulemaking is scoped to address a wide range of consumer protection issues,

³⁷ Motion at 1.

³⁸ Order Instituting Rulemaking Regarding Emergency Disaster Relief Program, R.18-03-011 (March 22, 2018) (“OIR”).

³⁹ Assigned Commissioner’s Scoping Memo and Ruling, R.18-03-011 (June 29, 2018) (“Scoping Memo”).

⁴⁰ Motion at 2 (citing OIR at 1) (emphasis added).

including what kinds of disasters trigger customer protections, service reconnection interval requirements, and types of information needed by consumers during and after emergencies.⁴¹ Neither of these statements supports the Motion’s assertion that its Requests are within scope. The Requests simply are not Commission-jurisdictional post-disaster consumer protection measures, as contemplated by the OIR or the subsequent Scoping Memo.

The PAO’s Requests are not “post[-]disaster” measures. Rather, the fulfillment of the Requests seemingly would necessitate each facilities-based wireless carrier in California to engage in extensive permanent network path redesign, facilities construction, and operational changes. As a result, not only do the measures fall outside the rubric of “post disaster” measures, but—as discussed below—they also fall outside the Commission’s jurisdiction.

Moreover, despite the PAO’s attempts to paint its Requests as “consumer protection measures,” the Requests do not fall within the “consumer protection measures” contemplated by either the OIR or Scoping Memo. In assessing whether an issue falls outside the scope of a proceeding, California courts have looked at the totality of the discussion and directives contained in the OIR.⁴² In this instance, the discussion and directives in the OIR and Scoping Memo address assistance measures that are to be activated to aid consumers during disaster events for which the Governor has issued an emergency proclamation.⁴³ The Motion’s Requests

⁴¹ *See id.*

⁴² *See S. Cal. Edison v. Cal. Public Utils. Comm’n.*, 140 Cal. App. 4th 1085 (June 26, 2006) (requiring utilities to pay prevailing wages was not within scope of rulemaking opened to adopt rules to prohibit bid shopping and reverse auctions consistent with rules governing state and federal public works contracts).

⁴³ *See* OIR at 1 (the Commission to address “whether to adopt the emergency consumer protections that were ordered in Resolutions M-4833 and M-4835 for use by all utilities in the event of incidents similar to those addressed in those Resolutions—disasters in which the Governor issues a state of emergency proclamation. In addition this proceeding may also consider whether those consumer protections, if adopted, should be modified or augmented to ensure the availability of well-defined and consistent post-disaster protections in emergency situations.”); *id.* at 5 (the “Commission seeks to establish consumer protections that can be implemented expeditiously by utilities following a triggering event rather than needing to prepare and adopt a resolution after each event.”); *see also* Scoping Memo at 1-2 (stating that

are not procedures to be activated or actions to be taken upon the Governor's issuance of an emergency disaster declaration. As such, the Requests are not within the scope of this proceeding, and cannot be considered as a result.

C. The PAO's Motion Contravenes the Commission's Rules of Practice and Procedure and, If Allowed to Go Forward, Will Result in an Unlawful Delegation of the Commission's Duties.

The relief requested in the PAO's Motion also exceeds the assigned Administrative Law Judge's ("ALJ's") authority to grant.⁴⁴ Accordingly, the Motion must be rejected.

Commission Rule 9.1 provides that an ALJ may "rule upon all objections or motions which do not involve final determination of proceedings."⁴⁵ The Motion is seeking a final determination that the requested regulatory measures should be imposed on communications providers. As such, the Motion disregards Commission Rule 9.1.

Moreover, allowing the ALJ to issue a ruling on the substance of the Motion would constitute an unlawful delegation of the Commission's duties. The Commission cannot delegate the power to make fundamental policy decisions or "final" discretionary decisions.⁴⁶ Again, the Motion is seeking a final determination from the assigned ALJ that its requested regulatory

“[o]n March 22, 2018, this rulemaking, R.18-03-011, was initiated to consider whether the Commission should adopt permanent rules requiring all energy, telecommunications, and water utilities under this Commission's jurisdiction to make available comparable post-disaster consumer protections measures to Californians in the event that certain types of emergency disaster declarations are pronounced.”)

⁴⁴ Appended to the Motion is a “Proposed Order” drafted for the ALJ's signature directing communications providers to immediately undertake the requested relief measures.

⁴⁵ CAL. CODE REGS. tit. 20, § 9.1 (2018).

⁴⁶ *Application of Union Pacific Railroad Company and BNSF Railway Company for Rehearing of Resolution ROSB-002*, Order Modifying Resolution ROSB-002 and Denying Rehearing of Resolution, as Modified, A.08-12-004, D.09-05-020 (Dec. 10, 2008) (citing *Cal. School Employees Ass'n v. Personnel Comm'n*, 3 Cal.3d 139, 144 (1970); *Schechter v. Cnty. of Los Angeles* 258 Cal.App.2d 391, 396 (1968)); see also *Application of the California Association of Competitive Telecommunications Companies for Rehearing of Resolution M-4801 et al.*, Ordering Modifying Resolution M-4801 and Denying Rehearing of the Decision as Modified, A.01-05-032 *et al.*, D.02-02-049 (May 21, 2001).

measures should be imposed on communications providers. The rendering of such a decision by the ALJ would constitute an unlawful delegation of authority by the Commission.

III. THE COMMISSION ACTIONS REQUESTED IN THE MOTION ARE UNLAWFUL

While the issues discussed *supra* provide more than ample justification to deny the Motion, the Commission additionally should deny the Motion because the actions the PAO requests are unlawful on multiple additional grounds.

A. Implementation of Requests 1, 2, and 3 Would Violate 47 U.S.C. § 332, as Interpreted By the Federal Communications Commission.

Requests 1, 2, and 3, if ordered, would violate Section 332(c) of the federal Communications Act of 1934, as amended (the “Act”). That statute reads in germane part: “[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.”⁴⁷ While the PAO’s Requests are ostensibly couched in terms of “emergency” communications, in reality they would appear to impose a state-specific regulatory overlay on wireless providers’ commercial networks and services more broadly.⁴⁸

Applying Section 332 of the Act, the FCC has explicitly held that “local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider’s network.”⁴⁹ To the extent CTIA’s members would be required

⁴⁷ 47 U.S.C. § 332(c)(3)(A).

⁴⁸ More generally, pursuant to explicit Congressional legislation and the Supremacy Clause, the FCC has exclusive jurisdiction under Title III of the Act over CMRS carriers’ use of spectrum and the operation and density of their facilities. U.S. CONST. art. VI (federal laws “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the contrary notwithstanding”). This “provides Congress with the power to pre-empt state law.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986); 47 U.S.C. §§ 301, 332.

⁴⁹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9104 n. 84 (2018) (“*Accelerating Wireless Broadband Order*”).

to satisfy the mandates represented by the Requests as a condition of entering the market or continuing to provide service in California, this would constitute impermissible regulation of entry (or of the continued ability to provide service). In addition, as CTIA has noted previously in this proceeding, the Seventh Circuit held in *Bastien* that Section 332(c)(3)(A) of the Act preempted state regulation of wireless carriers' transmitter locations, density, and use of frequencies.⁵⁰ The Ninth Circuit has cited *Bastien* with approval, further holding that Section 332(c)(3)(A) preempts a state from "substituting its judgment for the [FCC's] with respect to a market-entry decision."⁵¹

Furthermore, the FCC itself has further underscored Section 332's ban on state entry regulation by exempting wireless providers from the federal entry regulations in Section 214 of the Act.⁵² Section 214, among other things, allows the FCC to require an interstate common carrier "to provide itself with *adequate facilities* for the expeditious and efficient performance of its service"⁵³ including "undertak[ing] *improvements in facilities and expansion of services to meet public demand.*"⁵⁴ But the FCC has instead opted to use its exclusive Title III licensing authority for this purpose and to rely on market forces, and the Commission may not second-guess that judgment.

Thus, Requests 1, 2, and 3 would each appear to violate Section 332 of the Act, if adopted. Specifically, Request 1's relief regarding completion of call and data traffic "at all

⁵⁰ See *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983 (7th Cir. 2000).

⁵¹ *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1008 (9th Cir. 2010) (the FCC exclusively regulates market entry for mobile services "through determinations of public interest, safety, efficiency, and adequate competition"); see also *Stroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010) (decisions on "the requisite number of cellular towers to support service" and whether service "is above or below the proper standard for cell phone service" deal with market entry).

⁵² 47 C.F.R. § 20.15(d); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 182 (1994).

⁵³ 47 U.S.C. § 214(d) (emphasis added).

⁵⁴ *RCA Communications*, Memorandum Opinion and Order, 44 FCC 613, 618 (1956)) (emphasis added).

times” is incompatible with Section 332, because it constitutes impermissible regulation of type and level of service. Similarly, Request 2 appears to ask the Commission to violate the FCC’s exclusive jurisdiction regarding network design and the placement of specific aspects of wireless carriers’ facilities (*i.e.*, generators and/or backup batteries). The same issue may exist with Request 3, to the extent that it proposes to dictate construction of redundant backhaul paths in both the originating network and in 9-1-1-specific facilities. The PAO’s overarching request to have the Commission “dictate the design of a provider’s network”⁵⁵ exceeds the Commission’s permissible role with regard to wireless service. Further, as described *supra*, per the Commission’s own research even over a decade ago almost 90 percent of cell sites already had backup battery power.⁵⁶ In addition, as a practical matter, deploying and refueling diesel generators in high fire risk locations would be a poor idea that would put service providers’ personnel in harm’s way, and could exacerbate uncontrolled wildfires.

Accordingly, Requests 1, 2, and 3 are impermissible, given their inherent conflicts with federal statute and FCC authority.

B. Implementation of Request 1 Would Also Violate 47 U.S.C. § 615a-1.

Separately, Section 615a-1(d) of the Act establishes that state authority over emergency communications cannot be “inconsistent with Federal law or [FCC] requirements.”⁵⁷ Request 1 appears impermissibly inconsistent with the FCC’s current requirements relating to emergency communications—and the FCC has not delegated any such authority to state commissions in this area.

⁵⁵ See *Accelerating Wireless Broadband Order* at n. 84.

⁵⁶ See n. 17, *supra*.

⁵⁷ 47 U.S.C. § 615a-1(d).

Specifically, nowhere does the FCC mandate the call completion requirements contemplated by Request 1, making that Request inconsistent with the current FCC regime addressing 9-1-1 service.⁵⁸ In addition, Request 1 is also inconsistent with the current FCC regime addressing voice traffic prioritization. The FCC has considered—and expressly declined—to impose prioritization or grade of service requirements for wireless 9-1-1 calls. And if two statutorily impermissible inconsistencies were not each individually sufficient for denial of the Request, Request 1 *also* appears inconsistent with wireless 9-1-1 call delivery requirements and realities. Under the FCC’s rules, wireless providers are responsible for delivering 9-1-1 calls and associated E911 data to the input to the PSAP’s wireline network (*i.e.*, the wireline selective router or NG911 equivalent) — not for *completion* of the 9-1-1 call to the PSAP, which occurs off wireless carriers’ networks. The FCC also has long recognized the obvious: 9-1-1 calls cannot be originated, much less completed, when coverage does not exist or is lost. Again, the Commission may not, by law, override the FCC’s technical judgment and jurisdiction in this area.

C. All Four Requests Are Also Subject to Preemption Based on Existing FCC Regulations.

Finally, all four Requests are preempted by existing FCC regulations.

As a preliminary matter, Request 1’s proposed data mandate is explicitly preempted by the FCC’s *Restoring Internet Freedom Order*.⁵⁹ In that order, the FCC explicitly “preempt[ed] any state or local measures that would effectively impose rules or requirements ... that would impose more stringent requirements for any aspect of broadband service that we address in this order,” as well as “any so-called ‘economic’ or ‘public utility-type’ regulations, including

⁵⁸ See generally 47 C.F.R. § 20.18.

⁵⁹ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 ¶ 195 (2018) (“*Restoring Internet Freedom Order*”).

common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today[.]”⁶⁰ The State of California has already agreed to stay and hold in abeyance its enforcement of internet-regulating California Senate Bill 822 during the pendency of the D.C. Circuit’s review of the *Restoring Internet Freedom Order*,⁶¹ given in part the reality that the Hobbs Act requires a U.S. District Court to uphold the validity of an agency order while such order is under review by a higher federal court.⁶² The logic that justified the stipulated-to stay of Senate Bill 822’s enforcement would be turned on its head by Request 1’s proposed violation of the *Restoring Internet Freedom Order*.

The Requests are also subject to field preemption. Field preemption applies where “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state [or local] laws on the same subject.”⁶³ Federal regulations preempt state and local laws in the same manner as congressional statutes.⁶⁴ And “although the term ‘field preemption’ suggests a broad scope, the scope of a field deemed preempted by federal law may be narrowly defined.”⁶⁵

⁶⁰ *Id.* Even the FCC’s original *2015 Open Internet Order*, which the *Restoring Internet Freedom Order* reversed, expressly rejected applying requirements such as these. See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5849 ¶ 512 (2015) (rejecting arguments it should retain Section 214 authority “to provide itself with adequate facilities for the expeditious and efficient performance of its service” including “undertak[ing] improvements in facilities and expansion of services to meet public demand.”).

⁶¹ See generally Stipulation Regarding Temporary Stay of Litigation and Agreement Not to Enforce Senate Bill 822, *United States v. California*, No. 18-02660 (Oct. 26, 2018).

⁶² See 28 U.S.C. § 2342(1).

⁶³ *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (internal quotation marks omitted).

⁶⁴ See *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3rd Cir. 2008)).

⁶⁵ *Farina*, 625 F. 3d at 120 n. 25 (quoting *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3rd Cir. 1999)).

With regard to Request 1, while the PAO's proposed call completion standard is unclear, its categorical assertion that the Commission should require service providers to complete all calls, including during emergencies, impermissibly conflicts with existing FCC standards and initiatives. Such standards and initiatives include those arising under the federal General Emergency Telephone Service and Wireless Priority Service programs (which require call prioritization, in potential conflict with Request 1's unclear language).⁶⁶ Further, there may be instances, particularly immediately after an unforeseen disaster event, in which more calls are attempted than a communications provider's network is designed to handle simultaneously.⁶⁷ As discussed *supra*, federal law preempts state regulation of wireless network design matters such as this.

Request 1's nebulous "complete all calls" mandate would also conflict with the FCC's currently contemplated robocalling regime, which, if adopted, will permit and even encourage certain call blocking by carriers.⁶⁸ We also note the likelihood that any time-of-operation requirement potentially *de facto* imposed by an ordering of Request 1 or 2 also would run afoul of Section 303(c) of the Act and its assignment to the FCC of authority over station operation times.⁶⁹

⁶⁶ See, e.g., *About GETS*, DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/cisa/about-gets> (last visited June 19, 2019); *Wireless Priority Service (WPS)*, DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/cisa/wireless-priority-service-wps> (last visited June 19, 2019).

⁶⁷ Such capacity limitations are inherent to any communications network, not just wireless networks.

⁶⁸ See *Advanced Methods to Target and Eliminate Unlawful Robocalls et al.*, Draft Declaratory Ruling and Third Further Notice of Proposed Rulemaking, CG Docket No. 17-59, WC Docket No. 17-97, FCC-CIRC1906-01 (draft version rel. May 16, 2019), <https://www.fcc.gov/document/clarifying-voice-providers-can-block-robocalls-default> (last visited June 19, 2019).

⁶⁹ See 47 U.S.C. § 303(c). The FCC possesses plenary authority over the use of spectrum by wireless carriers, and state mandates that carriers use their spectrum in any particular manner or at particular times almost certainly interfere with and violate other elements of the FCC's exclusive jurisdiction over spectrum usage. Hour of operation is offered as one example, but certainly many others exist.

Separately, regarding Request 4, the FCC has also occupied the field with regards to “emergency alert and warning system messaging.” The Warning, Alert, and Response Network (“WARN”) Act gives the FCC alone the authority to adopt “relevant technical standards, protocols, procedures and other technical requirements” governing the Wireless Emergency Alerts (“WEA”) program and expressly ties WEA requirements to its exclusive Title III licensing authority. The FCC’s regime is comprehensive, leaving no room for state-level regulation.⁷⁰ The WARN Act also gives *the FCC alone* the authority to adopt procedures by which CMRS providers disclose their intent to voluntarily participate in WEA.⁷¹ Pursuant to this authority, the FCC has adopted requirements to prescribe WEA capabilities, WEA testing, and WEA election procedures, all of which dovetail with the *federal* FEMA-administered system for originators of WEAs.⁷² And the WARN Act gives *the FCC alone* the authority to enforce its provisions, and wireless carriers blanket immunity regarding WEA performance.⁷³ To the extent the PAO suggests that the Commission mandate or otherwise regulate the WEA program, any such regulation clearly is preempted.

Finally, nowhere does the FCC mandate the backup generators and/or battery power that appear to be contemplated by Request 2, much less the network architectures contemplated by Request 3. The FCC has rejected regulating the resiliency practices of wireless carriers in favor of a regulatory framework relying upon voluntary commitments, such as those set forth in the

⁷⁰ See Warning, Alert, and Response Network (WARN) Act, Title VI of the Security and Accountability for Every Port Act of 2006, 120 Stat. 1884, § 602(a), codified at 47 U.S.C. § 1201 *et seq.* (2006) (“WARN Act”).

⁷¹ See 47 U.S.C. § 1202(b).

⁷² See, e.g., *Wireless Emergency Alerts et al.*, Second Report and Order and Second Order on Reconsideration, 33 FCC Rcd 1320, 1321 at ¶ 2 n. 6 (2018); see also 47 C.F.R., Parts 10 and 11 (detailing the FCC’s comprehensive rules regarding EAS and WEA).

⁷³ See 47 U.S.C. §§ 1201(d), (e)(1).

wireless industry's cooperative framework.⁷⁴ The Motion's apparent attempt via Requests 2 and 3 to have the Commission establish a California-specific framework relating to emergency communications is inconsistent with the FCC's regulatory framework for resiliency. In doing so, the FCC has left no room for California to impose its own resiliency requirements.⁷⁵

IV. CONCLUSION

For the reasons discussed above, CTIA respectfully urges the Commission to deny the PAO's Motion in its entirety.

Respectfully submitted June 19, 2019, at San Francisco, California.

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⁷⁴ See, e.g., *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, Order, 31 FCC Rcd 13745 (2016); see also *Wireless Resiliency Cooperative Framework*, <https://www.fcc.gov/wireless-resiliency-cooperative-framework> (last visited June 19, 2019).

⁷⁵ The FCC's policy of non-regulation in this area is entitled to as much preemptive effect as a policy of affirmative, *ex ante* regulation would have. See *Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); see also *Computer & Comm'n's Indus. Ass'n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), (quoting *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982)); *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) ; *Farina*, 625 F.3d at 134 (quoting *Hillborough Cnty.*, 471 U.S. at 713).