

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

Order Instituting Rulemaking Regarding
Emergency Relief Disaster Program.

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

**COMMENTS OF CTIA
ON PROPOSED DECISION IN RULEMAKING 18-03-011**

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), CTIA files these comments in response to the Proposed Decision of President Michael Picker released July 16, 2019 in the above-captioned proceeding (“Proposed Decision”).

I. INTRODUCTION AND SUMMARY

As discussed in more detail below, CTIA and its members strongly support the goal of ensuring that “communications service provider customers who experience a housing or financial crisis due to a disaster keep vital services and receive support in the wake of a disaster.”¹ Indeed, wireless carriers have been at the forefront of efforts to ensure the continuity of communications services following disasters such as wildfires, and have taken significant steps to help affected consumers in emergencies. Wireless carriers in California will continue to work tirelessly to “sustain or restore essential communications functions, deliver critical communications services, and supply communications to customers and emergency officials,”² regardless of whether an official state of emergency has been declared.

CTIA and its members also agree that it is important for customers to be aware of measures that are available to assist them in times of crisis. The outreach requirements in the Proposed Decision, however, are not implementable as currently drafted and do not appear to be grounded in any valid Commission authority. At minimum, they must be clarified. As an alternative, however, CTIA proposes that wireless carriers and the Commission collaborate on the creation of a website hosted by the Commission, similar to the CalPhone Info website, that would provide consistent information targeted to consumers who need it in a language other than English.

¹ Proposed Decision at 2.

² Proposed Decision at 43, *id.* Finding of Fact 10.

The obligations that the Proposed Decision would impose on wireless carriers regarding use of wireless facilities to restore service and additional services and equipment that carriers would have to provide to fire-affected customers³ (“Wireless Requirements”) will not lawfully promote the Commission’s and wireless industry’s shared goals of ensuring that customers impacted by disasters receive assistance tailored to their circumstances. As discussed below, and as CTIA has articulated previously in this docket,⁴ federal law bars the Commission from imposing the Wireless Requirements as drafted. The Commission’s assertion that it is exercising California’s “police powers” does not change this outcome, because there is no exception to federal preemption for state “police power” authority, and the federal intent to preempt in these cases is clear. Furthermore, the Wireless Requirements are so imprecisely tailored that they would be invalid under the void for vagueness doctrine if adopted. The Commission can resolve these legal infirmities, however, by making all of the discussed activities voluntary preferred practices rather than mandatory obligations, as the Commission has already rightly done with regard to billing relief for fire-affected wireless customers. As detailed below, removing the mandatory nature of the directives will not detract from the wireless carriers’ efforts to aid consumers during times of disaster.

II. CALIFORNIA’S WIRELESS CARRIERS HAVE TAKEN, AND WILL CONTINUE TO TAKE, EXTRAORDINARY STEPS IN TIMES OF DISASTER TO ENSURE NETWORK RESILIENCY, RESTORATION, AND CUSTOMER ASSISTANCE.

As the record in this Rulemaking demonstrates, and as the Commission itself has acknowledged,⁵ wireless carriers have taken significant steps to ensure the continuity of

³ Proposed Decision at 27-28; *id.* Conclusions of Law 22-23; Ordering Clauses 4-5.

⁴ *See* Application of CTIA and AT&T for Rehearing of Decision 18-08-004, R.18-03-011, at 7-9 (filed Sept. 19, 2018) (“Rehearing Application”).

⁵ *See, e.g.*, Resolution M-4833, 10 (“We commend these companies on their efforts...”).

communications and to aid consumers in times of disaster, and have done so of their own volition. Wireless carriers' efforts to maintain or repair damaged network infrastructure have included:

- Constructing resilient networks with redundancy features such as ring configurations and backup power at virtually all critical coverage cell sites;⁶
- Deploying additional wireless facilities such as cells on wheels ("COWs"), cells on light trucks ("COLTs"), satellite picocells on trailers ("SPOTs"), and repeaters on trailers ("RATs") to improve service in areas where permanent wireless towers may have been damaged by fire, or where networks were overburdened by the movement of people seeking refuge;⁷
- Dispatching emergency response teams provisioned with a wide variety of equipment from portable microwave links to 4G network extenders in order to address a wide variety of network and community challenges in the field;⁸

Beyond their own network infrastructure, the wireless industry also continues to take significant steps to aid disaster-affected consumers, including providing wireless charging stations and Wi-Fi access,⁹ providing "loaner" handsets to customers,¹⁰ and waiving overage charges, extending payment dates, and giving additional data allotments free of charge.¹¹ California wireless carriers have even gone above and beyond and helped with matters unrelated to the provision of

⁶ See, e.g., AT&T's Opposition to Motion by the Public Advocates Office for an Immediate Order Requiring Communications Providers to Complete Calls and Deliver Data Traffic and Provide Other Post-Disaster Consumer Protection Relief, R.18-03-011, at 10-18 (filed June 19, 2019) ("AT&T Opposition"); Verizon June 19 Comments at 1, 4-8.

⁷ See, e.g., T-Mobile West LLC, Tier 1 Advice Letter No. 7 at 2 (filed Nov. 26, 2018) ("T-Mobile Advice Letter No. 7"); Verizon June 19 Comments at 4.

⁸ See, e.g., AT&T Opposition at 16-17; Verizon June 19 Comments at 4-5.

⁹ See, e.g., T-Mobile Advice Letter No. 7 at 2; Verizon June 19 Comments at 2-3.

¹⁰ See, e.g., T-Mobile Advice Letter No. 7 at 2.

¹¹ See, e.g., T-Mobile West, LLC, Tier 1 Advice Letter No. 8, at 2 (filed Nov. 26, 2018) ("T-Mobile Advice Letter No. 8"); Matt Adams, *How Carriers Are Helping Those Affected by California Wildfires*, ANDROID AUTHORITY (Oct. 12, 2017), <https://www.androidauthority.com/california-wildfires-carriers-807137/>.

wireless service; for example, wireless carriers have provided fire-affected customers with basic support such as water, food, and smoke-protection face masks.¹²

During emergencies in California, wireless carriers have also coordinated extensively with the Commission, with the California Office of Emergency Services (“CalOES”), and with other emergency response organizations.¹³ Wireless carriers have provided and continue to provide state and local emergency response officials with pertinent information, without any formal mandate to do so. Among these efforts, which have taken numerous forms, filers have noted positively the role that the California Utilities Emergency Association (“CUEA”) plays in information sharing and situational awareness with public safety entities at emergency operations centers (“EOCs”), as well as inter-industry information exchange.¹⁴ In certain circumstances, carrier representatives are even embedded at the state EOC. These and other methods of

¹² See, e.g., Press Release, T-Mobile, T-Mobile Responds to California Wildfires (Dec. 7, 2017), <https://www.t-mobile.com/news/t-mobile-responds-to-california-wildfires> (“Mobile trucks have been deployed in Ventura and LA counties so people can charge devices, access WiFi, use loaner mobile phones as needed, and get supplies like bottled water.”); Press Release, AT&T, AT&T to Offer Credits for Unlimited Data, Calls and Texts to Keep Customers Affected by California Wildfires Connected (Oct. 20, 2017), https://about.att.com/inside_connections_blog/california_fires (“AT&T Community Response Teams are at the following shelters today with wifi, charging solutions, phones for use, account support, live news via DirecTV Now, snacks/water: Napa: Napa Valley College, 2277 Napa-Vallejo Hwy; Santa Rosa: Elsie Allen High School, 599 Bellevue Ave; Petaluma: Community Center 320 N McDowell Blvd; Sonoma: Sonoma County Fairgrounds, 1350 Bennet Valley Road; Yuba City: Yuba Sutter Fairgrounds, 442 Franklin Ave”); see also Verizon June 19 Comments at 2-3 (describing community donations exceeding \$250,000 to fire-affected communities in 2018-19); T-Mobile Advice Letter No. 8 at 2.

¹³ This coordination was acknowledged in the transcript of the November 1, 2018 hearing and discussed in CTIA’s and carriers’ filings in this proceeding. See, e.g., AT&T Opposition at 27-28; Comments of CTIA and the Carrier Parties, R.18-03-011, at 13 (filed Feb. 22, 2019); California Cable and Telecommunications Association’s Comments Regarding Ruling Seeking More Information on Emergency Disaster Relief Program, R.18-03-011 (filed Feb. 22, 2019) (“CCTA Feb. 22 Comments”); Opening Comments of MCIMetro Access Transmission Services *et al.*, R.13-03-011, at 5 (filed Feb. 22, 2019) (“Verizon Feb. 22 Comments”) (also noting the critical importance of appropriate confidentiality protections).

¹⁴ See, e.g., Reply Comments of CTIA and the Carrier Parties, R.18-03-011 (filed Mar. 25, 2019); Response of California Water Association and Its Class A and Class B Water Utility Members to Assigned Commissioner Law Judge Ruling Seeking More Information on Disaster Relief Program, R.18-03-011, at 3, 5-6 (filed Feb. 22, 2019); CCTA Feb. 22 Comments at 6-7.

communication have proven successful, and other successful methods of communication and information exchange are common practice within the industry as well.

The wireless industry voluntarily undertakes these efforts as part of its commitment to its customers, and importantly, because it is *the right thing to do*. In fact, wireless carriers' relief efforts continue to be effective because wireless carriers currently have the flexibility to tailor efforts to the particular circumstances of each disaster, the conditions of varying service territories, and the needs of impacted customers.

The wireless industry recognizes the importance of continuing these and other efforts in order to ensure consumers' needs are met, both at present and when future disasters strike. Thus, the Commission's goals in this proceeding regarding wireless carriers will be achieved despite the agency's lack of authority to impose the Wireless Requirements as regulatory mandates, as detailed below.

III. WIRELESS CARRIERS STRONGLY SUPPORT CUSTOMER OUTREACH, BUT A COOPERATIVE APPROACH WOULD BE SUPERIOR TO THE VAGUE AND IMPRACTICAL REQUIREMENTS IN THE PROPOSED DECISION.

CTIA and its members agree that it is important for customers to have access to information about the resources that service providers make available in cases of emergency, and that such information should be provided in the same array of languages in which carriers market their services. Wireless carriers also believe that there are opportunities for the industry and the Commission to collaborate to ensure that consumers receive the most effective outreach, including consistent messaging in a wide array of languages, using an approach similar to the CalPhone Info website.

Although the wireless industry is committed to continuing effective outreach, the Commission does not have the authority to impose the mandates that the Proposed Decision

contemplates.¹⁵ Specifically, the Proposed Decision’s directive that communication service providers engage in “ongoing and continuous” outreach in multiple languages¹⁶ is not grounded in any statutory power, and is inconsistent with the “in-language” requirements previously determined by the Commission to be just and reasonable for communication service providers. Notably, the Proposed Decision’s citation to Section 8386(c)(16)(B) of the California Public Utilities Code to support an outreach requirement for wireless carriers in “English, Spanish, and the top three primary languages used in the state other than English or Spanish, as determined by the Commission based on the United States Census data”¹⁷ is misplaced. The mandates of Section 8386(c)(16)(B) apply solely to “electrical corporations,”¹⁸ and do not apply to wireless carriers. Further, the Commission has previously determined, based upon substantial record evidence, that communications service providers’ in-language obligations extend only to the languages in which the carrier markets its service.¹⁹

The outreach requirements in the Proposed Decision also raise material implementation challenges for carriers due to their lack of clarity. For example, the requirement to provide outreach in Chinese, “including Cantonese, Mandarin, and other Chinese languages”²⁰ is unreasonably vague and burdensome given that there are at least eight distinct language groups spoken in China, comprising potentially hundreds of languages. Similarly, the requirement to provide outreach “in Korean and Russian, where these languages are prevalent in the company’s

¹⁵ See Proposed Decision at 33-34.

¹⁶ Proposed Decision at 33.

¹⁷ Proposed Decision at 34 (emphasis added).

¹⁸ CAL. PUB. UTILS. CODE § 8386(c)(16)(B).

¹⁹ *Order Instituting Rulemaking to Address the Needs of Telecommunications Customers Who Have Limited English Proficiency*, Decision Addressing the Needs of Telecommunications Consumers Who Have Limited English Proficiency, R.07-01-021, D.07-07-043, at 63 and Conclusion of Law 7 (Aug. 1, 2007) (“LEP Order”).

²⁰ Proposed Decision at 35.

service territory”²¹ is unreasonably vague because it is unclear how “prevalent” either language would have to be to trigger the requirement, or how prevalence “in the company’s service territory” would be measured when wireless coverage does not conform to any geo-political boundaries.

To the extent that the Commission adopts any emergency measure outreach requirements, the Commission should clarify its proposals to make clear that: (1) carriers need only make information about disaster-response measures available in languages in which they market (consistent with the Commission’s existing in-language rules); and (2) the Proposed Decision’s list of outreach methods²² is illustrative rather than mandatory. The latter clarification is consistent with the requirements imposed on electric, gas, sewer, and water utilities in the Commission’s July 11, 2019 decision, in which the Commission held that the “utilities have the ability and flexibility to utilize various means to create a mix of tactics used at strategic times to reach customers and aid them in their understanding of these programs.”²³

CTIA also believes, however, that the Commission and the wireless industry could collaborate on outreach measures that would increase messaging consistency, further expand the range of languages in which outreach is available, and target disaster-related information more effectively. Consistent messaging is crucial in outreach regarding disaster-related information, and the approach contemplated in the Proposed Decision—in which multiple carriers would provide potentially differing information—does not serve this goal. In addition, each individual carrier’s ability to provide effective in-language information is limited by resources, particularly for smaller wireless carriers.

²¹ *Id.*

²² *See* Proposed Decision at 33-34.

²³ D. 19-07-015; *see also id.* Conclusion of Law No. 22.

To provide greater consistency and more options for non-English speaking or low-English proficiency customers, CTIA proposes that the wireless industry and the Commission collaborate on a Commission website that would provide useful information for consumers about the resources available to them following disasters. Such a website could be modeled on the Commission’s CalPhone Info website, which provides a consistent source of information for consumers about their telephone service, and makes it available in over a hundred languages.²⁴ The website could point to steps taken by the wireless industry to assist consumers following wildfires and other disasters. In addition to ensuring consistent messaging, such a website would ensure that information is available in a broader multitude of languages than would be practicable from individual carriers, and would avoid the difficulty of requiring carriers to determine which languages are most prevalent in carrier service areas. It also would allow for the Commission and carriers to make larger amounts of useful information available to customers in potentially fire-affected areas, while avoiding burdening customers in non-impacted areas with large amounts of information that is not relevant to them.

Wireless carriers would appreciate the opportunity to work with the Commission and other stakeholders on this outreach proposal, and would notify customers about the Commission-administered website (*e.g.*, annually prior to the fire season) in a manner consistent with the LEP Order.

IV. THE WIRELESS REQUIREMENTS WOULD EXCEED THE COMMISSION’S LAWFUL AUTHORITY.

As discussed above, wireless carriers have demonstrated a strong commitment to deploying resilient networks, restoring service quickly following disasters, and providing other

²⁴ See “About CalPhone Info,” <https://calphoneinfo.cpuc.ca.gov/about.aspx>.

assistance to customers to ensure the continuity of their access to communications services.²⁵ As a result, Commission mandates regarding disaster response measures are unnecessary, and could be counterproductive by reducing carriers' flexibility to respond to the varying challenges presented by each new disaster. The Wireless Requirements also are beyond the Commission's authority to impose, as discussed below.

A. The Wireless Requirements Are Preempted by Federal Law

As discussed at length in CTIA's Rehearing Application in this proceeding, the Wireless Requirements are preempted by federal law.²⁶ In particular, the federal Communications Act preempts all state regulation of "the entry or rates" of mobile service providers.²⁷ The Proposed Decision suggests that the Wireless Requirements are permissible regulation of "other terms and conditions" of service,²⁸ but this interpretation is inconsistent with controlling federal court precedent. For example, the proposed requirement that wireless carriers deploy supplemental mobile equipment such as COWs and COLTs runs afoul of the Federal Communications Commission's ("FCC's") sole jurisdiction over "the number, placement and operation of the cellular towers and other infrastructure" of mobile networks.²⁹ Courts have held that state attempts to regulate "[s]uch matters tread directly on the very areas reserved to the FCC"—and a

²⁵ See *supra* Section II.

²⁶ See Rehearing Application at 7-9.

²⁷ 47 U.S.C. § 332(c)(3)(A).

²⁸ Proposed Decision at 28.

²⁹ *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 988 (7th Cir. 2000) (the Communications Act of 1934, as modified, "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." (internal quotations, citations omitted)); see also *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010) (relying upon *Bastien* as a leading case in this area, and acknowledging *Bastien*'s holding that questions regarding "the requisite number of cellular towers" deployed and whether cell phone service reaches "the proper standard" inherently deal with matters preempted under federal law).

state may not “force [a carrier] to do more than required by the FCC: to provide more towers, clearer signals or lower rates.”³⁰ Additionally, whatever may be included in “other terms and conditions” authority over Commercial Mobile Radio Service (“CMRS”) providers, such authority cannot be so broad as to include services or products that are entirely separate and apart from CMRS itself.³¹ CMRS is the offering of an interconnected mobile service to the public for profit.³² Loaning of mobile phones is not CMRS; providing free Wi-Fi access to the public is not CMRS; and providing device charging is not CMRS. It can hardly be said that the Commission is “regulating the other terms and conditions of [CMRS]” when the Wireless Requirements pertain exclusively to the provision of services other than CMRS.

Similarly, a requirement to provide “loaner” mobile phones, Wi-Fi access, and charging stations would constitute prohibited entry regulation. In particular, it would “burden” and “erect obstacles” to wireless carriers’ ability to deploy networks and force them to “do more than required by the FCC.”³³ For example, the requirement to provide charging stations and Wi-Fi access would require wireless carriers to enter markets that they have not generally entered commercially, and to do so at a prescribed rate of zero.³⁴ The market entry requirements the Commission seeks to impose (rendering wireless carriers into guarantors for unavailable handsets, providers of electricity, and providers of free internet access over Wi-Fi to the general

³⁰ *Id*; see also *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 30 FCC Rcd 9088, 9103 n.84 (2018) (“[L]ocal 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.” [citing Section 332 and *Bastien*]).

³¹ See Rehearing Application at 17.

³² 47 U.S.C. § 332(d)(1).

³³ See *Bastien*, 205 F.3d at 989.

³⁴ The Proposed Decision thus misstates CTIA’s position in suggesting that CTIA argues that the Wireless Requirements would constitute rate regulation only because “complying with these measures may produce increased business costs for providers.” Proposed Decision at 28.

public), would also fail under California law as it can hardly be said that forced entry into these new markets is “cognate and germane” to the Commission’s limited ability to regulate the “other terms and conditions” of CMRS providers that are considered telephone utilities under California law.³⁵

The Proposed Decision also fails to address the other reasons discussed in CTIA’s Rehearing Application why the Wireless Requirements would be preempted, including field preemption for regulation of the use of spectrum, and federal preemption of regulation of CPE.³⁶ For example, the requirements to provide Wi-Fi access and loaner phones would require wireless carriers to use radio spectrum in particular ways, locations, and times, and the loaner phone requirement is impermissible given that “the FCC also preempted state regulation of . . . CPE”³⁷ such as mobile phones.

Finally, the Proposed Decision errs in suggesting that “47 USC 332(c)(3)(A) does not preempt state police power.”³⁸ The law is squarely to the contrary. Where, as here, the federal government has clearly preempted state authority,³⁹ assertion of state police power is unavailing.⁴⁰

B. The Wireless Requirements Would Be Invalid under the Void for Vagueness Doctrine If Adopted.

Additionally, the Wireless Requirements would be invalid under the void for vagueness

³⁵ See Rehearing Application at 17-18.

³⁶ See, e.g., Rehearing Application at 6-12.

³⁷ *California v. FCC*, 905 F.2d 1217, 1225 (9th Cir. 1990).

³⁸ Proposed Decision at 29; *id.* Conclusion of Law No. 11.

³⁹ See 47 U.S.C. §§ 332(c)(3), 301, 303; see also *California v. FCC*, 905 F.2d 1217, 1225 (9th Cir. 1990) (federal preemption of CPE such as handsets).

⁴⁰ See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 448 F.3d 1067, 1071 (9th Cir. 2006).

doctrine if adopted.⁴¹ For example, the requirements to provide charging stations and Wi-Fi access “in areas where impacted wireless customers seek refuge from fires” are vague because none of the key terms (e.g., “impacted wireless customer,” “area where impacted wireless customer seek refuge from fires”) is defined with sufficient clarity for a carrier to comply with or for a regulator to enforce. Likewise, is *each* carrier required to provide its own charging stations and Wi-Fi access at *every* refuge site? How is a carrier or regulator to know when there are a sufficient number of charging stations, and sufficient Wi-Fi capacity, to satisfy the rules? As another example, the “loaner” phone requirement leaves unclear how to verify whether a phone is “not accessible due to fires,” how carriers can predict how many phones will be rendered “not accessible due to fires” in order to have a sufficient cache of “loaner” phones, and the terms of the loan. As a result, the Wireless Requirements would be unenforceable.

C. The Commission Can Cure the Legal Deficiencies of the Wireless Requirements by Making Them Voluntary Preferred Practices Rather Than Mandatory

Apparently recognizing that regulation of deferred payment plans or payment due dates would represent preempted wireless rate regulation, the Proposed Decision simply “urges” wireless carriers to allow fire-affected customers to defer payments and extend payment dates rather than mandating such measures.⁴² The Commission can cure the legal deficiencies of the other Wireless Requirements by similarly making them voluntary preferred practices rather than mandatory. This would be consistent with CTIA’s advocacy in its petition seeking modification

⁴¹ The void for vagueness doctrine requires “that regulated parties should know what is required of them so they may act accordingly,” and that “precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012).

⁴² Proposed Decision at 28.

of Decision 18-08-004 in this proceeding.⁴³

V. THE WIRELESS REQUIREMENTS WOULD VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS APPLIED TO THE STATES VIA THE FOURTEENTH AMENDMENT

The Fifth Amendment to the United States Constitution prohibits “private property [from] be[ing] taken for public use, without just compensation,”⁴⁴ and this proscription is applicable to the states through the Fourteenth Amendment.⁴⁵ There is no question that the Wireless Requirements illegally compel wireless carriers to put their private property to public use without any compensation. This point is illustrated below relative to the “loaner” phone requirement, but the other Wireless Requirements also compel wireless carriers to put their private property to public use without any compensation, and are therefore barred by the Constitution.

The “loaner” phone program requires wireless carriers to “provide ‘loaner’ mobile phones to impacted customers whose mobile phones are not accessible due to fires”⁴⁶ for a period of no less than 12 months.⁴⁷ This is an unconstitutional taking. When the government appropriates private property, a taking occurs.⁴⁸ “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to

⁴³ Petition of CTIA for Modification of Decision 18-08-004 Affirming the Provisions of Resolutions M-4833 and M-4835 as Interim Disaster Relief Emergency Customer Protections, R.18-03-011, at 2 (filed Sept. 19, 2018).

⁴⁴ U.S. Const. amend V.

⁴⁵ See U.S. Const. amend XXIV, §1.

⁴⁶ PD at 53.

⁴⁷ See PD at 19 (“The customer protections shall ... conclude no sooner than twelve (12) months from the date of commencement ...”).

⁴⁸ See *Horne v. Dep’t of Agric.*, 135 U.S. 2419, 2429 (2015) (“But when there has been a physical appropriation, ‘we do not ask ... whether it deprives the owner of all economically valuable use’ of the item taken.”) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) at 323).

compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”⁴⁹ That carriers’ “loaner” mobile phones are appropriated by the Commission for use by another and subject to later return to the carrier is of no account, because “retain[ing] a contingent interest of indeterminate value does not mean that there has been no physical taking...”⁵⁰ Indeed, wireless carriers have no way of knowing how long the deprivation will last (other than that it cannot be less than 12 months) or the condition of their property (and therefore its value, if any) upon return.

There is no question that the “loaner” phone requirement constitutes a taking. It is unconstitutional for the Commission to impose this requirement without paying just compensation, and the Commission has failed entirely to do so. Regarding the remainder of the Wireless Requirements, each usurps wireless carriers’ control over their property and requires it to be put to public use at locations the Commission designates, for a duration the Commission specifies, at a rate (free) the Commission determines,⁵¹ and for a class the Commission defines. No less than with the “loaner” phone requirement, the Proposed Decision would, without any compensation, dramatically sever and diminish, if not destroy, wireless carriers’ bundle of rights relative to their property. Thus, the remainder of the Wireless Requirements violate the Fifth Amendment.

To be clear, wireless carriers do not suggest the Commission attempt to calculate and pay the just compensation due to make the Wireless Requirements lawful. There is no indication that the legislature intended to vest the Commission with discretion or authority to commit State

⁴⁹ Tahoe-Sierra Pres. Council, 535 U.S. 302 at 323.

⁵⁰ *Id.*

⁵¹ The Commission is fully proscribed from regulating wireless carriers’ rates. *See* 47 U.S.C. § 332(c)(3)(A). Here CTIA raises this point merely to illustrate its takings argument, but reserves the right to tender a full argument regarding the proscription against rate-making.

funds for that purpose. Therefore, and in light of the other legal infirmities of the Wireless Requirements, wireless carriers ask only that they be allowed to continue the voluntary approach to customer assistance measures that has proven successful in the past.

VI. CONCLUSION

As damaging wildfire seasons have plagued California, wireless carriers have taken exemplary steps to ensure the continuity of communications services to customers and to provide outreach to customers about their relief efforts. In the spirit of wireless carriers' and the Commission's common goals, CTIA urges the Commission to work together with the wireless industry to create a Commission website to present consistent and targeted outreach information in multiple languages rather than imposing the vague outreach requirements in the Proposed Decision. Similarly, the Commission should reject the Wireless Requirements or change them into voluntary preferred practices.

Respectfully submitted August 5, 2019 at San Francisco, California.

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