BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5	Petition 21-10-003

RESPONSE OF CTIA TO PETITION OF THE PUBLIC ADVOCATES OFFICE FOR RULEMAKING TO AMEND GENERAL ORDER 133-D TO ESTABLISH MINIMUM SERVICE QUALITY STANDARDS FOR ALL ESSENTIAL COMMUNICATIONS SERVICES

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I. INTRODUCTION AND SUMMARY

Pursuant to Section 6.3(d) of the California Public Utilities Commission's (Commission's) Rules of Practice and Procedure, CTIA[1] submits this Response to the Petition of the Public Advocates Office (Cal PA) for Rulemaking to Amend General Order 133-D to apply service quality standards—currently applicable only to traditional telephone service[2]—to mobile wireless service, broadband internet access service, and interconnected voice over IP (VoIP) service (Petition).

As discussed in more detail below, the Commission should reject the Petition because it (1) fails to offer any reason for the Commission to depart from its policy of allowing the intensely competitive market for wireless services to ensure that consumers continue to receive steadily improving network quality and greater value for their money; and (2) asks the Commission to impose technical service quality standards on mobile wireless voice and mobile broadband services in violation of federal and California law.

II. THE PETITION OFFERS NO JUSTIFICATION FOR DEPARTING FROM THE COMMISSION'S POLICY OF ALLOWING COMPETITION AMONG WIRELESS PROVIDERS TO CONTINUE TO ENSURE STEADILY IMPROVING MOBILE WIRELESS SERVICE QUALITY AND VALUE.

Only three years ago, the Commission considered and rejected calls to impose service quality standards on mobile wireless providers. Specifically, in D.18-10-058, the Commission

[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 Americans to lead a 21st-century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. 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] G.O. 133-D currently requires wireless carriers to report to the Commission on major service outages and to file coverage maps. Certificated local exchange companies that also provide interconnected VoIP services must submit outage reports on both types of service.

explained that it "has taken a more hands-off approach" for mobile wireless services, "with reliance on competition to ensure reasonable service and rates."[3] The Petition makes no attempt to explain why the Commission should change this approach—and indeed no such case can be made.

The Petition argues that service standards are justified on mobile wireless voice and broadband services given the "increasing prevalence and reliance" of consumers, but makes no showing that relevant conditions have changed significantly since the last time the Commission considered this questions, just three years ago. In fact, the market for mobile wireless services remains fiercely competitive, providing consumers with steadily improving speeds and capacity and declining prices.

Competition among mobile wireless providers continues to be aggressive. There are three nationwide mobile wireless providers, two large regional providers, and "dozens of other facilities-based mobile wireless service providers."[4] And a fourth nationwide facilities-based competitor is in the process of entering the market.[5] In addition, consumers can obtain service from a myriad of mobile virtual network operators (MVNOs), many of which tailor their service offerings to particular communities of mobile wireless consumers, such as older consumers or consumers in particular language and cultural groups.[6]

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[3] D.18-10-058 at 20.

[4] *Communications Marketplace Report*, 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 2949-50 ¶ 9 (Dec. 2020) (*FCC 2020 Communications Marketplace Report*).

[5] *Id.* at 2952-53 ¶ 14; *see also* D.20-04-008 at 42 ("[W]e find that the [Sprint-T-Mobile] merger will create a new company that is well- positioned to provide a robust 5G service network that can compete with the two larger carriers, while at the same time, the Transaction is subject to extensive conditions that mitigate potential adverse impacts on consumers. Accordingly, approval of the merger, as conditioned, is in the public interest").

[6] *2020 FCC Communications Marketplace Report* at 2951-52 ¶¶ 12-13.

And mobile wireless service quality is strong and improving. According to third-party testing, 4G LTE download speeds more than doubled from 14.4 Mbps in second-half 2014 to 36.3 Mbps in second-half 2019.[7] Mobile wireless providers are also rapidly deploying 5G networks, which offer even higher performance.[8]

Despite these increases in the quality of mobile wireless services, wireless consumers are paying less. For instance, the Consumer Price Index (CPI) for Wireless Telephone Services *decreased* five percent from 2017-19, while the overall CPI for all tracked goods and services *increased* by approximately four percent.[9] And the average revenue that mobile wireless providers receive from customers per unit of service (ARPU) also fell five percent (from $38.66 to $36.86) over the same period.[10]

The Petition does not offer any evidence that there is a problem to be solved by the proposed rules – no evidence, in other words, to contradict the data above showing steadily rising quality and falling prices. Instead, the Petition attempts to obfuscate by presenting data showing that consumers increasingly rely on mobile wireless and VoIP services more than they rely on traditional landline telephone service.[11] But this is a trend that has been active for quite some time - indeed, it was the case when the Commission first declined to adopt service quality standards for wireless. This trend is insufficient to support the imposition on competitive mobile wireless providers of a cumbersome regulatory framework originally adopted in 1972 for then-

[7] *Id.* at 2989 Fig. II.A.29.

[8] *See id.* at 2998-99 ¶¶ 79-80.

[9] *Id.* at 2977 ¶ 45.

[10] *Id.*

[11] *See* Petition at 17-18.

monopoly landline telephone utilities.[12] If anything, the greater consumer uptake of mobile wireless services demonstrates that consumers find value in the quality and pricing offered by carriers, which has in turn led to stronger competitive forces in the market, further driving mobile wireless providers to increase service quality and lower prices to win and retain customers.

Because the Petition offers nothing to contradict the strong evidence that competition is effectively ensuring steady increases in the quality of mobile wireless service and reductions in price, consistent with the Commission's policy, there is no factual predicate for the adoption of the rules proposed in the Petition, and any such action would be contrary to law.[13]

III. FEDERAL LAW BARS THE COMMISSION FROM IMPOSING THE REQUESTED REGULATIONS ON WIRELESS SERVICES.

In addition to the lack of any valid reason for departing from the Commission's current approach in rejecting regulation of wireless service quality, federal law is a clear obstacle to the adoption of the rules proposed in the Petition. As described below, adoption of the requested service standards would be preempted by federal law on numerous grounds. Indeed, D.18-10-058 acknowledged that the Commission is preempted by federal law from imposing service quality standards on mobile broadband services,[14] but the Petition does not address these federal preemption concerns.[15]

[12] *See* Decision No. 80082 (C.9535) (1972).

[13] *See, e.g.,* CAL. PUB. UTILS. CODE § 1757.1 (reviewing court may set aside a Commission decision that is an abuse of discretion or not supported by the facts found).

[14] D.18-10-058 at 20.

[15] The Petition's discussion of the Commission's authority to adopt the proposed rules does not mention 47 U.S.C. § 332 or any other provision in Title III of the federal Communications Act, nor the limitations under federal law on state regulation of interstate services, as discussed herein.

A. The Requested Service Standards Are Field Preempted by Title III of the Communications Act.

The requested service standards are field preempted by Title III of the Communications Act of 1934, as modified (Communications Act).[16] Though couched as "service standards," the Petition in fact proposes onerous, granular technical requirements on the performance of mobile wireless carriers' radiofrequency networks ranging from latency to jitter, from packet loss to call failure and drop rate, from call setup time to actual delivered network speeds. However, under federal law, the Federal Communications Commission ("FCC") is vested with exclusive authority over technical standards for the construction and performance of radiofrequency networks. Specifically, the proposed requirements would fall squarely within the FCC's "exclusive authority over technical matters" relating to use of radiofrequency spectrum,[17] and its related exclusive authority over wireless infrastructure design and deployment. Stated another way, the Petition is a demand for technical performance metrics that impinge on how wireless licensees use their federal spectrum licenses. As such, the proposed rules are preempted by federal law.

The FCC's occupation of the field of spectrum regulation and usage under Title III of the Communications Act is well-established.[18] Title III constitutes a "unified and comprehensive

[16] Field preemption applies where a federal regulatory framework is "so pervasive . . . that Congress left no room for the States to supplement it"—or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

[17] *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105 (2d Cir. 2010) (internal quotations omitted; citing *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000)); *see also Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963).

[18] *See, e.g.*, *Cellco P'Ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012) (internal citations omitted; quoting *NBC v. United States*, 319 U.S. 190 (1943) (*NBC*)); *see also MobileComm of New York, Inc.*, 2 FCC Rcd 5519 ¶ 3, n.3 (CCB 1987); *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1190 (10th Cir. 1999); *Freeman v. Burlington Broadcasters Inc.*, 204

regulatory system for the industry"[19] whose purpose is "to maintain the control of the United States over all the channels of radio transmission."[20] Thus, the FCC exercises exclusive jurisdiction over "all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States."[21]

In the Supreme Court's words, these exclusive and "comprehensive powers" include addressing "technical matters" as part of the FCC's sweeping mandate to promote the "effective use of radio in the public interest"[22]—*i.e.*, encompassing the setting of technical standards exactly in the manner the requested service rules would impose. That is, "Congress intended the FCC to possess *exclusive authority* over *technical matters*" relating to use of radio frequencies (*i.e.*, spectrum)—and "Congress's grant of authority to the FCC was intended to be exclusive and to preempt local regulation."[23]

Relatedly, the Communications Act confers on the FCC expansive authority over the operation of wireless infrastructure (i.e., the infrastructure used to facilitate the use of spectrum subject to the FCC's exclusive control). Among other things, the FCC has exclusive authority to regulate, among other things, "the nature of the services to be rendered" by the licensees;[24] the

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F.3d 311, 320 (2d Cir. 2000); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994); *Still v. Michaels*, 791 F.Supp. 248, 252 (D.Ariz. 1992).

[19] *NBC*, 319 U.S. at 214.

[20] 47 U.S.C. § 301.

[21] *Id.* § 152(a).

[22] *NBC*, 319 U.S. at 217; *see also, e.g.*, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *Head*, 374 U.S. at 430 n.6 ("[T]he Commission's [*i.e.*, the FCC's] jurisdiction over technical matters such as a frequency allocation . . . is clearly exclusive").

[23] *New York SMSA Ltd. P'ship*, 612 F.3d at 97 (internal quotations omitted; citing *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000) (discussing radio frequency interference, and reaching the same conclusion)); *accord Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1193 (10th Cir. 1999) ("Congress intended federal regulation of [radio frequency interference] issues to be so pervasive as to occupy the field.").

[24] 47 U.S.C. § 303(b).

times of operation;[25] location;[26] the "apparatus to be used . . . and the purity and sharpness of the emissions";[27] and the "zones or areas to be served."[28]

Thus, "[t]he [A]ct 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."[29] And as federal precedent makes clear, the FCC has exercised its exclusive jurisdiction over wireless services in full and exhaustive fashion through a comprehensive set of regulations.[30]

In short, the FCC and only the FCC occupies the field of spectrum regulation and usage, including the setting of wireless technical standards and wireless infrastructure design and deployment. Here, however, the Petition asks this Commission to dictate the specific levels of wireless service to be provided (*i.e.*, regulating "the nature of the services to be rendered") and impermissibly create service "zones or areas." These are matters "reserved exclusively" to the FCC,[31] and thus subject to field preemption.[32] Any state or local attempts to regulate in this area—such as the requested technical requirements—are therefore unlawful.

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[25] *Id.* § 303(c).

[26] *Id.* § 303(d).

[27] *Id.* § 303(e).

[28] *Id.* § 303(h).

[29] *Bastien v. AT&T Wireless Servs., Inc*., 205 F.3d 983, 988 (7th Cir. 2000) (citing 47 C.F.R. §§ 24.103, 24.132, and 24.232).

[30] *See, e.g.*, 47 C.F.R. Chapter 1, Subchapter B, Parts 20 and 22 (laying out rules for Commercial Mobile Services and Public Mobile Services).

[31] *Bastien*, 205 F.3d at 988.

[32] *See, e.g.*, *Hawaiian Tel. Co. v. Pub. Utils. Comm'n of Haw.*, 827 F.2d 1264, 1275-76 (9th Cir. 1987) (state rules for determining intrastate rates subject to field preemption); *Pub. Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 647 (9th Cir. 2004) ("When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government." (internal quotation, citation omitted)).

B. The Requested Service Standards Are Expressly Preempted by Section 332 of the Communications Act.

Section 332(c)(3)(A) of the Communications Act also expressly preempts the requested standards.[33] That provision states in pertinent part that "no 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."[34] It broadly preempts state regulation of commercial mobile radio service (CMRS) and private mobile radio service (PMRS)—the only two categories of mobile service and encompassing mobile voice, broadband, and messaging—as relates to both (1) rates, and (2) wireless entry.[35] Here, the requested service quality standards would run afoul of both prohibitions on state regulation.

1. The Requested Standards Constitute Unlawful Rate Regulation.

In the Supreme Court's words, "a complaint that service quality is poor is really an attack on the rates charged"[36] because "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."[37] As such, service quality regulation like that proposed in the Petition is necessarily rate regulation preempted by Section 332(c)(3)(A).

Further, the Ninth Circuit has expressly relied upon *Bastien*'s holding that whether cell phone service quality reaches "the proper standard" is inherently a matter that is preempted under Section 332(c)(3)(A).[38] And the Ninth Circuit has also held that Section 332(c)(3)(A)

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[33] Express preemption applies where Congress has specifically preempted state law. *See, e.g., Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1006 (9th Cir. 2010).

[34] 47 U.S.C. § 332(c)(3)(A).

[35] *Id.*

[36] *Bastien v. AT&T Wireless Servs*., 205 F.3d 983, 988 (7th Cir. 2000) (emphases added; citing *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1988) (*Central Office Telephone*)).

[37] *Central Office Telephone*, 524 U.S. at 223 (emphasis added).

[38] *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1040-41 (9th Cir. 2010) (acknowledging *Bastien*'s holding that "'[a] complaint that service quality is poor is really an attack on the rates charged

preempts a state from "substituting its judgment for the [FCC's] with respect to the reasonableness of a particular rate."[39] Because, as shown above, setting service standards intrinsically constitutes setting rates, no state has the authority to set wireless service standards. The Petition must therefore be denied.

2. The Requested Standards Constitute Unlawful Entry Regulation.

In addition to impermissibly regulating rates for wireless services and usurping the FCC's exclusive authority, the requested standards would constitute unlawful entry regulation in violation of Section 332(c)(3)(A), which *expressly preempts* state regulation of "entry,"[40] including "[a]ny [state] requirement that functions as an entry regulation."[41]

Courts have applied Section 332(c)(3)(A), in tandem with the Title III provisions vesting exclusive authority in the FCC over wireless infrastructure regulation, to conclude that any state action that impinges on "the modes and conditions under which" a wireless provider offers services—"the very areas reserved to the FCC"—is preempted.[42]

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for the service,'" and addressing whether a state law claim required AT&T to meet "the proper standard for cell phone service" and therefore would be preempted by Section 332); *see also Telesaurus VPC*, 623 F.3d at 1008, 1011.

[39] *Telesaurus VPC, LLC v. Power,* 623 F.3d at 1008; *see also Wireless Consumers Alliance, Inc*., Memorandum Opinion and Order, 15 FCC Rcd 17021 (2000); *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, 7508-509 ¶ 45 (1995).

[40] *Matter of Petition of the State of Ohio for Auth. to Continue to Regulate Mobile Radio Servs.*, 10 FCC Rcd. 7842, 7853 ¶ 45 (1995).

[41] *Promotion of Competitive Networks in Local Telecomms. Mkts.*, 14 FCC Rcd. 12673, 12714 ¶ 74 (1999).

[42] *Bastien*, 205 F.3d at 989 (complaint about quality of mobile services was preempted by Section 332 because it would require AT&T to "do more than required by the FCC," such as providing more cell towers); *Shroyer*, 622 F.3d at 1040-41 (noting that *Bastien* involved a challenge under state law to "the level of [wireless] service" and "the number of cellular towers needed to support service," which the court found was preempted); *In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1071 (N.D. Cal. 2010) (where state action would alter, among other things, "'the federal regulation of tower construction, location and coverage,' . . . the claims tread upon the FCC's role in regulating the 'modes and conditions under which [a wireless carrier] may begin to offer service in [a particular market].'") (quoting *Bastien*, 205 F.3d at 989) (brackets in original); *Telesaurus VPC*, 623 F.3d at 1008 (FCC licensing of wireless

Similarly, the FCC has interpreted Section 332(c)(3)(A)'s express preemption provision to mean that "local jurisdictions do not have the authority to require that [wireless] providers offer certain types or levels of service, or to dictate the design of a provider's network."[43] As discussed above, the technical standards requested in the Petition would do exactly that, requiring mobile wireless providers to offer particular levels of service, and compel changes to mobile wireless providers' networks. Nor is the broad preemption of "entry" regulation under Section 332(c)(3)(A) limited to the regulation of entities that had no prior presence in a state. Instead, it refers to "entry of . . . *any* commercial mobile service or *any* private mobile service," all-inclusive in both instances and not limited to a "new" market entrant.[44] It would make no logical sense for Congress to preclude state attempts to enact certain regulations prior to a company's entering the state but permit them after the company was present.[45]

Moreover, courts have held that, with the entry regulation provision in Section 332, Congress has "preempted state laws that not only regulate market *entry*, but also state laws that obstruct or burden a wireless service providers' ability to provide a network of wireless service *coverage*."[46] The requested service standards also have this prohibited effect. Levels of latency

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carriers "directly involves agency determinations of public interest, safety, efficiency, and adequate competition, all inquiries specially within the expertise of the FCC.") (citations omitted).

[43] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088, 9103 n.84 (2018) (citing 47 U.S.C. § 332(c)(3)(A); *Bastien*, 205 F.3d at 989), *pets. for review denied in part and granted in part sub nom. City of Portland v. United States*, 969 F.3d 1020, 1032 (9th Cir. 2020) (substantially upholding the challenged FCC orders "given the deference owed to the agency in interpreting and enforcing this important legislation").

[44] 47 U.S.C. § 332(c)(3)(A) (emphases added).

[45] *See also Shroyer*, 622 F.3d at 1039 (state law claims calling into question the FCC's approval of the AT&T-Cingular merger were preempted even though AT&T was offering service in California prior to the merger).

[46] *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 705 (4th Cir. 2015) (internal quotation, citation omitted; emphases added).

and jitter; the number of packets lost; call failure and drop rates; mandates as to network speeds, and more—each of these would obstruct and burden the entry of new CMRS and PMRS products into the California market.

In addition, Section 253(a) provides in relevant part that "[n]o State . . . statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[47] The FCC has explained that this provision prohibits (among other things) state or local requirements that "materially inhibit[] the introduction of new services or the improvement of existing services."[48] State regulation, such as suggested by Cal PA, that would "inhibit the deployment of infrastructure necessary to support" 5G networks is independently preempted under Section 253.[49]

3. The Proposed Technical Minimum Service Standards Would Not Be Saved by the Narrow Exception for "the Other Terms and Conditions of Commercial Mobile Services."

Section 332(c)(3)(A) only leaves room, via narrow carve-out, for states and localities to regulate the "other terms and conditions of commercial mobile services."[50] The requested technical requirements, however, would go well beyond the types of rules that have been upheld as regulation of the "other terms and conditions" of commercial mobile services.

For example, the "terms and conditions" exception has been construed to allow states to regulate "the use of line items in cellular bills,"[51] and "deceptive description[s] of [] rates in

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[47] 47 U.S.C. § 253(a).

[48] *Accelerating Wireless Broadband Deployment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. at 9104-9105 ¶¶ 37-38 (2018).

[49] *Id*. at 9089, ¶ 1.

[50] *Id.*

[51] *National Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006).

invoices and advertising."[52] But this type of classic consumer protection regulation of the financial relationship between the company and the consumer within states' traditional police powers is far removed from an assertion of authority over a wireless carrier's configuration of its network and the technical specifications as to how it transmits on its federally licensed spectrum, as proposed in the Petition. Because precedent makes clear that regulation of how mobile wireless providers use their spectrum to provide services would constitute rate and entry regulation, as discussed above, there is no valid argument that such regulations would constitute permitted regulation of "other terms and conditions."[53]

In any event, to the extent that the Petition proposes to regulate the service quality of mobile broadband service, the "other terms and conditions" exception is not available to save it from preemption. By its plain terms, that exception applies to state regulation of the other terms and conditions of only "commercial mobile services"—i.e., CMRS service. It is well established, however, that mobile broadband is a "private radio mobile service" or PMRS (a regulatory category that includes both wireless broadband[54] and wireless messaging).[55]

Recent Commission decisions in the disaster response and COVID non-disconnect proceedings do not establish otherwise.[56] CTIA respectfully maintains that the Commission's jurisdictional analysis in those decisions was erroneous but, in any event, the circumstances of

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[52] *State ex rel. Nixon v. Nextel W. Corp.*, 248 F. Supp.2d 885, 892 (E.D. Mo. 2003); *see also Matter of Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd 19898, 19908 ¶ 23 (1999) ("[B]illing information, practices and disputes . . . fall within 'other terms and conditions[.]'").

[53] *Cf.* D.21-10-105 at 6-10.

[54] *See generally Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (*RIF Order*), *aff'd in part, remanded in part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

[55] *See generally Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling, 33 FCC Rcd 12075 (2018).

[56] *See, e.g.*, D.21-10-015; D. 20-09-012; D.19-08-025; Resolution M-4848.

those cases were significantly different than here.[57] The technical standards proposed in the Petition are not adopted in response to an emergency situation or temporary or interim rules that are expected to be of limited duration. Such characteristics are absent relative to the rules the Petition asks the Commission to impose on a permanent basis—and they would impose even greater burdens than the already impermissible, onerous rules adopted in the other noted proceedings. Thus, even the Commission's legal analysis in those proceedings—which was contrary to federal law—cannot justify the extraordinary action that the Petition requests.

Finally, the operative Commission precedent for the action requested in the Petition is not the disaster response or non-disconnect decisions but rather D.18-10-058 and, as discussed above, that decision correctly rejected calls to impose service quality standards on mobile wireless providers. The Commission should reject the Petition's requests to depart from that conclusion.

C. Other Provisions of Federal Law Preclude State Service Quality Standards.

The rules proposed in the Petition are also barred by federal law on additional grounds. First, the rules requested by Petition would be subject to field preemption because and states may not regulate (among other things) charges and practices in connection with interstate services.[58] To the extent that the rules apply to mobile broadband, they are plainly preempted because it is well-established that broadband, including mobile broadband, is an *interstate* service.[59] To the

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[57] *See* D. 20-09-012 at 46 ("Whether a particular regulation falls under the meaning of 'market entry,' 'rates,' or 'other terms and conditions' is fact-specific, requiring a case-by-case determination.").

[58] *See, e.g.*, *New York State Telecommunications Ass'n, Inc. v. James*, 2021 WL 2401338, at *11 (E.D.N.Y. June 11, 2021); *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968); *see also California v. FCC*, 75 F.3d 1350, 1356 n.5 (9th Cir. 1996) (under the Communications Act, "state utilities [commissions], such as the CPUC, have authority over intrastate common carrier communications by wire or radio," while "[t]he FCC has authority over interstate common carrier communications by wire or radio.") (citing 47 U.S.C. § 152(a) & 152(b)).

[59] *See Restoring Internet Freedom*, 33 FCC Rcd. 311, 430, ¶¶ 199-200 (2018) ("[I]t is well-settled that Internet access is a jurisdictionally interstate service because "a substantial portion of Internet traffic

extent that the rules apply to mobile voice service or CMRS, they are also preempted. Because there is no practical way for wireless providers to adhere to the service mandates only to the extent they are providing *intrastate* CMRS —and it is impossible to limit the effect of these requirements to *intrastate* service—the service requirements would inevitably regulate interstate services in violation of federal law.[60]

Second, subjecting PMRS (mobile broadband and text messaging) to "minimum" service quality requirements is a classic form of common carrier regulation that would conflict with the federal policy expressed in the Communications Act that PMRS must not be treated as a common carrier service.[61] Third, such regulation would conflict with the FCC's policy judgment

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involves accessing interstate or foreign websites."), *petitions for review granted in part and denied in part, Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019); *see also Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601, 5803, ¶ 431 (2015) ("[W]e reaffirm the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes.") (citing numerous FCC orders), *pets. for rev. denied*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *cert. denied*, 139 S. Ct. 475 (2018).

[60] *See, e.g.*, *New York State Telecommunications Ass'n, Inc. v. James*, 2021 WL 2401338, at *11 (E.D.N.Y. June 11, 2021); *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968); *see also California v. FCC*, 75 F.3d 1350, 1356 n.5 (9th Cir. 1996) (under the Communications Act, "state utilities [commissions], such as the CPUC, have authority over intrastate common carrier communications by wire or radio," while "[t]he FCC has authority over interstate common carrier communications by wire or radio.") (citing 47 U.S.C. § 152(a) & 152(b)); *see also Vonage Holdings Corporation Petition* et al., Memorandum Opinion and Order, 19 FCC Rcd 22404, 22418, ¶ 23 (2004) ("Without a practical means to separate the [VoIP] service, the *Minnesota [PUC] Order* unavoidably reaches the interstate components of the DigitalVoice service that are subject to exclusive federal jurisdiction."), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007).

[61] *Cf. Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) ("We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.") (citing 47 U.S.C. §§ 153(51) and 332(c)(2) (prohibiting common carrier treatment of providers not engaged in providing a common carrier service or CMRS)). The Communications Act thus establishes a clear policy that providers of PMRS should not be subject to common carrier treatment. Under principles of conflict preemption, state law is preempted whenever it "prevent[s] or frustrate[s] the accomplishment of a federal objective," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000), including "the purposes and objectives of the [Federal Communications] Commission," *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072-73 (9th Cir. 2005) (internal quotations and citations omitted), *aff'd*, 127 S. Ct. 1513 (2007); *see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982) (a "state law stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of" the federal regulatory framework is preempted).

that mobile broadband (as well as fixed broadband) should not be subject to common carrier or public utility-style regulation.[62] As Cal PA well knows, this is the subject of ongoing litigation.[63] Finally, state regulation of mobile broadband service would violate the Dormant Commerce Clause of the United States Constitution.[64]

The proposed rules would regulate "commerce occurring wholly outside the boundaries of [California]."[65] Under the "dormant" or "negative" Commerce Clause, a state may not "discriminate against or burden the interstate flow of articles of commerce,"[66] or "erect barriers against interstate trade."[67] The proposed rules would have "the "practical effect" of regulating commerce occurring wholly outside [California's] borders."[68] As the FCC and courts have confirmed, Internet access service is inherently interstate, and it is impossible or impracticable to separate Internet service into intrastate and interstate activities.[69]

And the proposed rules would impose burdens on interstate commerce that are "excessive in relation to the putative local benefits" to California.[70] As discussed in Section II above, the

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[62] *See generally RIF Order*; *see also Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018) ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation, so that such regulation is preempted by federal law." (internal quotation marks and citation omitted)).

[63] *See generally Am. Cable Ass'n et al. v. Bonta*, Case No. 18-cv-02684 (E.D. Cal.), *appeal pending*, No. 21-15430 (9th Cir.).

[64] U.S. CONST. Art. I, § 8, cl. 3.

[65] *Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989).

[66] *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994).

[67] *Lewis v. BT Inv. Managers, Inc.,* 447 U.S. 27, 35 (1980).

[68] *Healy,* 491 U.S. at 332.

[69] *See, e.g., RIF Order* ¶¶ 199-200 (citing prior FCC orders). And "it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States.'" *Publius v. Boyer-Vine,* 237 F. Supp. 3d 997, 1024 (E.D. Cal. 2017) (quoting *Am. Booksellers Found. v. Dean,* 342 F.3d 96, 103 (2d Cir. 2003), which invalidated a state statute regulating certain Internet activities because the "[I]nternet's geographic reach . . . makes state regulation impracticable").

[70] *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 146 (1970).

Petition has made no showing of a need for the proposed regulations, and certainly no showing that would justify the burden of the proposed extensive technical standards.[71]

IV. THE PETITION HAS NOT ESTABLISHED COMMISSION AUTHORITY UNDER STATE LAW TO IMPOSE THE REQUESTED SERVICE QUALITY STANDARDS.

The Petition proposes to define "essential services" to include "broadband" and "wireless (voice, texting, and data)" and impose service quality standards on all of these services. The majority of the Petition's proposed service standards would require wireless service providers to configure their networks to meet multiple specific performance metrics, including latency, jitter, packet loss, and delivered network speeds, that apply only to fixed and mobile broadband networks.[72] Yet the Petition fails to explain how the Commission has authority over these services.

Even apart from the limitations on the Commission's authority under federal law (discussed above in Section III), the California Constitution limits the Commission's mandate to regulating "public utilities."[73] This structure is mirrored in the Public Utilities Code, which defines a "telephone corporation" as the owner or operator of a line or system for transmitting telephone messages, and a telephone corporation as a type of "public utility."[74] The provisions of the P.U. Code from which the Commission's powers are derived, including its power to

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[71] *See Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 530 (1959) (when "balanced against the clear burden on commerce," a state's "inconclusive" showing of benefit is insufficient to defeat a dormant Commerce Clause challenge).

[72] *Cf.* Petition at 23-24.

[73] CAL. CONST. Art. XII § 6, which are defined in pertinent part as "corporations and persons that own, operate, control or manage a line, plant, or system for . . . the transmission of telephone and telegraph messages, . . . and common carriers . . . ." *id.* § 3.

[74] CAL. PUB. UTILS. CODE §§ 216, 233, 234.

regulate rates,[75] policies and procedures,[76] and facilities,[77] are limited to public utilities and/or telephone corporations. Even the catch-all provision of California Public Utilities Code Section 701 refers to actions "which are necessary and convenient to the exercise of *such* power and jurisdiction"—i.e., *over public utilities*.[78] The provision cited in the Petition for the Commission's authority to adopt service quality standards—Section 2896—applies only to "telephone corporations"—again, defined in terms of their owning or operating facilities or lines for telephone messages. None of these provisions establishes Commission authority to regulate mobile wireless "information services" such as texting or mobile broadband.[79]

The Petition cites to a number of provisions of state law that pertain to universal service, including Sections 275.6, 280, and 281, of which only Section 281 actually mentions "advanced services." These provisions, however, empower the Commission to establish funding programs to expand the availability of services, including broadband service. Nothing in these sections grants the Commission authority to regulate outside of these support programs, and certainly not to impose comprehensive regulatory regimes on services that are not public utility services.

Indeed, the Commission cited some of these same provisions in D.20-07-032 directing the collection of data about the pricing of certain broadband services—a decision that the

[75] *Id.* § 728.

[76] *Id.* § 761.

[77] *Id.* § 762.

[78] *Id.* § 701.

[79] *See, e.g.,* D.13-12-005 at 2 ("It is well-established that Internet service is classified for state and federal regulatory purposes as an 'information service" and that state commissions such as the California Public Utilities Commission do not have jurisdiction over information services[2] even if the providers also provide "communications services" that are subject to state regulation. Such is the case here. Both defendants provide traditional telephone service that is subject to the jurisdiction of this Commission as well as DSL service that is not subject to our jurisdiction. Accordingly, this complaint must be dismissed.") (footnote omitted).

Petition also cites. In doing so, however, the Commission acknowledged—and did "not attempt to resolve"—the "broader jurisdictional arguments concerning the applicability of California's public utility law to broadband service providers." D.20-07-032 sidestepped those jurisdictional obstacles by making clear that it merely sought "to determine whether as a matter of public policy it is appropriate for the Commission to *analyze* the affordability of broadband service, in the context of a broader affordability analysis."[80]

Given the lack of organic authority for the Commission to regulate broadband services or other "information services" (such as text messaging services)—much less subject such services to common carrier or utility-style regulation—the Petition's reliance on the sunset of Section 710 is misplaced.[81] Section 710(a)(1) provided that, subject to specified exceptions that are not relevant here, "the commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services."[82] The sunset of that provision of course cannot *create* Commission authority that does not exist as an initial matter. As described above, the Commission does not have authority under the California Constitution and California Public Utilities Code to impose the service quality requirements on broadband and text messaging services—neither of which is a service that requires public utility status, *i.e.* must be a "telephone corporation," in order to provide.[83]

Because the Petition asks the Commission to impose comprehensive, utility-style regulations on services that the California Constitution and the Legislature have not placed under the Commission's jurisdiction, the Petition must be rejected.

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[80] Petition at 34 (emphasis in original).

[81] *Cf. id.* at 8 n.32, 18-19.

[82] CAL PUB. UTILS. CODE §§ 710(a)(1).

[83] *See generally* D.13-12-005.

V. CONCLUSION

The Petition asks the Commission to impose an extensive regulatory framework on competitive services without making any showing of a need for the regulations. In addition, the proposed rules would invasively regulate mobile wireless carriers' radiofrequency networks and interstate information services, in violation of federal law and in excess of the Commission's authority. For all these reasons, the Commission must deny the Petition.

Respectfully submitted on October 29, 2021 at San Francisco, California.

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