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

Order Instituting Rulemaking Proceeding to Consider Amendments to General Order 133	Rulemaking 22-03-016

REPLY COMMENTS OF CTIA ON PHASE ONE STAFF PROPOSAL

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CTIA submits this reply to the comments filed in response to the Administrative Law Judge's Ruling Issuing Staff Proposal, released June 27, 2024 in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

The initial comments confirm the lack of any evidentiary or policy basis for the wireless regulations in the Staff Proposal. The record shows that the proposed regulations would be preempted and otherwise contrary to federal and state law, and no commenter challenged that. While multiple commenters affirm the numerous legal and policy issues with the Staff Proposal, some commenters suggest the California Public Utilities Commission ("Commission") should expand the scope of the Staff Proposal – in some cases, even repeating suggestions that staff already has rejected. Like the Staff Proposal, these expanded approaches suffer from a total lack of record support and should be rejected.

The record in this docket clearly shows that the Commission's longstanding decision to take "a more hands-off approach" to mobile wireless service quality, "with reliance on competition to ensure reasonable service and rates,"[2] is based on sound policy and is serving California wireless consumers well. The Commission should retain this approach and reject the Staff Proposal and other wireless service quality proposals made in parties' initial comments.

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[1] Administrative Law Judge's Ruling Issuing Staff Proposal, R.22-03-016 (filed June 27, 2024) ("Ruling"); *id.* at Attachment A ("Staff Proposal"). Unless otherwise noted, references herein to a party's "Comments" refer to initial comments on the Ruling filed in this proceeding on September 3, 2024.

[2] *Order Modifying Decision (D.) 16-08-021 on Issue of Fines for CLECS and Denying Rehearing of Decision as Modified*, R.11-12-001, D.18-10-058 at 20 (Issued Oct. 30, 2018) ("Modification Order").

II. THE RECORD PROVIDES NO FACTUAL OR POLICY BASIS FOR WIRELESS SERVICE QUALITY REGULATIONS PROPOSED BY STAFF OR COMMENTERS.

A. No Commenter Challenges the Record Showings That the Wireless Market Is Robustly Competitive or That, in a Competitive Market, Service Quality Regulation Is Unwarranted and Potentially Harmful.

Parties' initial comments affirm the extensive data and expert testimony in the record that shows that wireless providers operate in an intensely competitive market and, in such markets, service quality regulation is unneeded and more likely to harm consumers than help them.[3] Verizon discusses the record evidence showing the health of the wireless marketplace, including the choice of multiple providers available to consumers, and data showing that consumers do in fact switch wireless providers readily.[4] As AT&T observes, "[w]here there is robust competition, the marketplace ensures optimal quality of service attuned to customers' needs," because "any provider that fails to provide optimal service faces loss of business, which is the most compelling incentive to respond."[5] For example, Verizon notes that, when a wireless outage occurs, "wireless carriers already do as much as possible to restore service swiftly, including working around the clock, because customer satisfaction is paramount to retaining customers."[6]

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[3] *See* Opening Comments of AT&T on Phase One Staff Proposal ("AT&T Comments") at 10-11; Opening Comments of Cellco Partnership dba Verizon Wireless (U 3001 C) on Administrative Law Judge's Ruling Issuing Staff Proposal ("Verizon Comments") at 5-6; Comments of CTIA on Phase One Staff Proposal ("CTIA Comments") at 2-3.

[4] Verizon Comments at 5 (switching rates of 9-34%), *citing* Verizon Reply Comments to Order Instituting Rulemaking Proceedings to Consider Amendments to General Order 133 Attachment A, Reply Expert Report of Christian M. Dippon, Ph.D. on behalf of Verizon, ¶¶ 42-45 (May 23, 2022) ("Dippon Report"). *See also* CTIA Comments at 2.

[5] AT&T Comments at 10, *citing* Decl. of Dr. Debra J. Aron on Behalf of AT&T, R.22-03-016, ¶ 63, (Dec. 21, 2022) ("Aron 2022 Decl.") *and* Decl. of Dr. Debra J. Aron Supporting Comments of AT&T on Staff Report, R.11-12-001, ¶ 81 (Oct. 24, 2014) ("Aron 2014 Decl.").

[6] Verizon Comments at 15-16.

Commenters cite prior economic testimony in this docket and prior service quality dockets that shows that attempting to extend utility-style service quality regulations into a competitive marketplace is unneeded and likely to be harmful. AT&T quotes Dr. Debra Aron's testimony that "'unnecessary regulation on quality distorts firms' incentives and ability to compete on price; just as unnecessary regulation on price distorts firms' incentive and ability to compete on quality.'"[7] Building on this record, CTIA included with its comments a comprehensive report by Dr. Aren Megerdichian that reviews extensive data showing that "the wireless industry is highly competitive" and concludes that "competition among providers to acquire new subscribers and retain existing ones keeps wireless service quality at a competitively optimal level."[8] Dr. Megerdichian also notes that the Staff Proposal offers no economic basis for the regulations it proposes, and observes that, "[g]iven robust competition in the wireless industry and the lack of evidence indicating material deficiencies in service quality in the marketplace, it is more likely than not that the costs incurred by the service providers … as a result of the recommended regulation would outweigh any potential benefits."[9] Dr. Megerdichian cautions that attempting to regulate service quality in a competitive market "can wind up harming wireless service subscribers through higher prices and less (or slower) innovation and coverage compared to a world without the regulation."[10]

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[7] AT&T Comments at 11, *quoting* Aron 2014 Decl. at ¶ 12. *See also* Verizon Comments at 6, *citing* Dippon Report at ¶¶ 68-82.

[8] CTIA Comments, App. A., Aren Megerdichian, Ph.D., *Wireless Service Quality Regulation: An Economic Assessment of Marketplace and Enforcement Realities*, Expert Report Prepared on Behalf of CTIA, at 19 (Sept. 3, 2024).

[9] *Id.* at 22.

[10] *Id.* at 23-24.

By contrast, parties favoring wireless service quality regulation continue to ignore the substantial record, offer nothing to refute it, and offer no factual basis supporting their own positions.[11]

In sum, the record in this proceeding shows that the Commission's longstanding approach of relying on competition to best safeguard wireless service quality remains most appropriate, and no basis exists to modify that approach.[12]

B. The Record Contains No Evidence of a Need for Wireless Service Quality Regulation.

The comments also affirm the utter lack of any factual basis for the Staff Proposal's wireless regulations (or any other expansion of wireless service quality regulation). For example, AT&T's comments systematically debunk the bases offered in the Staff Proposal, including its reliance on 330 unverified statements offered at the PPHs. AT&T explains that those statements represent a minuscule sample size of California consumers – just 0.000579 percent of the working voice lines in the state – and so, even assuming they were all (a) accurate and (b) related to wireless service, those statements represent far too small a basis for Staff to draw broad, negative conclusions about wireless service quality.[13] The same is true of public comments filed in the docket, which AT&T notes represents a similarly insignificant sample size of consumers, and, in any event, includes many comments that that actually expressed *positive* sentiments about wireless service. AT&T also addresses Staff's distorted account of the testimony at the Workshop, which mischaracterized anecdotes lamenting the lack of coverage in some

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[11] *See, e.g.,* Comments of The Utility Reform Network, Center for Accessible Technology, and the Communications Workers of America, District 9 at 45-46 ("Joint Commenters Comments") (asserting vaguely that public comments and public participation hearings ("PPHs") participants undermine providers' claims of competition), *but see* Verizon Comments at 13; AT&T Comments at 5-6 (demonstrating that few public commenters PPHs participants mentioned wireless service quality, and all such commenters represent a statistically insignificant share of California wireless customers) *and* CTIA Comments at 5 (complaints "either have nothing to do with wireless carriers or have nothing to do with service quality").

[12] *See* Modification Order at 20.

[13] AT&T Comments at 5-6.

rural and Tribal areas as service quality issues, as well as its faulty analysis of outage reports data.[14] Verizon also presents a detailed critique of the Staff Proposal's misuse of outage report data and other information to support its proposals,[15] as does CTIA.[16]

Despite the assertions found in the Staff Proposal, the initial comments affirm the extensive evidence in the record that the quality of wireless service is constantly improving, due to intensive network investments by California wireless carriers ($4.8 billion in California in 2022 alone),[17] even as consumer prices fall—just as one would expect to see in a well-functioning competitive market. As Dr. Megerdichian explains, wireless providers "have invested substantially in network infrastructure, expanding coverage to new areas and creating better networks for existing coverage areas" and "provid[ing] nearly all consumers in California … with wireless network coverage from multiple service providers."[18] Wireless networks are supporting an ever-expanding number of customers (increasing five-fold in the last twenty years) and an even more-rapidly expanding volume of traffic (growing 85-fold in the last ten years).[19] Wireless network performance has improved significantly, with average data speeds rising from 19.3 Mbps in July 2016 to 151.5 Mbps in December 2022.[20] Yet, at the same time, the

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[14] AT&T Comments at 5-10. The wireless industry understands that coverage in rural areas is a confounding problem, but it is not a problem within the scope of this docket. Deployment issues are best addressed through deployment programs such as the Broadband Equity, Access, and Deployment program that the Commission is currently administering.

[15] Verizon Comments at 7-15.

[16] CTIA Comments at 2-5.

[17] CTIA Comments at 2.

[18] CTIA Comments, App. A. at 9-13.

[19] *Id.* at 15.

[20] *Id.* at 17.

Consumer Price Index ("CPI") for wireless services has *declined* by 37 percent over the last two decades, even as the CPI for all goods and services has *increased* by almost 77 percent.[21]

Meanwhile, commenters favoring wireless service quality regulation generally offer no factual basis at all for their proposals. Instead, they vaguely reference the faulty justifications in the Staff Proposal,[22] or repeat the nonsensical argument that increased consumer adoption of wireless services necessitates imposing monopoly-era service quality regulations.[23] This proposition is not simply a *non sequitur*; as Dr. Megerdichian observes, "[q]uite the opposite" is true: The "continued growth in demand for wireless services and its expected expanded role in the U.S. communications landscape will continue to create incentives for wireless providers to compete vigorously … on service quality," making service quality regulation less needed and more potentially harmful.[24]

Ignoring the overwhelming evidence in the record of intensive wireless network investment and improvements, Joint Commenters now suggest that the Commission should "consider collecting ARMIS-type financial information from … wireless service providers" to determine whether their network investment levels are adequate.[25] CTIA and other parties previously addressed in this docket the complete lack of a basis for extending ARMIS-type reporting to wireless providers, and Joint

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[21] *Id.* at 13.

[22] *See, e.g.*, Comments of the Public Advocates Office on the Administrative Law Judge's Ruling Issuing Staff Proposal ("PAO Comments"), *passim* (no evidence offered or discussed); Joint Commenters Comments at 45-46; Opening Comments of Rural County Representatives of California on Administrative Law Judge's Ruling Issuing Staff Proposal ("RCRC Comments") at 6.

[23] *See, e.g.,* PAO Comments at 2; Joint Commenters Comments at 1; RCRC Comments at 2.

[24] CTIA Comments, App. A. at 7.

[25] Joint Commenters Comments at 45-46.

Commenters raise no new arguments to support their proposal.[26] This approach has already been excluded from the Staff Proposal and should not be adopted now.

C. Specific Elements of the Staff Proposal and Commenters' Proposed Additions Are Wholly Unsupported by Record Evidence.

The comments show that, as AT&T observes, the "Staff proposal lacks any facts or analysis that provides a rational basis for key details in the proposed standards and proposed penalties," including for example the answer time metric.[27] Verizon discusses how the proposed change to the coverage map requirements to reflect "equipment constraints" appears to be based on a single, factually incorrect anecdote shared at the Workshop,[28] and observes that there is no evidence of greater outage impacts in Disadvantaged Communities ("DACs") or Areas of Affordability Concern ("AACs") to support higher penalties in such areas.[29] CTIA's initial comments provide a non-exhaustive list of unsupported and arbitrary elements of the Staff Proposal, including the amounts of the proposed penalties.[30]

Commenters favoring wireless service quality regulations offer arguments in support of the Staff Proposal and a variety of suggestions to expand it, but provide no evidentiary basis to support their approaches. For example, RCRC seeks to increase the Staff Proposal's unsupported base penalty to "$5 or 5 percent of a customer's bill, whichever is greater."[31] But neither the Staff Proposal nor RCRC's comments provides any basis for why either of their approaches constitutes an appropriate base penalty.[32]

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[26] *See* Comments of CTIA on Ruling Requesting Comments on Network Examination and ARMIS Reporting, R.22-03-016, at 16 (Dec. 21, 2022).

[27] AT&T Comments at 4; *see also* Verizon Comments at 44.

[28] Verizon Comments at 46-47.

[29] *Id.* at 44.

[30] CTIA Comments at 43.

[31] RCRC Comments at 4 (emphasis omitted).

[32] Nor do they explain how such a requirement would be lawful. *See infra* Section III.A.

Similarly, Joint Commenters argue that the Commission should adopt the proposed higher penalty levels in DACs and AACs because "[p]roviders have incentive to prioritize restoring service to areas with 'high average revenue per user' (ARPU), because those areas are more profitable," but "lower ARPU areas, which are disproportionately Tribal, AAC, and DAC communities, are often deprioritized, and must wait longer for restored service."[33] Joint Commenters offer no evidence that their allegations are true, and the record is devoid of any evidence of such behavior by wireless providers.

Similarly, Joint Commenters seek to augment the Staff Proposal's unsupported requirement that all voice providers offer live agents to answer 100% of all customer service calls, when requested by consumers, and suggest that the online chat option also should "be clarified to ensure that a customer is able to quickly chat with a live representative, and not be forced to engage in an extensive chat with an automated system."[34] Neither the Staff Proposal nor Joint Commenters provide any basis for these proposals, however, and the record contains no evidence that wireless customers are dissatisfied with their providers' customer service, that wireless providers fail to offer sufficient customer care options, or that wireless providers' customer care options require excessive interaction with an automated system. In fact, the record shows that customer service is one of the many ways carriers compete with one another and consumers are free to choose the provider that best meets their particular needs or preferences.[35] Moreover, Joint Commenters' proposal is too vague to implement, with no parameters for how "extensive" an interaction with an automated system would have to be to be objectionable or how "quickly" the customer would have to be able to access a live representative to avoid penalty.

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[33] Joint Commenters Comments at 25.

[34] *Id.* at 21 (emphasis omitted).

[35] *See* CTIA Comments, App. A at 24.

These and similar proposals in the comments are contrary to the Ruling's direction that parties "support their comments with specific cites to … any relevant factual information,"[36] and California law requires the Commission to have a record basis for its regulations.[37] AT&T further observes that, without supporting facts and rationales for key elements of its proposals, the Staff Proposal fails to "provide parties adequate notice and an opportunity to be heard"—a defect that cannot be cured at the proposed decision stage.[38]

D. The Comments Show That Changes to the Wireless Coverage Map Rules Are Not Needed and the Proposed Standard Would Not Be Feasible.

The initial comments make clear that the Staff Proposal's changes to the wireless coverage map rules to require address-level accuracy and disclosure of "equipment limitations" are not needed because wireless providers' coverage maps already show coverage at the address level and provide information about device compatibility. More significantly, however, the proposals' premises—that consumers could get locked into a contract with a service provider offering poor service at their location or using a different generation of wireless service—are inaccurate. Moreover, the proposals would be infeasible.

First, the initial comments demonstrate that wireless providers already provide consumers and regulators with continually updated coverage maps at the address level. For example, Verizon states that its "online coverage maps already provide the ability to input a customer's address to determine the existence of coverage in that area."[39] Similarly, AT&T states that its "online mapping tool allows customers to input an address to view an approximation of outdoor coverage by technology (*i.e.*, 5G+,

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[36] Ruling at 4.

[37] *See* AT&T Comments at 5 n.19; CTIA Comments at 42 n.154; Verizon Comments at 7 & n.9 (all citing Cal. Pub. Util. Code § 1757.1(a) (reviewing court may set aside a Commission decision that is an "abuse of discretion" or "not supported by the [factual] findings").

[38] AT&T Comments at 4.

[39] Verizon Comments at 45.

5G, 4G, LTE coverage, and partner coverage)."[40] T-Mobile and UScellular do the same.[41] Wireless providers also provide detailed voice and data coverage maps to the Commission and the Federal Communications Commission ("FCC").[42] The Commission requires wireless providers to submit coverage maps in specific formats,[43] and the FCC has adopted specific rules for wireless providers' coverage data submissions.[44] The FCC makes these maps available on its website, and consumers can search them at the address level.[45] Importantly, these maps are subject to challenge by stakeholders and individuals alike, both as to whether address information is accurately conveyed and whether service is available at a listed address.[46]

The record also shows that no changes to the wireless coverage map rules are needed to protect consumers because the premises underlying the proposals are faulty. As Verizon notes, the Staff Proposal's changes to the wireless coverage map rules "seek to resolve a non-existent problem."[47] Indeed, the proposed changes to the wireless coverage map requirements seem to be driven by concerns such as those expressed by Joint Commenters, that a "customer should not be sold a service and/or a phone under the false impression that they can receive good quality voice and data service at their

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[40] AT&T Comments at 39.

[41] *See* T-Mobile, *4G & 5G Coverage Map*, https://www.t-mobile.com/coverage/coverage-map (last visited Sept. 16, 2024); UScellular, *Coverage Map*, https://www.uscellular.com/coverage-map (last visited Sept. 16, 2024).

[42] AT&T Comments at 38; *see also* Verizon at Comments 45.

[43] CPUC, *Broadband Data Submission Guidelines and Templates*, https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/broadband-mapping-program/broadband-data-submission-guidelines-and-templates (last visited Sept. 16, 2024).

[44] 47 C.F.R. § 1.7004(c)(3).

[45] FCC, *FCC National Broadband Map, About*, https://broadbandmap.fcc.gov/about?version=jun2022 (last visited Sept. 16, 2024).

[46] 47 C.F.R. § 1.7006; FCC, Broadband Data Collection Help Center, *How to Submit an Availability Challenge*, https://help.bdc.fcc.gov/hc/en-us/articles/10476040597787-How-to-Submit-an-Availability-Challenge (updated May 7, 2024).

[47] Verizon Comments at 45 n.76.

address, if the service as described is not available,"[48] and RCRC that "[t]here may be situations where customers are locked into a wireless carrier's contract based on misleading or unreliable wireless coverage maps."[49] Commenters provide no evidence of this phenomenon, however, and wireless providers have already taken steps to ensure it does not occur.

CTIA's Consumer Code for Wireless Service, to which the four largest wireless providers and others are signatories, requires a trial period of not less than 14 days for wireless plans,[50] and trial periods are now standard in the wireless industry. Moreover, today, "[c]ustomers generally don't have long term service contracts" and "ETFs for terminating service are a thing of the past."[51]– changes that are the direct result of wireless providers responding to shifting consumer preferences in a competitive marketplace.

The record also shows that changes to the coverage map rules are not needed to ensure "customers have the proper equipment that can accommodate changes in wireless technology."[52] First, the unverified anecdote from the Workshop about the phase-out of 3G service in Modoc County, repeated in the Staff Proposal,[53] mischaracterizes how wireless technology transitions are handled. In fact, "[w]ireless providers engaged in multiple efforts to notify customers of the transition in technology … over lengthy periods of time," and engaged in other efforts such as "sen[ding] free 4G phones to holdouts

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[48] Joint Commenters Comments at 37.

[49] RCRC Comments at 6. In such cases, RCRC urges the Commission to consider "nullifying a carrier's early termination fees, if applicable, when wireless coverage is inaccurate or unsuitable for the customer." *Id.*

[50] CTIA, Consumer Code for Wireless Service at 2 § 4 (Mar. 2020), https://api.ctia.org/wp-content/uploads/2020/03/CTIA-Consumer-Code-2020.pdf.

[51] Verizon Comments at 45 n.76.

[52] Staff Proposal at 31.

[53] *Id.* at 31-32.

before finalizing such decommissioning."[54] Moreover, as Verizon notes, there was no flash-cut from 3G to 5G as the Staff Proposal suggests—"there was absolutely no mandate to move to 5G services" and "4G technology was available to consumers" even after 3G networks were decommissioned.[55] Thus, no rules are needed to ensure, as RCRC proposes, that wireless providers engage in clear communications with consumers about technology transitions and test new network infrastructure before phasing out old networks.[56]

For all these reasons, the record shows that the proposed changes to the wireless coverage map rules are not needed. The record also demonstrates, however, that the proposed rule changes would be infeasible and misleading. As Verizon observes, a "requirement that coverage maps are capable of verifying coverage at an exact address also requires a level of certainty as to service that is reasonable in the wireline context but unreasonable for wireless services" because it "unreasonably ignores the variable and dynamic nature of wireless service that makes it impossible to guarantee coverage at all times."[57] As AT&T notes, wireless providers' terms of service generally specify that the carrier cannot guarantee "any specific network capability at any given time."[58] The declaration of Mark Settle, P.E., attached to CTIA's comments, makes clear that the Staff Proposal "appears to require a degree of precision that is

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[54] Verizon Comments at 47 & n.81. *See also* AT&T Comments at 40 ("AT&T began informing customers years in advance of the 3G sunset … via email, text messaging, bill inserts, direct mail, outbound calling, voice messages, and customer service engagement," and "launched a dedicated webpage with resources to help customers determine if their phones would still work post-sunset and information on how to upgrade to a new phone.").

[55] Verizon Comments at 47.

[56] RCRC Comments at 6. In addition, like other proposals to regulate wireless providers' communications with their customers, such rules would raise First Amendment concerns and potentially be illegal. *See infra* Section III.D.

[57] Verizon Comments at 4, 45.

[58] AT&T Comments at 39 n.138.

inconsistent with the inherent variability of wireless networks and standard principles of wireless signal coverage mapping."[59]

Similarly, the proposal to impose additional requirements on wireless coverage maps related to "equipment constraints" also is ill-advised. As CTIA notes, the requirement is unclear and undefined, but it would be impracticable and serve no useful purpose to require wireless providers to offer specific coverage maps for the myriad of wireless devices available today, and impossible to require them to account for the effects that real-world incidents and behaviors can have on a device's wireless radio, such as antenna damage caused by dropping a device, or impacts on signal strength that can arise from using poorly designed phone cases.[60] AT&T confirms that it and other wireless service providers "sell hundreds of different handsets/devices from third-party manufactures" and "new handsets are constantly being introduced," yet AT&T nonetheless "provides a list of devices on its website that work on its network."[61] As such, no new rules are needed, nor would they be practical.

III. ADOPTING VARIOUS COMMENTERS' PROPOSALS WOULD VIOLATE FEDERAL AND STATE LAW

A. The Proposed Alternative Penalties Mechanisms Are Unlawful for the Same Reasons as the Staff's Proposed Mechanisms

Various commenters propose modifications to the penalty mechanisms contemplated in the Staff Proposal, including the following:

- "tying the base fine to inflation or linking it to a percentage of the customer's bill or plan,"[62]

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[59] CTIA Comments, App. B, Engineering Decl. of Mark Settle, at 8 (Sept. 3, 2024).

[60] CTIA Comments at 52-53.

[61] AT&T Comments at 39

[62] RCRC Comments at 4; *see also* Comments of the California Broadband & Video Association at 11-12 ("CalBroadband Comments") (proposing a "proportional customer credit framework," whereby a service provider that experiences a covered outage of 24 hours or more would be required to "proactively credit affected customers for 1/30th of their monthly voice bill for each 24 hour outage period, or fraction thereof, beginning 24 hours after the outage.").

- imposing penalties in the form of both automatic customer credits *and* refunds,[63]
- imposing cumulative penalties on a per-line basis for multi-line subscribers,[64]
- requiring direct payments to customers for certain covered outages,[65]
- increasing the amount of fines that service providers that experience a covered outage must pay into the California General Fund,[66]
- imposing an investment requirement in addition to customer credits, with "Commission oversight" of wireless providers' investment decisions, including staff "authority to direct and approve the location[s]" in which providers "would invest capital or operational expenditures,"[67] and
- starting the clock for the calculation of customer credits and refunds "from the date and time the outage began" (even though outages of less than 24 hours are not covered by the Staff Proposal).[68]

To be clear, all of these proposed penalty mechanisms – as well as any other sanction imposed on wireless providers for experiencing a covered outage – would be preempted by federal law on multiple independent grounds and would violate the U.S. Constitution's Contract Clause for the same reasons that the penalty mechanisms outlined in the Staff Proposal are unlawful. CTIA explained these defects in detail in its opening comments and need not repeat them at any length here.[69]

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[63] Joint Commenters Comments at 23 ("The Commission should ensure that revisions to GO 133-D explicitly state that a provider that has failed to meet the service quality standards is required to provide an affected customer a refund (without the customer needing to request the refund) and *also* provide that affected customer with a customer credit."); *id.* (requesting clarification that multipliers for fines apply to customer credits).

[64] *Id*. ("[F]or customers who have multiple lines (for example, a customer who has a separate phone for a home office, or a family plan with multiple phones), that customer should receive not only a refund for their service, but a customer credit for each affected line.").

[65] *Id.* at 25-26 ("[T]he Commission should require that if a customer receives customer credits for more than four days in a month, the …. provider [must] pay the amount of the customer credit directly to that customer.") (alteration to original).

[66] *Id.* at 26-27.

[67] *Id.* at 32-33; *see also* RCRC Comments at 5 ("RCRC supports reforms to investment-in-lieu-of-fine penalty mechanisms and believes these options (including Operational Expenditures in-lieu-of-fine or Capital Investments in-lieu-of-fine) should be in addition to—and not in place of—automatic customer credit fine mechanisms.").

[68] Joint Commenters Comments at 24.

[69] *See* CTIA Comments at 8-31.

Among other fatal flaws, these alternative penalty mechanisms plainly would constitute rate regulation expressly prohibited by Section 332(c)(3)(A) of the Communications Act (47 U.S.C. § 332(c)(3)(A)).[70] They would also constitute unlawful market entry and rate regulation that is expressly prohibited by the same statutory provision, regulate matters exclusively reserved to the FCC under numerous Title III provisions of the Communications Act, and conflict with federal policy.[71]

While CTIA agrees with CalBroadband that the daily penalties outlined in the Staff Proposal are arbitrary and unconstitutionally excessive in violation of the Eighth Amendment's Excessive Fines Clause,[72] CalBroadband's alternative proposal of a "proportional customer credit" would suffer from the same legal infirmities as the staff's proposed mechanism if it were applied to wireless providers. In particular, this mechanism would also constitute unlawful rate regulation in plain violation of Section 332(c)(3)(A).[73]

In addition, the proposed alternative penalty mechanisms lack any evidentiary basis and would run afoul of California law for the reasons previously explained.[74] As AT&T and Frontier point out, they would also exceed the Commission's statutory authority.[75]

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[70] *See id.* at 8-11.

[71] *See id.* at 12-24.

[72] *See* CalBroadband Comments at 11 & n.32. The Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution is applicable to state entities such as the Commission under the Fourteenth Amendment's Due Process Clause. *See Timbs v. Indiana*, 586 U.S. 146, 150-51 (2019); *see also Pimentel v. City of Los Angeles*, 974 F.3d 917, 922 (9th Cir. 2020). Here, the $5 and $10 fines proposed by the staff are "grossly disproportional" to the action prohibited (community isolation outages of 24 hours or more, including outages that may occur through no fault of the service provider). *See United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998). For similar reasons, these penalties would transgress constitutional bounds under substantive due process cases. *See, e.g.*, *In re Exxon Valdez*, 270 F.3d 1215, 1239-40 (9th Cir. 2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

[73] *See* CTIA Comments at 8-24.

[74] *See id.* at 42-43.

[75] AT&T Comments at 28-29; Frontier Comments at 12.

Accordingly, the Commission should not adopt any of these alternative proposals, which would violate both federal and state law.[76]

B. The Proposed Service Quality Regulations, Including Metrics, Would Be Preempted by Federal Law

Although the Staff Proposal decided not to adopt metrics proposed by PAO,[77] PAO persists in proposing such metrics, which it asserts will improve service quality by wireless and other communications providers.[78]

The record in this proceeding unequivocally shows that service quality regulation designed for the monopoly and rate-of-return era is both entirely unnecessary and inapposite in the well-functioning and highly competitive marketplace for wireless services—and is far more likely to do more harm than good.[79] But even apart from these facts, CTIA has previously explained that such service quality regulation is squarely preempted by federal law.[80]

Undeterred, PAO asks the Commission to require wireless providers to submit "Trouble Reports" that can be leveraged to fine the providers if they fall short of benchmarks selected by PAO.[81] But this

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[76] Venturing far beyond the scope of the present proceeding, the Joint Commenters request stiffer penalties for violations of the Commission's disaster resiliency rules. Any such penalties would be preempted for the reasons CTIA discussed when opposing those rules. *See, e.g.*, CTIA *et al*. Application for Rehearing of Decision 20-07-011, R.18-03-011, at 7-21 (Aug. 19. 2020).

[77] *See* Staff Proposal at 32 & n.94 (acknowledging PAO's proposed "mean opinion score" metric, but concluding that the workshop in this proceeding "did not offer any . . . . clear direction" concerning the utility of such metrics).

[78] *See* PAO Comments at 4-9 (again proposing the "Mean Opinion Score" metric to cover "elements of call quality including latency, jitter, and 'signal-to-noise-ratio.'"); *see also* Opening Comments of Small Business Utility Advocates ("SBUA") at 4 ("While not included in the Staff Proposal, SBUA continues to advocate for the adoption of standards based on packet loss rate, network jitter, and latency.").

[79] *See* CTIA Comments at 2-8 & App. A.

[80] *See, e.g.*, Comments of CTIA on Joint Summary of September 7, 2023 Workshop, R.22-03-016, at 10-24 (Oct. 5, 2023) ("CTIA Workshop Comments").

[81] *See* PAO Comments at 10-12 (proposing to extend the Trouble Reports metric to all facilities-based wireless providers and stating that "there must continue to be enforcement [of the metric] through the use of fines, in order to keep carriers accountable and to address regional and individual concerns."). The staff proposed to "[e]liminate

proposal would be preempted for the same reasons. Among other defects, it would (i) entail unlawful state regulation of market entry and wireless provider rates in violation of Section 332(c)(3)(A) of the Communications Act, (ii) trench on the FCC's exclusive authority over technical matters concerning the use of radio frequency ("RF") spectrum, and (iii) embroil the Commission in impermissibly dictating wireless providers' levels of service and network design and operations.[82]

Worse still, PAO's proposal would conflict with the FCC's decision not to impose a "grade of service requirement" for wireless service—instead concluding that market forces will best ensure high quality of service.[83] The proposal therefore must be rejected based on its conflicts with federal law.

RCRC's suggestion to require wireless providers to "[c]onduct[] extensive testing to ensure new network infrastructure is fully functional before old networks are phased out" (for example, when upgrading from one wireless technology to another)[84] suffers from the same—and even more glaring—legal flaws and should be rejected for the same reasons. RCRC also ignores the reality that new wireless networks are extensively tested.

In short, none of these alternative approaches should be adopted.

C. Penalizing Facilities-Based Wireless Providers for Outages Affecting the Customers of Resellers Would Violate Federal Law

PAO next urges the Commission to penalize facilities-based wireless providers for covered outages that affect the customers of resellers of wireless service.[85]

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the customer trouble reports standard," noting that it "attempts to tackle too many types of issues." Staff Proposal at 41.

[82] *See* CTIA Comments at 12-19; CTIA Workshop Comments at 11-24.

[83] CTIA Workshop Comments at 19-20, 22-23.

[84] *See* RCRC Comments at 6.

[85] *See* PAO Comments at 14 ("In the case of resold service, the automatic customer credit should be paid by the wholesale provider that provides the underlying service."); *see also* Comments of the National Lifeline Association et al. at 2 ("[I]f the Commission adopts its proposed Wireless Community Isolation Outage Repair Standard, the

As CTIA has explained, however, any such rule would only exacerbate the legal infirmities of the proposed outage prohibition and related enforcement mechanisms. In particular, it would amplify concerns under Section 253(a) of the Communications Act by creating an even more serious impediment to the provision of telecommunications service and could more substantially interfere with wireless providers' contracts in violation of the Constitution.[86]

The Commission should soundly reject requests to make facilities-based wireless providers liable for outages affecting customers of resellers—customers with whom the facilities-based providers have no direct relationship.

D. Proposals Focusing on Communications With Customers Would Be Unlawful

In tandem with its renewed request for call-quality metrics – a request the Commission staff rejected – PAO asks the Commission to require wireless providers to develop special customer-facing apps that "measure[] the signal strength, signal quality, signal-to-noise ratio, network congestion, and cell tower proximity at a customer's premises."[87] This extraordinary requirement would contravene federal law on numerous independent grounds.

First, it would impermissibly trench on the FCC's exclusive jurisdiction over technical matters concerning the use of RF spectrum and wireless provider network facilities, and therefore would be subject to field preemption.[88]

Commission should account for the impact on wireless resellers, e.g., MVNOs, that do not own the underlying wireless network. Specifically, the Commission should exempt these wireless resellers from compliance with the wireless outage repair standard.").

[86] *See* CTIA Comments at 26-27, 31.

[87] PAO Comments at 14-15.

[88] *See* CTIA Comments at 15-19.

Second, it would subject wireless providers (in particular, smaller and rural providers) to substantial costs and thereby materially inhibit the provision of telecommunications service in violation of Section 253(a) of the Communications Act.[89]

Third, it would violate the First Amendment for essentially the same reasons that the staff's proposed requirement to host an online chat function would be unconstitutional.[90] The proposed app mandate would compel speech with customers based on the content of that speech and would thus trigger strict scrutiny—an extremely demanding standard that the Commission could not come close to satisfying.[91] Nor could the mandate withstand review under the First Amendment even if "intermediate scrutiny" or the more relaxed *Zauderer* standard[92] applied.[93] The proposed app mandate is unduly burdensome and would not advance any valid government interest supported by record evidence showing any need for an app. PAO has not shown (and cannot show) that a requirement to custom-build apps is necessary or would even have any utility to consumers.

Fourth, given the lack of any record evidence supporting the need for an app mandate, PAO's proposed requirement would violate California law, and adopting the requirement would constitute an abuse of discretion.[94]

For their part, the Joint Commenters ask the Commission to adopt a modified version of the staff's unlawful and misguided proposal to mandate an online chat function for customers of wireless providers. In doing so, however, these commenters would make the requirement even more onerous and

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[89] *See id.* at 24-28.

[90] *See id.* at 33, 36-37.

[91] *See id.* at 33-34 & n.130.

[92] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

[93] *See* CTIA Comments at 35-38.

[94] *See id.* at 42.

costly to implement by mandating live agents who interact with customers via the chat function (rather than using increasingly sophisticated interactive technology, including Artificial Intelligence functions).[95] This would merely exacerbate the First Amendment problems with the Staff Proposal—making it even more unduly burdensome and, hence, indefensible.[96]

Joint Commenters' proposal would also "impermissibly burden interstate commerce in violation of the U.S. Constitution's dormant Commerce Clause" for the reasons CTIA has previously discussed.[97]

In sum, the proposals by PAO and Joint Commenters are unconstitutional, unsupported by the record, and unnecessary. The Commission should reject them.

IV. CONCLUSION.

The initial comments confirm the lack of any evidentiary, policy, or legal basis for the proposed wireless regulations in the Staff Proposal. The Commission should reject the Staff Proposal and retain the Commission's longstanding decision to rely on the power of the competitive wireless marketplace to deliver optimal service quality.

Respectfully submitted September 17, 2024, at San Francisco, California.

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September 17, 2024

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[95] Joint Commenters Comments at 21.

[96] *See* CTIA Comments at 36-37.

[97] *See id.* at 37 n.141.