BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Changes to the Commission's Carrier of Last Resort Rules.	Rulemaking 24-06-012

COMMENTS OF CTIA ON ORDER INSTITUTING RULEMAKING

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CTIA[1] submits these comments in response to the Order Instituting Rulemaking Proceeding to Consider Changes to the Commission's Carrier of Last Resort Rules issued June 28, 2024 in this docket ("OIR").[2]

The OIR asks a variety of questions about whether and how the Commission should revise its carrier of last resort ("COLR") rules. CTIA's comments are limited to one question in the OIR: "Can the Commission direct wireless voice providers to serve as COLRs?"[3] The Commission may not direct wireless providers to serve involuntarily as COLRs for the policy and legal reasons discussed below.

I. Directing Wireless Providers to Serve Involuntarily as COLRs Would Be Bad Policy in the Competitive Wireless Marketplace.

The Commission should not adopt rules pursuant to which it could direct wireless providers to serve involuntarily as COLRs, because such a requirement would be inconsistent with the competitive marketplace in which wireless providers operate. As commentators have observed, "[u]nder classical COLR policy, a local exchange company accepted a bundle of obligations," such as the obligation to serve all customers in a designated service area, mandated service levels and offerings, and a requirement to receive regulatory approval to exit the market,

[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 providers, 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] *Order Instituting Rulemaking Proceeding to Consider Changes to the Commission's Carrier of Last Resort Rules*, R. 24-06-012 (Issued June 28, 2024).

[3] OIR at 5, § 2.f.

in exchange for "compensating economic benefits," including an exclusive franchise to serve in its designated area and regulated rates designed to garner a robust return on its investments.[4]

These classical elements of COLR policy are ill-adapted to, or – as explained below – prohibited in, the wireless marketplace. Wireless providers in California operate in an intensely competitive market where "there are multiple providers that compete for wireless subscribers" and "consumers have the ability to switch providers" if they wish to do so. Due to this fierce competition, wireless providers in California experience customer switching rates between 9% and 34%.[5] In this environment, directing a wireless provider to serve involuntarily as a COLR would be bad policy, skewing competition to the detriment of consumers.

II. Any Requirement Directing Wireless Providers to Serve Involuntarily as COLRs Would Be Preempted by Federal Law.

Beyond policy reasons that counsel against directing wireless providers to serve involuntarily as COLRs, the Commission may not do so because such a requirement would be preempted by federal law.

Under federal law, "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."[6] This is a "broad preemption clause" that "completely preempt[s] the regulation of rates and market entry."[7] Requiring a wireless provider to serve involuntarily as a COLR would constitute

[4] Peter Bluhm and Phyllis Bernt, Ph.D., National Regulatory Research Institute, "Carriers of Last Resort: Updating a Traditional Doctrine," at iii (July 2009) (Bluhm-Bernt Report), https://pubs.naruc.org/pub/FA864A19-A48B-267A-3893-A310062183C4.

[5] Aren Megerdichian, Ph.D., "Wireless Service Quality Regulation: An Economic Assessment of Marketplace and Enforcement Realities," at 12 ¶ 8 (Sept. 3, 2024), Appendix A to Comments of CTIA on Phase One Staff Proposal, R.22-03-016 (filed Sept. 3, 2024) (CTIA Service Quality Staff Proposal Comments).

[6] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[7] *In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1070 (N.D. Cal. 2010).

both rate and entry regulation. Such a mandate also would be barred by conflict and field preemption.

Rate regulation has always been a key element of COLR regulation. For example, the Commission currently prohibits a COLR from setting its basic rates in high-cost areas above 150% of its highest basic rate in California outside of high-cost areas.[8] Some "non-wireline COLR[s] … [must] apply the 150% limit based on stand-alone rates of an adjacent ILEC or other acceptable proxies as may be approved by the Commission."[9] In addition, the Commission requires COLRs to offer LifeLine service,[10] and LifeLine rates are specifically regulated.[11] The Commission also regulates COLRs' rate structures by requiring them to offer an option with monthly rates and without a contract or any early termination penalty.[12] These types of rate and rate structure regulations, if applied to wireless providers, would be preempted by Section 332(c)(3)(A) of the Communications Act.

Involuntarily applying COLR regulations to wireless providers would also constitute preempted entry regulation. By ordering a wireless provider to serve involuntarily as a COLR, the Commission would be effectively ordering the provider to offer a Commission-prescribed tier of basic service, which currently includes LifeLine and directory assistance service,[13] in a Commission-prescribed area without regard to whether the service area designated by the Commission corresponds with the area where the wireless provider has chosen to provide

[8] *See* D.12-12-038 at 31.

[9] *Id.*

[10] *Id.* at 24.

[11] *See* GO 153 at 23-26 § 8.

[12] D.12-12-038 at 11.

[13] D.12-12-038, App. A at 3-4.

service, is licensed to provide service, or can provide service. It also would disregard whether the services in the Commission's current or future basic service definition correspond with the services that the wireless provider has chosen to provide. As such, an involuntary COLR designation order could require the wireless provider to enter a geographic market and/or a product market it had not chosen to enter, constituting preempted entry regulation. Commission COLR regulations also strictly limit COLRs' ability to exit the market in their designated service areas,[14] which is an additional form of preempted entry regulation (*i.e.* a provider's market entry is conditioned on a requirement that the Commission must approve market exit).[15]

Further, by requiring the wireless provider to offer a specific level of service to any requesting customer in a Commission-designated service area, an order involuntarily designating a wireless provider as a COLR also would be preempted because Section 332(c)(3)(A) precludes any state regulation of the scope, configuration, or sufficiency of wireless providers' networks.[16] At minimum, an involuntary COLR designation would require a wireless provider to have sufficient available wireless spectrum and equipment to offer COLR-grade service to every customer in the designated service area. Such a requirement would be preempted because it would conflict with the FCC's pervasive regulation of wireless service and exclusive authority over the use of the radio spectrum over which wireless services are provided.[17]

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[14] *See* OIR at 3-4.

[15] *See, e.g.*, Bluhm-Bernt Report at iii (COLRs are subject to state-specified obligations, including "obtaining advance regulatory approval for any planned market exit").

[16] *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 988 (7th Cir. 2000); *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1040–41 (9th Cir. 2010); *In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1074 (N.D. Cal. 2010).

[17] *See* CTIA Service Quality Staff Proposal Comments at 11-23.

Even apart from Section 332 preemption of entry regulation, however, exit restrictions on wireless providers also would be preempted because they would conflict with an affirmative federal decision not to require wireless providers to obtain regulatory approval for market exit. The FCC specifically elected to forbear from exercising its statutory authority to require CMRS providers to obtain approval for market exit for specific policy reasons, including that "barriers to exit may also deter potential entrants from entering the marketplace" and "the time involved in the decertification process can impose additional losses on a carrier after competitive circumstances have made a particular service uneconomic," such that "forbearance will better serve the public interest by avoiding the social costs identified in this paragraph."[18]

An affirmative federal decision *not* to regulate in a particular area has the same preemptive effect as a promulgated federal regulation. Here, the FCC's decision not to regulate wireless providers' market exit is enough to preclude a state from involuntarily imposing the kind of exit regulations inherent in COLR regulation.[19] In this case, however, the case for preemption is even clearer, because the FCC's decision was made pursuant to a specific delegation of authority from Congress to determine the scope of common carrier regulations (which includes exit regulation) that should apply to wireless providers.[20] A Commission

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[18] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, 1480-81 ¶ 182 (1994) (*CMRS Order*).

[19] *Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Bethlehem Steel Co. v. State Labor Rels. Bd.*, 330 U.S. 767, 774 (1947); *see also Computer & Commc'ns Indus. Assoc. v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), (quoting *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982)); *Minn. Pub. Util. Comm'n v. FCC*, 483F.3d 570, 580 (8th Cir. 2007); *Farina v. Nokia*, 625 F.3d 97, 115, 134 (3d Cir. 2010) (quoting *Hillsborough Cnty v. Automated Med. Labs., Inc..*, 471 U.S. 707, 713 (1985)).

[20] 47 U.S.C. § 332(c)(1)(A) (a wireless provider shall "be treated as a common carrier for purposes of this chapter, except for such provisions … as the [FCC] may specify by regulation as inapplicable to that service or person…."); *see also CMRS Order*, 9 FCC Rcd at 1463 ¶ 124; *id.* at 1480-81 ¶ 182 (determining pursuant to section 332(c)(1)(A) to forbear from exit regulation).

decision to involuntarily designate a wireless provider as a COLR would frustrate this federal policy decision and therefore be preempted.

III. Conclusion.

The Commission should not adopt rules that would allow it to designate a wireless provider to serve involuntarily as a COLR because such an obligation would be poor policy for the competitive marketplace in which wireless providers operate and preempted by federal law.

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