



December 9, 2020

Via Electronic Filing

State of Hawaii
Public Service Commission
465 S. King Street #103
Honolulu, HI 96813

Re: *Comments on Commission’s Undocketed November 25, 2020
Request for Feedback from Utilities and the Consumer Advocate on
the Suspension of Termination or Disconnection of Regulated Utility
Services Due to Non-Payment*

Dear Madam or Sir:

CTIA¹ submits these comments in response to the Public Service Commission’s (“Commission’s”) November 25, 2020 request for feedback from utilities and the Consumer Advocate on the suspension of termination or disconnection of regulated utility services due to non-payment (“Request”).

CTIA commends the Commission for considering its path forward regarding measures offered by communications providers to help ensure consumers stay connected during the ongoing COVID-19 pandemic. CTIA’s comments address two of the four questions posed in the Request – question 1, regarding the merits of lifting the suspension, and question 4, regarding carrier engagement with and

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.



outreach to customers about relief measures that are available to customers adversely economically affected by the pandemic. CTIA has no response to questions 2 and 3 in the Request, which seek carrier-specific data not in CTIA's possession.

I. INTRODUCTION AND SUMMARY

Wireless carriers support the goal of ensuring that Hawaii consumers remain connected during the pandemic, and have voluntarily taken steps to prevent customer disconnection for customers affected by the COVID-19 pandemic.

While wireless carriers will continue to work with customers affected by the coronavirus and its associated economic consequences to keep them connected, the Commission must ensure that its requirements remain consistent with legal limitations and the scope of its authority.² Applying a suspension on disconnections to wireless carriers would be inconsistent with federal law, which preempts state regulation of wireless carriers' rates,³ and also with the Commission's prudent 2004 decision to largely deregulate the wireless industry.⁴ It also would effect an unconstitutional taking and violate 47 U.S.C. §§ 2(b) and 254(f).

As the pandemic response moves through its third quarter, rather than impermissibly applying a suspension of disconnections in 2021, the Commission should recognize that circumstances of this scale require a broader response than is within the Commission's purview to order for companies, like wireless

² The proposed disconnection suspension targets "Commission-regulated ... telecommunications ... public utilities." It is not clear the Commission intends that phrasing to include wireless carriers.

³ See 47 U.S.C. § 332(c)(3).

⁴ See *Instituting a Proceeding of Commercial Mobile Radio Service ("CMRS") Providers in the State of Hawaii, Including an Investigation to Determine Whether It is Consistent with the Public Interest to Exempt CMRS Providers, Their Services or Both, from Any Provisions of Hawaii Revised Statutes Chapter 269*, Decision and Order No. 20890 (April 7, 2004) ("Decision 20890").



carriers, that are subject only to very limited state regulation. CTIA urges the Commission to explore more effective measures to address the pandemic, and the wireless industry is happy to engage with the Commission in that endeavor.

II. CTIA AND ITS MEMBERS ARE PROVIDING SIGNIFICANT AID TO CUSTOMERS ADVERSELY AFFECTED BY THE COVID-19 PANDEMIC

Wireless carriers have taken significant steps to aid Hawaii consumers affected by the COVID-19 pandemic. As COVID-related restrictions ordered by Governor Ige were being imposed in Hawaii, wireless carriers were implementing policies and programs to assist affected customers. As soon as it was announced, Hawaii wireless carriers signed on to the Federal Communications Commission's ("FCC's") Keep Americans Connected Pledge ("Pledge"), which included a promise not to terminate service to residential or small business customers due to inability to pay caused by the coronavirus-related disruptions, a waiver of late fees incurred as a result of economic circumstances caused by the pandemic, and opening of Wi-Fi hotspots to everyone, including non-customers.⁵

Wireless carriers in Hawaii have also taken other steps to assist consumers, both during the Pledge and since its expiration. These include, for example:

- Extension by some carriers of the non-disconnection guarantee beyond the end of the Pledge;
- Deferred bill-payment plans for customers economically affected by the pandemic;
- New low-cost prepaid plans with enhanced benefits, such as unlimited voice and larger data allotments;
- Waivers of overage fees for voice, data, and text or additional data allotments to customers on metered plans or plans that limit hotspot usage;

⁵ See FCC, News Release, "Chairman Pai Launches The Keep Americans Connected Pledge" (Mar. 13, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363033A1.pdf> (last accessed Dec. 9, 2020).



- Provider arrangements with school districts to provide free or deeply discounted Internet access to students, teachers, or both who lack Internet access at home;
- Donations of Internet devices such as iPads and Chromebooks to students and teachers for at-home teaching and learning; and
- Network-level protection against fraudulent calls, including COVID-related scams.⁶

CTIA and its members recognize the significant impact that COVID-19 has had on Hawaii consumers, and have been and continue to be at the forefront of providing relief measures to ensure that Hawaii consumers remain connected through this difficult period.

III. SUSPENDING WIRELESS DISCONNECTIONS WOULD CONSTITUTE PROHIBITED REGULATION OF WIRELESS CARRIERS' RATES

While wireless carriers will continue to work hard to ensure that Hawaii consumers remain connected through the pandemic, the Commission must ensure that its regulations and measures are consistent with the scope of its authority. State regulation of wireless rates is preempted by Section 332(c)(3) of the federal Communications Act.⁷ A Commission order suspending disconnections would violate this provision by effectively setting wireless carriers' rates at zero.

To better understand why a disconnection suspension would be preempted under Section 332(c)(3)(A), understanding the meaning of the terminology of the statute, "rates charged," is helpful. It is uncontroversial that

⁶ See, e.g., CTIA, "The Wireless Industry Responds to COVID-19," *available at* <https://www.ctia.org/homepage/covid-19> (last accessed Dec. 9, 2020).

⁷ 47 U.S.C. § 332 (c)(3)(A) ("[N]o State or local government shall have any authority to regulate the entry of or the *rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.") (emphasis added).



Section 332(c)(3)(A) bars states from setting the monetary amount a wireless carrier charges its customers. However, the FCC has recognized that a rate is not just a dollar figure set by a carrier. Rather, that figure is one of a whole set of elements.⁸ To reach this conclusion, the FCC relied on the Supreme Court’s articulation that, “[r]ates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.”⁹ The Supreme Court also recognized that charges or rates necessarily include non-price features, noting that unless this were true, carriers would be free to lower or raise the increment of service provided without changing the price.¹⁰ Thus, the FCC recognized that a rate is an amount of payment that is based on some other amount(s).

Wireless carriers’ “rates” for a particular service typically have three core elements:

- The first element is a dollar amount or price;
- The second is an increment of service permitted be consumed (typically minutes for voice and gigabytes or some other measurement for data); and
- The third is the service period within which the price entitles the customer to consume the increment of service.

Since Section 332 preempted states from regulating wireless carriers’ rates or entry in 1993 there have been multiple state attempts to challenge parameters of the statute, including in the context of wireless carriers’ rates. In one such example, a number of states challenged the practice of measuring customer usage of voice service by rounding up when measuring partial minutes used. States argued that they could prohibit this practice under their preserved “other terms and conditions” authority. The FCC disagreed, finding

⁸ In the Matter of Southwestern Bell Mobile Systems, Inc., 14 FCCR 19898 at 19906-07 (1999) (“*Southwestern Bell*”).

⁹ *Id.* (quoting *Am. Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 223 (1988) “*Central Office*”).

¹⁰ *Central Office* at 223.



that Section 332 prohibits states from regulating “both *rate levels and rate structures*” and that states “*may not prescribe the rate elements* for CMRS or specify which among CMRS services can be subject to charges by CMRS providers.”¹¹ It has also been held that state “regulations [cannot] require a carrier to recover nor prohibit a carrier from recovering a particular cost.”¹² More to the point, these holdings demonstrate that even if a state is not setting a dollar figure for wireless service, it can still be attempting to impose prohibited rate regulation – as is the case here.

A disconnection suspension would run afoul of Section 332 by regulating wireless carrier rate levels, rate structure, and/or rate elements. Specifically, such would fundamentally and impermissibly change a rate element of wireless carriers’ offerings by denying them the discretion to collect from consumers on a monthly basis. Carriers operate under the expectation that they will be receiving remissions from their customers at the end of monthly terms, which comes at the risk that their customers will not pay (and therefore deny carriers revenue or necessitate costly collection measures). Under normal circumstances, there are ways for carriers to help balance this risk through their rates. If a customer does not pay bills on time, the carrier can assess a late fee to defray the costs of carrying the consumer longer than they expected based on their anticipated revenue, or simply refuse to provide service to a delinquent customer going forward. Alternately, if a carrier wishes to mitigate the risk of increased loss of revenue over a longer-term contract, it has the option to set pricing higher for that period of time to compensate. A disconnection suspension would strip carriers of a risk mitigation option, which is why it constitutes prohibited rate regulation. Essentially, it requires a carrier to offer all its consumers plans of indefinite term regardless of a consumer’s ability to pay, thus increasing risk and removing any predictability from when a carrier will recover the costs of the service it continues to provide. Section 332

¹¹ *Southwestern Bell* at 19,908 (emphasis added).

¹² *National Association of State Utility Consumer Advocates v. Federal Communications Commission*, 457 F.3d 1238, 1255 (2006).



forbids states from “prohibit[ing] a carrier from recovering a particular cost,”¹³ and by prohibiting disconnections, the Commission is doing just that.

A Commission ordered disconnection suspension cannot reasonably be interpreted as something other than as a regulated rate of zero, nor can it be justified as the imposition of only temporary rates or indefinite delays in wireless carriers’ ability to collect their rates; a disconnection suspension constitutes unlawful rate regulation. Due to the time value of money, mandating the deferral of payment effectively constitutes an obligation on the carrier to accept a lower rate.¹⁴ In other words, it would constitute a regulation of the carrier’s rates, which is prohibited by Section 332(c)(3)(A) of the federal Communications Act.

As discussed above, wireless carriers are already providing various forms of relief for customers affected by the pandemic. There is no need for the Commission to mandate such relief.

IV. SUSPENDING WIRELESS DISCONNECTIONS WOULD BE INCONSISTENT WITH THE COMMISSION’S DEREGULATION OF WIRELESS CARRIERS

Imposing a suspension on disconnections would also be inconsistent with the Commission’s conclusion in 2004 to substantially revise its rules to broadly deregulate the wireless industry and make its rules more consistent with the provisions of Section 332(c)(3) of the federal Communications Act.

In Decision 20890, the Commission waived virtually all requirements of the Hawaii Revised Statutes (“HRS”) and Hawaii Administrative Rules (“HAR”) related to pricing of services and billing practices of carriers, finding that “competition, in this instance, will serve the same purpose as public interest regulation, and ... the waiver of such sections is consistent with the public

¹³ *Id.*

¹⁴ See, e.g., *Application of Hawaiian Electric Co., Inc. and Maui Electric Co., Inc. for Approval to Recover Deferred Costs for Stage 2 Inter-Island Interconnection Study Through the Renewable Energy Infrastructure Program Surcharge*, Decision and Order No. 32980, at 33 (July 10, 2015) (allowing applicants to recover carrying charges for an interconnection study, including the time value of money).



interest.”¹⁵ It is inconsistent with the stipulations and waivers in Decision 20890 for the Commission to impose a disconnection suspension requirement on wireless carriers, thereby directly regulating wireless carriers’ rates and practices in a manner inconsistent with Decision 20890.

Further, the facts developed over the course of the 15 years since the Commission adopted Decision 20890 contradict any argument supporting such an approach. During that time Hawaii consumers experienced economic effects from crises such as large-scale volcanic eruptions and the global financial crisis in 2009. As the Commission accurately predicted in Decision 20890, the competitive market served customers well as carriers’ responded to their customers’ needs and offer relief measures. Furthermore, vibrant wireless competition has brought to market many low-cost service plans for consumers to select among and broad participation in the Lifeline program – a social safety net available to consumers in need. CTIA suggests that the Commission should continue to trust that competitive forces within the wireless market will ensure that consumers receive relief – just as they did during the current and prior crises – and that there is no need to impose a suspension of disconnections.

V. THE COMMISSION’S SUSPENSION WOULD CONSTITUTE A TAKING IF APPLIED TO WIRELESS CARRIERS

A suspension on disconnection for non-payment would also constitute an unconstitutional regulatory taking as applied to wireless carriers. In determining whether governmental regulation constitutes a “taking” under the Fifth Amendment of the U.S. Constitution, courts apply an ad-hoc, factual test based on factors articulated in the Supreme Court’s *Penn Central* decision.¹⁶ Particularly relevant in this analysis is whether the regulation would interfere with reasonable, investment-backed expectations.¹⁷ There is no question that a

¹⁵ Decision 20890 at 15. CTIA notes that many of the regulations removed via Decision 20890 undoubtedly were earlier preempted by Congress’s adoption of 47 U.S.C. § 332(c)(3)(A).

¹⁶ *Penn Central Transportation Co. v. City of N.Y.*, 438 U.S. 104 (1978) (“*Penn Central*”).

¹⁷ See *Penn Central*, 438 U.S. at 124.



suspension of disconnections would interfere with wireless carriers' expectations regarding their ability to collect their rates for their services, undermining their ability to recover their significant investments in their networks. Hawaii's wireless carriers are investing billions of dollars to deploy 5G networks, including throughout Hawaii, and their ability to recover those costs depends upon their ability to predictably recover fees from their customers. A suspension of disconnections would place an open-ended restriction on their ability to do so, significantly interfering with their reasonable, investment-backed expectations.

The economic impact and character of a suspension on disconnections also demonstrate that it would be a taking from wireless carriers. The economic impact of an open-ended restriction on carriers' ability to collect their rates for their services has the potential to be significant. And the character of the governmental action – an order that would require regulated entities to provide service without the ability to collect charges from a potentially significant number of customers – also highlight that a suspension of disconnections would be a taking.

The impact of a disconnection suspension would be particularly pronounced for wireless carriers because, unlike rate-regulated utilities subject to the Commission's jurisdiction, such as electric utilities, the Commission cannot make wireless carriers whole for any uncollectable charges. Wireless carriers operate in a competitive environment where they could lose customers to other providers, and the Commission cannot set wireless carriers' rates to ensure that they recover the costs of the regulation (here a disconnection suspension) that the Commission imposes on them. The suggestion that wireless providers may earn reasonable returns from other customers or lines of business other than those that are the subject of a disconnection suspension does not allow the Commission to cut off companies' ability to recover their rates from customers (effectively setting a rate of zero for those customers) without just compensation.¹⁸ The Commission must arrange recompense if it forces a

¹⁸ *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 399 (1920) (“A carrier cannot be compelled to carry on even a branch of business at a loss.... [It cannot] be



company to operate one line of business at a loss, and it cannot look to revenues earned in other lines of business to make up the difference.¹⁹ Because the Commission lacks the authority to regulate wireless carriers' rates, it also lacks authority to provide the cost recovery that the Takings Clause requires.

Wireless carriers' willingness to provide relief from disconnection and late fees pursuant to the Pledge does not change that a disconnection suspension imposed by the Commission would be a taking. The Pledge was a voluntary measure agreed to by communications carriers in the context of a cooperative framework. Signatories to the pledge had the opportunity for input into the structure of the Pledge and also controlled the time and extent of their participation. A carrier experiencing excessive financial hardship, for example, could opt out of the Pledge. Not so with a Commission-ordered suspension, which would leave carriers no choice with regard to their participation.

VI. A DISCONNECTION SUSPENSION WOULD IMPERMISSIBLY IMPOSE STATE REGULATION ON INTERSTATE WIRELESS SERVICES

As applied to wireless services, a disconnection suspension would be inconsistent with federal law on the grounds that it would impermissibly apply state regulation to interstate services. Section 2 of the Communications Act delineates the boundaries of federal and state authority, reserving for federal regulation "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio,"²⁰ and reserving for the states jurisdiction over intrastate communications services.²¹ This jurisdictional separation would be violated by imposing a disconnection suspension on wireless carriers because it would inevitably impose state regulation on interstate telecommunications (such as interstate voice calls), interstate information

compelled to spend any other money to maintain a [business] for the benefit of others who do not ... pay for it.").

¹⁹ *Id.*

²⁰ 47 U.S.C. § 152(a).

²¹ *See* 47 U.S.C. § 152(b).



services (such as mobile broadband Internet access and text messaging) and customer premises equipment (“CPE”).

As the Commission is well aware, the overwhelming majority of wireless consumers in Hawaii subscribe to bundles of services that include both intrastate and interstate calling, mobile broadband Internet access, and other interstate services. Some Hawaii wireless consumers’ bills also include charges for mobile devices and other CPE, which are also beyond the Commission’s authority to regulate.²² Stated simply, wireless carriers largely lack the ability to “unbundle” the intrastate voice service and apply a disconnection suspension only to that service. In fact, courts have recognized that no-disconnect rules inherently affect both interstate and intrastate service and therefore, given the strictures of Section 2, have required the FCC to justify no-disconnect rules under principles of federal preemption.²³ Hawaii, however, has no power to preempt federal law and therefore may not extend its regulations to interstate services. As a result, a suspension on disconnections cannot be applied to wireless carriers.

VII. APPLYING A DISCONNECTION SUSPENSION TO WIRELESS CARRIERS WOULD BE INCONSISTENT WITH AND BURDEN THE FEDERAL UNIVERSAL SERVICE FUND IN VIOLATION OF FEDERAL LAW

Finally, a disconnection suspension also would be impermissible if applied to wireless carriers because it would violate section 254(f) of the federal Communications Act.²⁴ That provision bars any state “regulations” that are “inconsistent with the [FCC’s] rules to preserve and advance universal service.”²⁵ The ability to disconnect a customer is one of several important tools carriers have to encourage payment, so suspending disconnections is inconsistent with the FCC’s rules to preserve and advance universal service because it would

²² See *California v. FCC*, 905 F.2d 1217, 1225 (9th Cir. 1990).

²³ See, e.g., *Texas Office of Pub. Util. Council v. FCC*, 183 F.3d 393, 421-424 (5th Cir. 1999).

²⁴ See 47 U.S.C. § 254(f).

²⁵ *Id.*



significantly interfere with wireless carriers' ability to collect customer charges, including interstate telecommunications charges. The FCC's universal service mechanism depends on the collection of mandatory contributions from carriers based on interstate telecommunications revenues.²⁶ A state regulation, such as the proposed suspension, that would reduce wireless carriers' ability to collect interstate revenues plainly would be inconsistent with the FCC's universal service rules, and thus impermissible.

In addition, under section 254(f), states may adopt policies to preserve and advance universal service "only to the extent that such regulations ... do not rely on or burden Federal universal service support mechanisms."²⁷ A suspension of disconnections is a universal service mechanism because it seeks to ensure that voice service remains universally available to Hawaii consumers during the pandemic. As applied to wireless, it would significantly interfere with wireless carriers' ability to collect customer charges, including interstate telecommunications charges that fund the federal universal service fund. This would depress Hawaii carriers' interstate revenues, thereby impermissibly burdening the federal universal service fund.

VIII. THE COMMISSION'S APPROACH SHOULD RECOGNIZE THE REALITIES OF A LONG-TERM PANDEMIC RESPONSE

CTIA recognizes that the Commission's goal is to address hardship caused by the ongoing pandemic, and the wireless industry wholeheartedly shares that goal. As discussed in Section II above, Hawaii's wireless providers agree that the unique circumstances of this pandemic warrant a response and are actively engaged in providing one. At the same time, an open-ended requirement that wireless providers offer free service and allow customers' bills to accumulate is not a sustainable approach for either customers or providers.

Separate from the legal infirmities with the Commission applying a disconnection suspension to wireless carriers, CTIA suggests that such a suspension is over-

²⁶ See 47 C.F.R. § 54.706.

²⁷ 47 U.S.C. § 254(f).



broad in that it would appear to prevent all disconnections, not just disconnections caused by circumstances arising from the Covid-19 pandemic. Accordingly, if the Commission seeks to apply a disconnection suspension in 2021, it should make clear that it applies only to customers affected by the pandemic. To be clear, though, even such an amendment to the suspension would not cure the fact that it would be illegal if applied to wireless carriers.

In May, as the FCC's Pledge was nearing the end of its term, FCC Chairman Pai [wrote](#) to leaders of both parties in Congress.²⁸ He described the extraordinary actions that the FCC and providers had taken to ensure that Americans remained connected through the pandemic, but noted that, given the passage of time, it was appropriate for legislators to consider appropriating additional funding to advance the effort of ensuring that Americans remain connected in these difficult times.

CTIA concurs that, at this point in the pandemic response, it is appropriate for policymakers to recognize that the cost of ensuring that Americans retain their mobile and broadband services is a shared burden best addressed through legislation or global rulemakings rather than moratorium orders. CTIA therefore encourages the Commission to consider other approaches to ensuring that Hawaii consumers remain connected, and CTIA stands ready to work with the Commission to that end.

Respectfully submitted,

/S/

Benjamin J. Aron
Director, External and State Affairs

²⁸ See Letter from FCC Chairman Ajit Pai to Members of Congress (June 19, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-365042A1.pdf>.

FILED

2020 Dec 09 PM 13:27

PUBLIC UTILITIES
COMMISSION

The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).