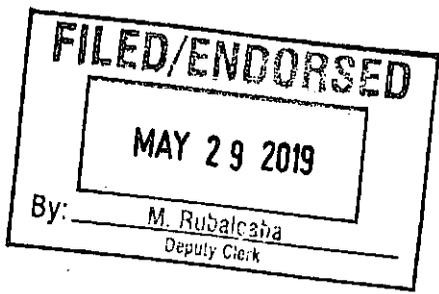


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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SACRAMENTO

**AT&T CORP.,**  
  
Petitioner,  
  
v.  
  
**CALIFORNIA GOVERNOR'S OFFICE OF  
EMERGENCY SERVICES,**  
  
Respondent.

Case No. 34-2019-80003146  
[Assigned to the Honorable James P. Arguelles—Department 17]  
**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
PETITIONER'S EX PARTE  
APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND ORDER  
TO SHOW CAUSE RE PRELIMINARY  
INJUNCTION**  
  
Date: June 3, 2019  
Time: 1:30 p.m.  
Dept: 17  
Judge: Hon. James P. Arguelles  
Trial Date: None  
Action Filed: May 16, 2019

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1 **INTRODUCTION**

2 AT&T's ex parte application for a temporary restraining order and an order to show cause  
3 is defective on a number of grounds.

4 First, AT&T has not shown that the balance of harms tips in its favor. On the contrary, the  
5 record demonstrates that the balance of harms tips heavily in favor of the California Governor's  
6 Office of Emergency Services (Cal OES). Delay in deploying Next Generation 9-1-1 (NG 9-1-1)  
7 in California, as will be the case if AT&T's last-minute attempt to derail the bidding process  
8 succeeds, will indefinitely endanger the health, safety, and welfare of tens of millions of people  
9 across California. In contrast, if the Court denies AT&T's untimely ex parte application,  
10 comparatively little harm will come to AT&T, which will still have the opportunity to complete  
11 the bidding process, and if it is an unsuccessful bidder, challenge any award in the ordinary  
12 course through a petition for writ of mandate. At this stage, and through an emergency  
13 proceeding no less, there is no reason for the Court to place AT&T's asserted business interests  
14 over and above the public's health and safety interests.

15 AT&T has also failed to show that it is likely to succeed on the merits of any of its claims.  
16 AT&T's principal contention, that Public Utilities Code section 710 (section 710) prohibits the  
17 tariff requirement under the Request for Proposal (RFP), ignores the clear exception set forth in  
18 section 710, subdivision (c)(8), which provides that section 710 does not affect or supersede the  
19 Warren-911-Emergency Assistance Act, the California statute generally governing 9-1-1 services.  
20 As explained below, subdivision (c)(8) strongly evidences the Legislature's intent that the 9-1-1  
21 emergency services at issue here remain outside the reach of section 710. AT&T ignores this  
22 aspect of section 710 entirely.

23 AT&T's argument that Cal OES may not require pricing to be publically disclosed also  
24 lacks merit. The applicable provisions of the Public Contract Code governing information  
25 technology and telecommunications contracts, along with the RFP, permit the tariff requirement,  
26 including the accompanying public cost disclosure at issue here. As explained in the declarations,  
27 submitted herewith, the successful bidders will have the opportunity to update their filed tariffs to  
28 reflect the final, negotiated price as contemplated by the authorities governing this procurement.

1 AT&T equally fails in its attempt to challenge the “not to exceed” price (NTE) requirement  
2 of the RFP. As discussed below, and as set forth in the declarations filed in support of this brief,  
3 Cal OES utilized an objective and deliberate process to develop the NTE pricing included in the  
4 RFP. Among other things, that process involved the consideration of data provided by a third-  
5 party consultant, who provided an informed estimate of the probable cost of NG 9-1-1, and Cal  
6 OES’s own research and analysis of similar services outlined in publically available contracts  
7 involving other states. Substantial evidence supports the NTE requirement as included in the  
8 RFP, and the Court should reject AT&T’s assertion to the contrary.

9 Finally, this Court should reject AT&T’s emergency application for injunctive relief  
10 because AT&T waited until the eleventh hour to file it. Having been aware of the relevant  
11 bidding requirements for many months—since July 2018 in the case of the “not to exceed” (NTE)  
12 pricing requirement as well as the tariff requirement—AT&T unreasonably waited until May 23,  
13 2019 to file the instant ex parte application. Such a delay in seeking relief weighs heavily against  
14 granting emergency injunctive relief. It also works to prejudice Cal OES’s opportunity to defend  
15 against the instant application; Cal OES has had a scant three court days to respond to it.  
16 Whether framed as laches, unclean hands, or unjustifiable delay, the Court should deny the  
17 application for this reason as well.

## 18 **FACTUAL BACKGROUND**

### 19 **I. NEXT GENERATION 9-1-1 EMERGENCY COMMUNICATION SYSTEMS**

20 In 2014, the Legislature enacted Senate Bill No. 1211, which was an amendment to the  
21 Warren-911-Emergency-Assistance Act of 1976, the bill that established California’s  
22 existing 9-1-1 system. (Stats. 2014, ch. 926, § 1.) The bill added Government Code section  
23 53121, which directs Cal OES to implement and operate a NG 9-1-1 emergency communication  
24 system.

25 Section 53121 provides that Cal OES “shall develop a plan and timeline of target dates for  
26 the testing, implementation, and operation of a Next Generation 911 emergency communication  
27 system, including text to 911 service, throughout California.” (Gov. Code, § 53121, subd. (a).)  
28 “In order to maximize efficiency and contain costs,” section 53121 also states that “the Next

1 Generation 911 emergency communication system shall incorporate, where consistent with public  
2 safety and technologically feasible, shared infrastructure and elements of other public safety and  
3 emergency communications networks[.]” (*Id.*, § 53121, subd. (b).) This shared infrastructure  
4 includes, but is not limited to, specified public safety communications elements; public safety  
5 broadband networks authorized by federal law; and public safety radio and communications  
6 facilities used for the purpose of public warnings. (*Id.*, § 53121, subd. (b)(1)-(4).)

7 The Legislature clearly viewed the orderly and timely development and implementation of  
8 NG 9-1-1 as a critical endeavor. For example, in discussing the “text to 911” service that the  
9 Legislature required be included in the new system, one Senate bill analysis explained: “While a  
10 voice call to 911 is still preferred, text to 911 offers public safety advantages for persons with  
11 disabilities, in a hostage situation or home break-in when a voice call can be dangerous, and when  
12 network congestion from high usage during a crisis makes voice connections unavailable or  
13 slow.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 1211 (2013-2014  
14 Reg. Sess.) Aug. 24, 2014, p. 4, italics added.)<sup>1</sup>

15 The Legislature’s view of the importance of NG 9-1-1 is well-taken. The state’s current  
16 9-1-1 system (referred to as “Legacy 9-1-1”) is based on technology and infrastructure that is  
17 beyond its useful life. (Declaration of Walter Carrier, submitted herewith (Carrier Decl. ¶ 3.)  
18 The state is currently experiencing an increased number of outages that exceed acceptable levels.  
19 (*Ibid.*) The Legacy 9-1-1 system cannot be upgraded in its current form to reduce these outages  
20 to acceptable levels. (*Ibid.*)

## 21 **II. THE REQUEST FOR PROPOSAL AT ISSUE**

22 To accomplish the Legislature’s directives regarding NG 9-1-1, Cal OES, in conjunction  
23 with the California Department of Technology (CDT), developed a solicitation and procurement  
24 process to secure vendors to build and operate NG 9-1-1. (Carrier Decl. ¶ 4.) On April 1, 2019,  
25 Cal OES released the RFP to obtain bids from qualified bidders. (See *id.* ¶¶ 5-8.)

26  
27 <sup>1</sup> Cal OES requests the Court to take judicial notice of this report in the Request for  
28 Judicial Notice filed herewith. A copy of the report is attached to the supporting Declaration of  
Jeffrey A. Rich, also filed herewith.

1           **A. The Tariff Requirement**

2           Among other things, the RFP includes a requirement for all vendors participating in the  
3 solicitation to file tariffs with the California Public Utilities Commission (CPUC). (Carrier Decl.  
4 ¶ 16.) A tariff, by definition, is a document that lists fixed charges made by a business, often for  
5 the use of gasoline, electricity, or a telephone, for example. (See [https://www.merriam-  
6 webster.com/dictionary/tariff](https://www.merriam-webster.com/dictionary/tariff) [“a schedule of rates or charges of a business or a public utility”].)  
7 Broadly speaking, entities like the CPUC require utilities to file and maintain tariffs so that they  
8 can adequately monitor and regulate the terms and conditions of the utility’s services to its  
9 customers, along with any rates, charges, or rules of a utility, for example.<sup>2</sup>

10           In California, the CPUC requires regulated utilities, including telephone corporations, to  
11 maintain with the CPUC tariffs setting forth what the utility is authorized to charge customers for  
12 various services. (See e.g. Declaration of Cynthia Walker, submitted herewith (Walker Decl.)  
13 ¶¶ 4, 9.) A tariff is a non-discriminatory offer of service with specified prices, and terms and  
14 conditions. (*Id.* ¶ 4.) In the context of the Cal OES RFP, a tariff ensures that the State of  
15 California, the customer, is purchasing a properly-regulated service that is essential to the public  
16 welfare—here, 9-1-1. (*Ibid.*) Absent tariffing, 9-1-1 services would be effectively unregulated in  
17 California, with no firm mechanisms in place to ensure that the public actually receives the  
18 services mandated by the Legislature. (*Ibid.*)

19           Tariffs are a critical aspect of NG 9-1-1 because Cal OES cannot rely solely on contract  
20 remedies to ensure 9-1-1 services are available 24 hours a day, seven days a week and 365 days a  
21 year. In most cases, the harshest contract remedy for nonperformance is to terminate the contract.  
22 For 9-1-1 services, terminating the contract is not a viable option because 9-1-1 services cannot  
23 fail. Californians’ health, welfare and safety, and in many cases, their lives, are dependent on a  
24

25           <sup>2</sup> The CPUC “is a state agency of constitutional origin with far-reaching duties, functions  
26 and powers. (Cal. Const., Art. XII, §§ 1–6.) It “may supervise and regulate every public utility in  
27 the State and may do all things, whether specifically designated in this part or in addition thereto,  
28 which are necessary and convenient in the exercise of such power and jurisdiction.” (Pub. Util.  
Code, § 701.) “The commission’s authority has been liberally construed” (*Consumers Lobby  
Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905, citing cases), and  
includes not only administrative but also legislative and judicial powers (*People v. Western Air  
Lines* (1954) 42 Cal.2d 621, 630).

1 fully functional operating 9-1-1 service. Administering a procurement process to transition from  
2 one 9-1-1 service provider to another can be a 12-18 month process and 9-1-1 must remain  
3 available throughout. Pursuant to a tariff, 9-1-1 providers must deliver 9-1-1 service based on  
4 CPUC regulations governing their performance. (Currier Decl. ¶ 18.)

5 By their own admission, AT&T was aware of the relevant tariff requirement—and all of the  
6 RFP requirements—as early as February of this year: “OES released a draft RFP in February  
7 2019. Members of the AT&T sales team met with OES at OES’s invitation to discuss the terms  
8 of the draft RFP. In communications to OES regarding the draft RFP, AT&T expressed concern  
9 about the legality of OES’s stated intention (in the draft RFP) to tariff NG 9-1-1 services as well  
10 as the amounts of the not to exceed prices that OES intended to incorporate into the RFP.”

11 (Declaration of Patrick Thetford, submitted in support of AT&T’s ex parte application [Thetford  
12 Decl.] ¶ 6.)

13 **B. The NTE Requirement**

14 Relevant to the RFP currently at issue, in July of 2018, Cal OES and CDT released the pre-  
15 solicitation document that included NTE pricing in a cost workbook. A total of nine vendors,  
16 including AT&T, participated in confidential discussions to ensure NTE pricing aligned with the  
17 services outlined in the pre-solicitation. All versions of the cost workbook pre-solicitation  
18 process included the statement: “The cost worksheets contain a not to exceed amount that has  
19 been calculated based on industry research for similar services.” (Currier Decl. ¶ 9.) AT&T first  
20 had the opportunity to comment on NTE pricing on July 20, 2018. During the pre-solicitation  
21 process, AT&T did not ask any questions related to individual cost items in the NTE pricing.  
22 (*Ibid.*) The pre-solicitation process provided an opportunity for potential bidders to provide  
23 feedback on NTE pricing. As a result of the confidential discussions, many bidders provided  
24 feedback either validating the NTE pricing or suggesting where the NTE pricing should be  
25 adjusted. As a result of the pre-solicitation process, many updates were made to the NTE pricing  
26 to ensure that the NTE pricing was accurate and in alignment with NG 9-1-1’s technical  
27 requirements. (*Id.* ¶ 11.)

1           When the RFP was released in April 2019, the NTE pricing reflected all verified feedback  
2 and validation received during the pre-solicitation process. In addition, the RFP process included  
3 the opportunity for vendors to further clarify the NTE requirements through the question and  
4 answer process. All written questions submitted by all vendors during the RFP process were  
5 posted with responses generated by CDT and Cal OES. All vendors could view RFP questions  
6 and responses. Some of the questions and responses during the RFP process were related to NTE  
7 pricing. (Currier Decl. ¶ 15.)

8           Cal OES utilized an objective and deliberate process to develop the NTE pricing included  
9 in the NG 9-1-1 RFP. The initial NTE pricing was based on data provided by a third party  
10 consultant who provided an estimate of probable cost for NG 9-1-1. Cal OES performed research  
11 and analysis of similar services in publically available contracts from procurements in other  
12 states. (Currier Decl. ¶ 12.)

13           **STANDARD FOR ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF**

14           An injunction is an extraordinary power, to be exercised always with great caution and,  
15 therefore, should rarely, if ever, be exercised in a doubtful case. “The right must be clear, the  
16 injury impending and threatened, so as to be averted only by the protective preventive process of  
17 injunction.” (*City of Tiburon v. Northwestern Pac R. Co.* (1970) 4 Cal.App.3d 160, 179, quoting  
18 *Schwartz v. Arata* (1920) 45 Cal.App. 596, 601.) As one court has observed, “it is clear that a  
19 plaintiff must make some showing which would support the exercise of the rather *extraordinary*  
20 power to restrain the defendant’s actions prior to a trial on the merits.” (*Tahoe Keys Property*  
21 *Owners’ Ass’n. v. State Water Resources Control Board* (1994) 23 Cal.App. 4th 1459, 1471  
22 (*Tahoe Keys*), emphasis added.)

23           When deciding whether to grant preliminary injunctive relief, the trial court considers two  
24 interrelated factors: (1) the interim harm that the applicant will sustain if the injunction is denied  
25 as compared to the harm to the defendant if the injunction issues; and (2) the likelihood of success  
26 on the merits at trial. (*Choice-In-Education League v. Los Angeles Unified School District* (1993)  
27 17 Cal.App.4th 415, 422.) The court may deny a preliminary injunction either (1) on its finding  
28 irreparable injury will not result to the party seeking the injunction, or (2) that the party has failed

1 to demonstrate a reasonable probability of success on the merits. (*People v. Pacific Land*  
2 *Research Co.* (1977) 20 Cal.3d 10, 21.) “However before the trial court can exercise its  
3 discretion the applicant must make a prima facie showing of entitlement to injunctive relief. The  
4 applicant must demonstrate a real threat of immediate and irreparable injury [citations] due to the  
5 inadequacy of legal remedies.” (*Triple A Machine Shop, Inc., v. State of California* (1989) 213  
6 Cal.App.3d 131, 138); see also *Tahoe Keys, supra*, 23 Cal.App. 4th at p. 1471 [“Accordingly,  
7 before individually addressing the potential merits of TKPOA’s theories, we will first address  
8 TKPOA’s claim of interim harm by denial of preliminary injunctive relief”].)

9 The plaintiff faces a higher burden where, as here, he or she seeks to enjoin public officers  
10 from performing their duties. The moving party must make a higher showing of irreparable  
11 injury because “[t]here is a general rule against enjoining public officers or agencies from  
12 performing their duties.” (*Tahoe Keys, supra*, 23 Cal.App.4th at p. 1471; see also *Agricultural*  
13 *Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401 [“The codes, embodying a  
14 settled principle of equity jurisprudence, prohibit the granting of injunctive relief [t]o prevent the  
15 execution of a public statute by officers of the law for the public benefit”].) “[T]o support a  
16 request for such relief the plaintiff must make a *significant* showing of irreparable injury.”  
17 (*Tahoe Keys*, at p. 1471, italics added.)

## 18 ARGUMENT

### 19 I. THE BALANCE OF HARMS TIPS HEAVILY IN CAL OES’S FAVOR

20 Indefinitely delaying the RFP process for the reasons argued by AT&T, which in turn will  
21 delay the implementation of NG 9-1-1, could jeopardize the lives of those who use 9-1-1 in  
22 California. The existing Legacy 9-1-1 infrastructure is beyond its useful life and must be  
23 upgraded to NG 9-1-1. In California, over the past 12 months, there has been an average of  
24 thirteen 9-1-1 outages per month, which equates to 22,705 minutes when 9-1-1 was not available.  
25 In March of 2019, some portion of the 9-1-1 network was down for 61,534 minutes. (Carrier  
26 Decl. ¶ 21.) Each minute the 9-1-1 system is not available, potentially as many as fifty-one (51)  
27 9-1-1 calls are not delivered. Delaying the RFP will delay the deployment of NG 9-1-1 and will  
28 perpetuate the current 9-1-1 outages. According to federal regulators, decreasing emergency

1 response times by as little as one minute could result in 10,000 more lives saved per year. (*Id.*  
2 ¶ 22.)

3 “It is well established that when injunctive relief is sought, consideration of public policy is  
4 not only permissible but mandatory.” (*O’Connell v. Superior Court* (2006) 141 Cal.App.4th  
5 1452, 1471.) “Where a prima facie case has otherwise been made out, an injunction will be  
6 granted only when such a remedy is appropriate, and in determining the availability of injunctive  
7 relief, the court must consider the interests of third persons and of the general public.” (*Loma*  
8 *Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588.)

9 If AT&T’s requested TRO is granted, the deployment of NG 9-1-1 will be delayed and the  
10 current 9-1-1 outages will be perpetuated. Further, if NG 9-1-1 is delayed, text to 9-1-1 will be  
11 delayed. As mentioned above, text to 9-1-1 offers public safety advantages for persons with  
12 disabilities, in a hostage situation or home break-in when a voice call can be dangerous, and when  
13 network congestion from high usage during a crisis makes voice connections unavailable or slow.  
14 Simply put, delay in deploying NG 9-1-1 presents a threat to the public’s safety. If, on the other  
15 hand, AT&T’s ex parte application is denied, AT&T still has the opportunity to proceed in the  
16 bidding process in the ordinary course, and seek judicial relief if it ends up being an unsuccessful  
17 bidder.

18 Because the balance of hardships tips sharply in Cal OES’s favor, the Court should deny the  
19 application.

## 20 **II. AT&T IS NOT LIKELY TO SUCCEED ON THE MERITS**

### 21 **A. Emergency 9-1-1 Services Are Not Subject to Section 710 and May Be** 22 **Tariffed**

23 AT&T contends (supp. memo. at p. 12) that section 710 “sets out a blanket prohibition” that  
24 the CPUC cannot exercise regulatory jurisdiction over Internet Protocol enabled services; section  
25 710 applies to NG 9-1-1 services because NG 9-1-1 is an IP-based system; and “[t]hus, by the  
26 plain language of Section 710, OES is prohibited from imposing any CPUC regulation on the NG  
27 9-1-1 services it seeks to procure through the RFP.”

1 But AT&T's core premise is wrong. Section 710 does not strip the CPUC of regulatory  
2 jurisdiction over 9-1-1 services. To the contrary, subdivision (c)(8) of section 710 makes clear  
3 that the statute does not affect or supersede the Warren-911-Emergency Assistance Act, which  
4 establishes and governs the state's 9-1-1 emergency services system.<sup>3</sup> Thus, through subdivision  
5 (c)(8), the Legislature expressly exempted the 9-1-1 emergency services system from section 710.  
6 Accordingly, there is no legal support for AT&T's contention that section 710 somehow exempts  
7 the NG 9-1-1 services from CPUC regulation.

8 Both section 710's legislative history and circumstances since section 710's enactment  
9 confirm that the Legislature always intended the 9-1-1 emergency services system to fall outside  
10 the scope of section 710. Section 710 was enacted in 2012 as part of Sen. Bill No. 1161 (2011-  
11 2012 Reg. Sess.) § 3 (SB 1161). (Stats. 2012, ch. 733.) The Legislature declared its intended  
12 purpose for enacting section 710:

13 It is the intent of this act to reaffirm California's current policy of regulating  
14 Internet-based services only as specified by the Legislature and thereby achieve both  
of the following:

15 (1) Preserve the *future of the Internet by encouraging continued investment and*  
16 *technological advances* and supporting continued *consumer choice and access to*  
*innovative services* that benefit California.

17 (2) Ensure a *vibrant and competitive* open Internet that allows California's  
18 technology businesses to continue to *flourish and contribute to economic*  
*development* throughout the state.

19 (*Id.*, § 1, subd. (b), italics added.) Notably, the Legislature made no mention that its purpose for  
20 enacting section 710 included the deregulation of 9-1-1 emergency services, as AT&T alleges.  
21 That fact is significant here because “[the Legislature] does not alter the fundamental details of a  
22 regulatory scheme in vague or ancillary provisions—it does not, one might say, hide elephants in  
23 mouseholes.” (*Whitman v. American Trucking Association* (2001) 531 U.S. 457, 468.)

24 \_\_\_\_\_  
25 <sup>3</sup> “In 1972 the Legislature enacted the Warren-911-Emergency Assistance Act. This act  
26 expressly recognizes the importance of the telephone system in procuring emergency aid. ‘The  
27 Legislature further finds and declares that the establishment of a uniform, statewide emergency  
28 [telephone] number is a matter of statewide concern and interest to all inhabitants and citizens of  
this state.’ (Gov. Code, § 53100, subd. (b).) The act also impliedly recognizes that ‘police, fire,  
medical, rescue, and other emergency services’ are frequently sought by use of the telephone.  
(*Ibid.*)” (*Soldano v. O’Daniels* (1983) 141 Cal.App.3d 443, 450.)

1 Furthermore, the Senate's Floor analysis of SB 1161 indicates that the Legislature specifically  
2 included subdivision (c)(8) to make clear that SB 1161 does not deregulate 9-1-1 emergency  
3 services: "Assembly Amendments add two additional *savings clauses to provide even more*  
4 *assurance* that the bill's limitation on regulation could not be construed to prevent enforcement of  
5 agency requirements related to communications services: (1) provides that the bill *does not affect*  
6 *enforcement of the Warren Act requiring a statewide 911 emergency telephone system . . . .*"  
7 (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 1161 (2011-2012 Reg.  
8 Sess.) Aug. 21, 2012, p. 2, italics added.)

9 AT&T's argument rings especially hollow because AT&T itself has long recognized that  
10 the mere inclusion of IP-based services does not deprive the CPUC of regulatory authority over 9-  
11 1-1 services. For years, AT&T California has provided 9-1-1 services that include IP-based  
12 services. (Walker Decl. ¶ 8.) And as far back as 2007, the CPUC issued a formal decision  
13 requiring AT&T to tariff those services.<sup>4</sup> Indeed, even as these services have increasingly  
14 incorporated IP-based services, AT&T has continued to comply with the CPUC's tariff  
15 requirement for 9-1-1 services. Thus, while it argues now that section 710 exempts it from  
16 tariffing, AT&T California currently maintains a publicly-available tariff on file for IP-enabled 9-  
17 1-1 services. (*Id.* at ¶ 9.)

18 In sum, because the RFP and NG 9-1-1 are specifically exempted from the scope of section  
19 710 under subdivision (c)(8), AT&T will not likely succeed on the merits of its claim that section  
20 710 prohibits the RFP from requiring bidders to file tariffs.

21 <sup>4</sup> More specifically, in Decision 07-09-018 the CPUC authorized AT&T California to  
22 detariff most of its existing retail services, with some notable exceptions including "a tariff for  
23 911 or other emergency services." (Declaration of Cynthia Walker, submitted herewith (Walker  
24 Decl.) ¶ 5.) In that decision, the CPUC determined that "detariffing of 911 services is not in the  
25 public interest." (*Ibid.*) Since the CPUC authorized the detariffing of telephone services in 2007,  
26 the CPUC has not at any point authorized the detariffing of 911 services. (*Ibid.*) Decision 07-09-  
27 018 further concluded that "the 911 system provides the public an important public service that  
28 must be available to all phone customers and must not be detariffed." (Walker Decl. ¶ 6.) The  
Commission noted in its discussion that Pacific Bell—AT&T's predecessor—also urged  
exempting 9-1-1 services from detariffing regime. (*Ibid.*) In comments submitted to the CPUC  
on September 26, 2008, Pacific Bell stated "because E911 services play such a unique and critical  
public safety role, the public interest would not be served by requiring them to be detariffed."  
(*Ibid.*)

1           **B. AT&T's Claim That the RFP Cannot Require Pricing to Be Publically**  
2           **Disclosed Is Unsupported**

3           **1. Public Contract Code section 6611 allows for the RFP processes in**  
4           **place here**

5           Presumably because it directly undermines AT&T's approach to this case, the ex parte  
6 application brushes aside the fact that Cal OES issued the RFP under Public Contract Code  
7 § 6611. (See RFP § 1 at p. 29 [Exh. B. to Thetford Decl.]) That statute expressly permits the  
8 State to negotiate with contractors in situations involving information technology and  
9 telecommunications. (See Pub. Contr. Code, § 6611, subd. (a)(2) [state can use negotiations  
10 when the "business need or purpose of a procurement or contract is known by the Department;  
11 but a negotiation process may identify different types of solutions to fulfill this business  
12 purpose"].) The statute authorizes such a negotiation process when any one of a number of  
13 conditions exist, including but not limited to when "negotiation is necessary to ensure that the  
14 department is receiving the best value or the most cost-efficient goods, services, information  
15 technology, and telecommunications." (Pub. Contr. Code 6611(a)(4); see generally Robert S.  
16 Metzger, Lauren B. Kramer, *The Importance of Competitive Negotiations to State Information*  
17 *Technology Procurement, Procurement Law*, Spring 2013, at 24 ["state officials are urged to  
18 examine their practices and to embrace the use of competitive negotiations in their procurement  
19 process"].)

20           Here, AT&T's challenge the RFP because, as AT&T puts it, the tariff-filing requirements  
21 violates a "general premise for confidentiality" applicable to a competitive bidding process.  
22 (Supp. Memo at p. 15.) But that assertion misses the point. The RFP indeed contains a  
23 confidentiality provision, but it is a limited provision. In relevant part, the RFP explains to all  
24 potential bidders that "[t]he content of all working papers and discussions relating to the Bidder's  
25 proposal shall be held in confidence indefinitely, *unless the public interest is best served by an*  
26 *item's disclosure because of its direct pertinence to a decision, agreement or the evaluation of the*  
27 *proposal.*" (RFP § 5 at p. 38, italics added [Exh. B. to Thetford Decl.]) This language makes  
28 sense when considered in light of Public Contract Code section 6611 and the open negotiation  
process it authorizes. As the RFP also explains, one intention of the tariff-submission

1 requirement is “to structure the pricing format in order to facilitate a straightforward comparison  
2 among all Bidders and foster competition to obtain the best market pricing.” (RFP § 5 at p. 62,  
3 [Exh. B. to Thetford Decl.].) Without the tariff-submission requirement, the comparison among  
4 bidders, competition, and best market pricing—all features of our economy that AT&T itself  
5 trumpets—simply will not occur.

6 Finally, and as the declarations on file demonstrate, AT&T has participated in several past  
7 procurements involving public pricing information submitted with the bids, prior to contract  
8 award. (Declaration of Tiffany Angulo, submitted herewith (Angulo Decl.) ¶ 13.) AT&T has  
9 participated in these procurements without protesting the requirement to publicly disclose the  
10 pricing information. (*Ibid.*) AT&T’s pricing information is already publicly available from  
11 various sources such as service catalogs, federal and state contracts and mandated tariffs filed  
12 with the CPUC. (*Ibid.*) The NG 9-1-1 tariff filing requirement is consistent with the standard  
13 competitive bidding requirements which AT&T has willingly complied with in other solicitations.  
14 (*Ibid.*)

15 **2. AT&T’s reliance on *Michaelis, Montanari & Johnson v. Superior***  
16 **Court is misplaced**

17 Arguing that pricing information cannot be publically disclosed, AT&T cites a single case,  
18 *Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal.4th 1065 (2006), in support of its  
19 position. *Michaelis*, though, arose in an entirely different context, one involving the intersection  
20 of competitive bidding rules and the Public Records Act duty of disclosure. Those are not the  
21 circumstances here. Moreover, the issue in *Michaelis* concerned the “availability and timing of  
22 public disclosure of competitive proposals submitted to a public agency as part of a process of  
23 qualifying and negotiating for a public contract, lease, or other project.” (38 Cal.4th at p. 1067.)  
24 And the Court concluded, under the circumstances there, “that public disclosure of such proposals  
25 properly may await conclusion of the agency’s negotiation process.” (*Id.* at p. 1068.) The Court  
26 did *not* hold, as AT&T states, that public disclosure of proposals in advance of a contract award is  
27 never allowed. And nowhere in *Michaelis* did the Court prohibit the requirement of, or reliance  
28 upon, publicly filed pricing information.

1           **C. The NTE Requirement of the RFP Is Entirely Proper**

2           As demonstrated in detail in the declarations filed in support of this opposition, the release  
3 of the RFP was preceded by an extensive “pre-solicitation” process to determine the technical  
4 requirements and pricing structure, including the NTE amounts specified in the RFP. The final  
5 NTE pricing structure set forth in the RFP was based on information obtained from: (i) several  
6 rounds of confidential discussions with eight vendors, including AT&T, (ii) written feedback  
7 from these vendors through the pre-solicitation question and answer process, (iii) extensive  
8 independent research conducted by Cal OES, (iv) publicly available information published by the  
9 federal government, (v) publicly available information from contracts and procurements  
10 conducted by other states, and (vi) data and recommendations provided by a third party  
11 independent consultant. (Currier Decl. ¶¶ 7-8.)

12           In July 2018, Cal OES and CDT released the pre-solicitation document that included NTE  
13 pricing in the cost workbook. A total of nine vendors, including AT&T, participated in  
14 confidential discussions to ensure NTE pricing aligned with the services outlined in the pre-  
15 solicitation. All versions of the cost workbook pre-solicitation process included the statement:  
16 “The cost worksheets contain a not to exceed amount that has been calculated based on industry  
17 research for similar services.” AT&T first had the opportunity to comment on NTE pricing on  
18 July 20, 2018. During the pre-solicitation process, AT&T did not ask any questions related to  
19 individual cost items in the NTE pricing. (Currier Decl. ¶ 10.)

20           The pre-solicitation process provided an opportunity for potential bidders to provide  
21 feedback on NTE pricing. As a result of the confidential discussions, many bidders provided  
22 feedback either validating the NTE pricing or suggesting where the NTE pricing should be  
23 adjusted. As a result of the pre-solicitation process, many updates were made to the NTE pricing  
24 to ensure that the NTE pricing was accurate and in alignment with NG 9-1-1’s technical  
25 requirements. (Currier Decl. ¶ 11.)

26           When the RFP was released in April 2019, the NTE pricing reflected all verified feedback  
27 and validation received during the pre-solicitation process. In addition, the RFP process included  
28 the opportunity for vendors to further clarify the NTE requirements through the question and

1 answer process. All written questions submitted by all vendors during the RFP process were  
2 posted with responses generated by CDT and Cal OES. All vendors could view RFP questions  
3 and responses. Some of the questions and responses during the RFP process were related to NTE  
4 pricing. (Currier Decl. ¶ 15.)

5 Accordingly, AT&T's contention that the RFP's NTE amount is unsupported by any  
6 evidence is demonstrably false.

### 7 **III. LACHES AND UNCLEAN HANDS BARS AT&T'S EX PARTE INJUNCTIVE RELIEF**

8 AT&T was first apprised of the RFP's NTE requirement in July 2018, nearly one year ago.  
9 (Currier Decl. ¶ 9.) AT&T was well aware of all of the issues it alleges in support of its requested  
10 injunctive relief more than three months ago, in February 2019, when Cal OES released a draft  
11 RFP. (Thetford Decl. ¶ 6 ["AT&T expressed concern about the legality of OES's stated intention  
12 (in the draft RFP) to tariff NG 9-1-1 services as well as the amounts of the not to exceed prices  
13 that OES intended to incorporate into the RFP"].) (*Ibid.*) Cal OES issued the RFP at issue on  
14 April 1, 2019, almost two months before AT&T filed the instant application. (*Id.* ¶ 7.)

15 AT&T bases its need for a TRO on the June 7, 2019, deadline for filing its tariffs, claiming  
16 it will suffer irreparable harm: "AT&T will, by June 7, 2019, be unlawfully forced to submit to  
17 the jurisdiction of the CPUC in violation of California law as to NG 9-1-1 services or, to avoid  
18 such an illegal condition, be forced to forgo bidding altogether." (Supp. Memo. at p. 6; see also  
19 *id.* at p. 17 ["AT&T will, by June 7, 2019, be forced to submit to the jurisdiction of the CPUC as  
20 to IP-enabled NG 9-1-1 services in violation of California law (Pub. Util. Code §710), or forgo  
21 bidding altogether"].)

22 However, AT&T fails to offer any justification for delaying until May 23, 2019, to file its  
23 TRO application. Indeed, AT&T's delay appears to be tactical, that is, AT&T's delay allows it to  
24 argue that it must seek injunctive relief on an ex parte basis, rather than by noticed motion,  
25 because of the June 7, 2019 deadline. AT&T's delay severely prejudices Cal OES, which is  
26 being forced to defend this action on shortened time. Specifically, AT&T's manufactured  
27 emergency severely limits Cal OES' ability to adequately oppose AT&T's TRO as contrasted to  
28 the additional time Cal OES would have to prepare its opposition papers for a noticed motion.

1 Cal OES has had only three court days to review AT&T's ex parte papers and prepare its  
2 opposition. (Declaration of Jeffrey A. Rich, submitted herewith [Rich Decl.] ¶ 4.)

3 It is well settled that laches is established by showing unreasonable delay in bringing the  
4 action and prejudice to defendant resulting from this delay. (*Conti v. Board of Civil Service*  
5 *Commissioners* (1969) 1 Cal.3d 351, 359.) It is likewise recognized that the defense of laches can  
6 be asserted in injunction cases. (*Tustin Community Hospital, Inc. v. Santa Ana Community*  
7 *Hospital Assn.* (1979) 89 Cal.App.3d 889, 894.) What is more, whether or not laches applies  
8 here, the Court should take AT&T's unexplained delay and manufactured emergency into account  
9 in assessing whether AT&T is entitled to preliminary injunctive relief. (See *Dolske v. Gormley*  
10 (1962) 58 Cal.2d 513, 520-521 [delay in seeking injunction against encroachments is factor to be  
11 considered in determining whether relief is warranted].)

12 Further, a party seeking the equitable remedy of injunctive relief must have "clean hands."  
13 Under the clean hands doctrine, inequitable conduct on the part of the party seeking relief is a  
14 complete defense. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446.)  
15 AT&T's hands are unclean for the same reasons that laches should apply: AT&T has  
16 unreasonably delayed in bringing its request for emergency relief to the Court's attention.

17 AT&T has brought this application at the last minute for no reason other than to delay the  
18 RFP bid process, gain leverage in that process, and interfere with the state's compelling interest in  
19 protecting its citizens through the provision of viable NG 9-1-1 services. This is clearly a tactic  
20 by AT&T to gain advantage over Cal OES in its opposition to this application, and further, to  
21 gain an advantage over AT&T competitors, who are now competing for the delivery of 9-1-1  
22 services. AT&T's unexplained and, therefore unreasonable, delay has prejudiced Cal OES and is  
23 subjecting the public to potential harm. Laches and unclean hands should bar AT&T's requested  
24 injunctive relief.

## 25 CONCLUSION

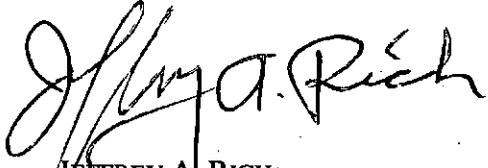
26 For the reasons stated above, AT&T's ex parte application should be denied in its entirety.  
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Dated: May 29, 2019

Respectfully Submitted,

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SA2019101526

**DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER**

Case Name: **AT&T Corp. v. California Governor's Office of Emergency Services  
[AT&T Bid Protest]**

No.: **34-2019-80003146**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **GOLDEN STATE OVERNIGHT COURIER SERVICE**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

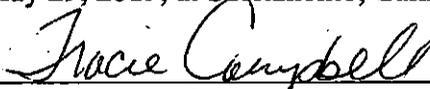
On May 29, 2019, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 29, 2019, at Sacramento, California.

Tracie L. Campbell  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature