

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of:

Restoring Internet Freedom

WC Docket No. 17-108

**REPLY COMMENTS  
OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

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## I. INTRODUCTION

The California Public Utilities Commission (CPUC) respectfully submits these reply comments in the Federal Communications Commission's (FCC or Commission) *Notice of Proposed Rulemaking* in WC Docket No. 17-108, *In the Matter of Restoring Internet Freedom (NRPM)*. The CPUC agrees with the many comments that demonstrate a continuing need for the Open Internet Rules as adopted in the *2015 Open Internet Order*<sup>1</sup> and urges the FCC to retain these rules. The CPUC also urges the FCC to retain the existing legal underpinning for the Open Internet Rules, as a review of the comments has not identified any other legal basis for retaining nondiscriminatory rules. The CPUC further agrees with commenters encouraging the FCC to act in a way that assures nothing prejudices States' reserved authority under various provisions of the Communications Act of 1934, as amended by the 1996 Telecommunications Act. In particular, the CPUC shares concerns that the FCC's proposals may undermine States' abilities to preserve and advance universal service, promote and regulate access to poles & conduit, and safeguard privacy and other consumer rights with respect to those services. Although the CPUC has independent authority to protect the public safety and welfare that the FCC cannot diminish,<sup>2</sup> fully ensuring the continued quality and reliability of telecommunications

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<sup>1</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (rel. Mar. 12, 2015) (*2015 Open Internet Order*) (referred to as the "Title II Order" in the *NRPM*).

<sup>2</sup> See CPUC Opening Comments, at 4-5 (citations omitted):

States have independent and primary authority, under both energy and telecommunications law, which is to say under both the Federal Energy Regulatory Commission (FERC) and FCC regulatory regimes, to ensure the safety of the energy and communications infrastructure. The CPUC and California utilities have an obligation under state law to protect the safety and

services will become a much more difficult task if the transmission network is again balkanized into “telecommunications” and “information” service regions. The CPUC addresses these points further below. These reply comments are not exhaustive. Silence with respect to any party’s comments should not be construed as assent or dissent.

## **II. DISCUSSION**

### **A. There is a continuing need for the Open Internet Rules.**

The CPUC agrees with the numerous commenters that outline the continued need for the Open Internet Rules, and urges the FCC to retain those rules in their entirety. As noted by the States’ Attorneys Generals, an open Internet is essential to consumers’ daily lives, and changes to the Open Internet Rules would “contradict consumers’ understanding of the role of their Internet Service Provider (ISP) and would unnecessarily expose consumers to the risk that their Internet access will be interfered with and disrupted.”<sup>3</sup> Greenlining further points out that, “[w]ithout these rules, ISPs will have the

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health of the public. Protection of public safety is a core exercise of a state’s police powers, and the CPUC has exercised its jurisdiction to ensure the safety of all poles and conduit in California by promulgating rules related to overhead electric and communications facilities (General Order 95) as well as underground electric and communications facilities (General Order 128). The FCC cannot diminish this state police power to protect public safety and welfare ...

The CPUC ... exercises jurisdiction over electric distribution facilities, and has authority to oversee reliability of those facilities, including utility poles. California additionally possesses authority delegated by FERC and implemented by the North American Electric Reliability Corporation (NERC), which cannot be diminished by FCC action.

California’s primary responsibilities in this regard are only underscored by the fact that it has “reverse preempted” and opted to regulate pole and conduit attachments under state law, pursuant to 47 U.S.C. § 224(c). *Id.* at 4.

<sup>3</sup> Attorneys General Comments, at p. 1.

incentive and power to charge for priority access to users or content while degrading access to traffic from parties that do not pay for priority.”<sup>4</sup>

Despite broadband providers’ promises that they are “committed to the core principles of Internet freedom”<sup>5</sup> or “strongly support an Open Internet,”<sup>6</sup> other commenters offer numerous reminders of past practices which demonstrated a need for the rules in the first place, including Comcast’s throttling consumer access to BitTorrent,<sup>7</sup> Verizon’s blocking its customers from using Google Wallet,<sup>8</sup> AT&T’s blocking of certain VoIP apps,<sup>9</sup> and Verizon’s statement in court that but for the rules, it would be exploring commercial arrangements [i.e., paid prioritization].<sup>10</sup> The CPUC agrees with Public Knowledge’s assessment that, despite carriers’ pledges and promises, they have the incentives and ability to engage in practices that are harmful to an open Internet, as the FCC itself found in its *2015 Open Internet Order*.

Broadband providers function as gatekeepers for both their end user customers who access the internet and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider’s end-user subscribers. ... [B]roadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users.<sup>11</sup>

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<sup>4</sup> Greenlining Comments, at p. 4.

<sup>5</sup> Frontier Comments, at p. 5.

<sup>6</sup> Verizon Comments, at p. 5.

<sup>7</sup> See, e.g., Attorneys General Comments at p. 8; Public Knowledge Comments, at p. 11.

<sup>8</sup> Public Knowledge and Common Cause Comments, at pp. 105-106.

<sup>9</sup> Public Knowledge and Common Cause Comments, at p. 106.

<sup>10</sup> Public Knowledge and Common Cause Comments, at p. 112; see also, National Association of State Utility Consumer Advocates (NASUCA) Comments at pp. 13-14.

<sup>11</sup> *2015 Open Internet Order*, ¶ 78.

The FCC cited to some of the very examples set forth here to support its finding that Internet openness is at risk, noting “the record provides substantial evidence that broadband providers have significant bargaining power in negotiations with edge providers and intermediaries that depend on access to their networks because of their ability to control the flow of traffic into and on their networks.”<sup>12</sup>

Certain providers further argue that prescriptive Open Internet Rules are not necessary as competition will operate to protect consumers from harmful practices. AT&T, for example, claims that “[b]roadband competition is more than capable of disciplining conduct that threatens consumer welfare.”<sup>13</sup> Verizon, too, asserts that it “faces significant competition... nearly everywhere it offers wireline broadband services.”<sup>14</sup> However, this is not the case in California.

The CPUC recently completed a review of the California telecommunications marketplace as of year-end 2015, and found that the market for residential broadband is “highly concentrated,” and especially so at higher speeds (25/3 Mbps and above).<sup>15</sup> Content and other edge providers effectively have very limited ways to reach consumers,

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<sup>12</sup> *Id.*, ¶ 80.

<sup>13</sup> AT&T Comments, at p. 5.

<sup>14</sup> Verizon Comments, at pp. 9-10.

<sup>15</sup> *Decision Analyzing the California Telecommunications Market*, CPUC D.16-12-025, Findings of Fact Nos. 17, 19 and 28 (available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M171/K031/171031953.pdf>). In this proceeding, the CPUC analyzed the broadband market at various speed tiers, and followed the FCC in setting a benchmark for Residential High-Speed Broadband to mean fixed (i.e., residential) broadband service advertised at speeds of at least 25 megabits per second download and 3 megabits per second upload. See, D.16-12-025, slip op. at p. 11, fn 16, citing *In re Deployment of Advanced Telecommunications Capability to All Americans Pursuant to Section 706 of the Telecommunications Act of 1996*, (GN Docket No. 14-126), 30 FCC Rcd 1375, rel. February 4, 2015, at ¶ 3 (2015 Broadband Progress Report) (setting 25/3 standard for first time).

with the primary avenue being, effectively, a cable/ILEC duopoly.<sup>16</sup> Wireless services do not compensate for the shortage of wireline competition, as no wireless carrier in California is regularly capable of delivering 25/3 Mbps service to California consumers.<sup>17</sup> The CPUC further noted how the market for wholesale inputs needed by wireless carriers – including middle-mile backhaul, poles, and access to poles and conduits – was insufficiently robust to promote new market entry and retail competition.<sup>18</sup> Pole and conduit support structures, in particular, were “bottlenecks” that further constrained competition.<sup>19</sup>

Absent strong prescriptive rules, providers – particularly those with substantial and persistent market power – would be free to engage in practices that harm an open Internet, control access to end users, and thwart consumers’ ability to access lawful content of their choice. Indeed, Frontier seems to indicate a desire to engage in such a practice when it complains that “by prohibiting paid prioritization and effectively preventing commercial negotiations, the Title II rules shield these largest providers [i.e., Netflix and YouTube] from contributing anything to broadband deployment or contributing to the continued upgrades required to support their increasingly bandwidth-intensive services.”<sup>20</sup> Verizon, too, qualifies its opposition to paid prioritization, citing

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<sup>16</sup> *Id.*; see also, *id.* at slip op. pp. 70 and 94 (relative lack of overbuilders, i.e., providers of a third wire into the house), and pp. 148-150 (dangers posed by vertical integration, i.e., “[t]elecommunications’ carriers increasing acquisitions of content,” and the conflicts of interest that brings).

<sup>17</sup> *Id.* at slip op. p. 96, second chart (last line numbers on first chart corrected by subsequent ruling), Finding of Fact No. 18.

<sup>18</sup> *Id.* at slip op. pp. 34-36, 98-117, Findings of Fact Nos. 21-27.

<sup>19</sup> *Id.*, and Finding of Fact No. 24.

<sup>20</sup> Frontier Comments, at p. 8.

instances that “result in harm to competition or consumers,”<sup>21</sup> thus, leaving the door open to some form of paid prioritization. The door should not be left open for carriers to engage in these types of practices; as the FCC previously found, a complete ban on paid prioritization was warranted as “the threat of harm is overwhelming, case-by-case enforcement can be cumbersome for individual consumers or edge providers, and there is no practical means to measure the extent to which edge innovation and investment would be chilled.”<sup>22</sup>

**B. The FCC should retain the existing legal support for the Open Internet Rules.**

Despite the *NPRM*’s apparent endorsement of the proposition that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service, the “proposals in this *NPRM* explicitly provide no legal basis for the FCC to impose several key net neutrality principles....”<sup>23</sup>

Some commenters claim they support the bright line rules the FCC adopted in the *2015 Open Internet Order*, but say that the FCC can support these rules with a Title I classification by following the “blueprint” the D.C. Circuit Court of Appeals offered in its 2014 *Verizon* decision. The Communications Workers of America (CWA) and NAACP, for example, cite to the D.C. Circuit’s suggestion that the Commission could adopt no blocking and anti-discrimination rules – based on Section 706 of the Communications Act – so long as the Commission also allowed negotiated agreements

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<sup>21</sup> Verizon Comments, at p. 4.

<sup>22</sup> *2015 Open Internet Order*, ¶ 19.

<sup>23</sup> National Association of Regulatory Utility Commissioners (NARUC) Comments, at p. 4.

between broadband and edge providers that meet a “commercially reasonable” standard.<sup>24</sup> This claim simply ignores the D.C. Circuit’s actual holding in *Verizon* that non-discrimination rules are common carriage rules, and would only be permissible if broadband were classified as a Title II telecommunications (i.e., common carrier) service.<sup>25</sup>

The position NAACP and CWA advance assumes that a “commercially reasonable” standard is equivalent to the nondiscriminatory rules adopted in the *2015 Open Internet Order*. We disagree. Any rules adopted with the information services classification would need to allow for some level of discrimination, per the D.C. Circuit’s analysis in the *Verizon* case.<sup>26</sup> Rules that allow for “commercially reasonable” practices in the provision of broadband Internet access service would enable providers to serve customers and carry traffic on an individually-negotiated basis, without having to hold themselves out to serve all users indiscriminately on the same or standardized terms, so long as the providers’ conduct is “commercially reasonable.” This is not common carriage, i.e., it is not the same as requiring providers to conduct themselves on nondiscriminatory terms with respect to both edge providers and end users.<sup>27</sup> Allowing

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<sup>24</sup> Communications Workers of America/NAACP Comments, at p. 4.

<sup>25</sup> *Verizon v. FCC*, 740 F.3d 623, at 655-656 (D.C. Cir. 2014) (*Verizon*):

[t]hus, we must determine whether the requirements imposed by the *Open Internet Order* subject broadband providers to common carrier treatment. If they do, then given the manner in which the Commission has chosen to classify broadband providers, the regulations cannot stand ... We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has ‘relegated [those providers], pro tanto, to common carrier status.

<sup>26</sup> *Verizon*, *supra*, 740 F.3d at 656-58.

<sup>27</sup> *Id.* at 652 (“we cautioned that were the Commission to apply the ‘commercially reasonable’ standard in

broadband carriers to discriminate among edge provider traffic is inconsistent with both consumers' wishes and the carriers' own advertising (which repeatedly refers to the "go anywhere" quality of the Internet).<sup>28</sup> Thus, reliance on "commercially reasonable" discriminatory practices could not simultaneously further the FCC's vision of protecting and promoting an expanding broadband market *and* an open Internet. Allowing such discrimination also would be directly at odds with the CPUC's historical, consistent advocacy of nondiscriminatory rules as a means to ensure fairness in telecommunications markets. Accordingly, California cannot support the "commercially reasonable" discrimination approach.

Further, as several commenters note, any changes to the rules or classification of broadband Internet access service (BIAS) would invite challenges sounding the theme that the FCC's action is arbitrary and capricious. As the State Attorneys General comment, the FCC adopted these rules previously based on a demonstrated need and they were upheld on judicial review. The Commission has identified no change in the function of the Internet or consumer perception of Internet access service that would justify reversing policies.<sup>29</sup> The CPUC shares concerns with several commenters who

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a restrictive manner, essentially elevating it to the traditional common carrier 'just and reasonable' standard, *see* 47 U.S.C. § 201(b), the rule might impose obligations that amounted to common carriage *per se*"). "In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold themselves out 'to serve the public indiscriminately'"). *Id.* at 655-56.

<sup>28</sup> 2015 *Open Internet Order*, at ¶ 27 ("go anywhere" advertising) and ¶ 330 ("'indispensable function' of broadband Internet access service is 'the connection link that in turn enables access to the essentially unlimited range of Internet-based services'").

<sup>29</sup> State Attorneys General Comments, at p. 1.

note the *NPRM* does not address key findings underpinning the FCC’s 2015 determination that BIAS should be classified as a telecommunications service.

For example, as several comments point out, in the *2015 Open Internet Order* the FCC resolved the question as to whether a BIAS provider offering BIAS is offering a stand-alone service or a single integrated service.<sup>30</sup> The FCC did so by examining consumer perception of what broadband providers offer, and found that consumer choice among ISPs is based primarily on the speed, price, and reliability of the offered broadband transport; the D.C. Circuit upheld this finding.<sup>31</sup> The current *NPRM* indicates that it may abandon the consumer perception approach. But, the FCC offers no explanation as to why it would abandon this approach, or why it should disregard these facts that underlay prior policy. As NASUCA points out, “what the *NPRM* absolutely lacks is a showing that the 2014 Order – upheld in *USTelecom* – was based on a misunderstanding of how Internet access works, how consumers actually use Internet access services, or other mistakes or omissions.”<sup>32</sup> Referring to the *Brand X* case,<sup>33</sup> NASUCA states “[w]hen the Supreme Court reviewed the classification of cable modem service in *Brand X*, it reviewed the treatment of Internet access service based on how the

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<sup>30</sup> See, e.g., Public Knowledge and Common Cause Comments, at pp. 2, 24, 31, 39, 41; State Attorneys General Comments, at pp. 13-14; Free Press Comments, at p. 42, 43; NASUCA Comments, at pp. 7, 18; Writers’ Guild of America West Comments, at pp. 5-6.

<sup>31</sup> *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 697-698 (D.C. Cir. 2016) (*USTA v. FCC*). (“[C]onsumers focus on transmission to the exclusion of add-on applications.”)

<sup>32</sup> NASUCA Comments, at p. 7.

<sup>33</sup> *National Cable and Telecommunications Association v. Brand X*, 545 U.S. 967 (2005) (*Brand X*). The CPUC was a party to this litigation.

service was offered to the public, and how consumers perceive their Internet service.”<sup>34</sup>

The CPUC agrees that in light of the substantial record upon which the *2015 Open Internet Order* relied, the lack of change in the intervening two years, and the D.C. Circuit Court’s extensive review of the record when it affirmed the telecommunications and commercial mobile service classifications, “it is hard to see how a reversal of these classifications is justified and would not be deemed arbitrary and capricious.”<sup>35</sup> Further, if the FCC were to eliminate or modify the Open Internet Rules themselves, the FCC would need to explain why the rules are no longer necessary, or why the rules should be changed to something less than a nondiscriminatory standard. If FCC decides to eliminate the Open Internet Rules entirely, it would need to explain how and why carriers’ incentives to engage in harmful practices no longer exist or are no longer relevant.

**C. The FCC should carefully examine whether there has been a significant impact on broadband investment and identify the reason for the impact.**

In advocating for a return to Title I classification for BIAS, several commenters, including large ISP providers such as AT&T, Verizon, Comcast, and Charter, claim there has been a decrease in broadband investment since the 2015 Open Internet Order.<sup>36</sup> Charter for example claims that “there can be no doubt that private investment in internet

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<sup>34</sup> NASUCA Comments, at p. 7, citing *Brand X*, 545 U.S. 967, 993.

<sup>35</sup> NASUCA Comments, at p. 10.

<sup>36</sup> See, e.g., AT&T Comments, pp. 50-55; Verizon Comments, pp. 1-2, 9-11; Comcast Comments, pp. 27-34; Charter Comments, pp. 3, 9-11.

infrastructure has been on the decline.”<sup>37</sup> The CPUC notes, however, that these claims directly contradict public statements these very same providers have made, asserting that Title II has had no effect on investment. For example, in December 2015, AT&T’s CEO told investors that the company would “deploy more fiber” in 2016 than it did in 2015 and that Title II would not impede its future business plans.<sup>38</sup> In December 2016, Comcast’s chief financial officer admitted to investors that any concerns it had about reclassification were based only on “the fear of what Title II could have meant, more than what it actually meant.”<sup>39</sup>

As the CPUC noted in its Comments, the CPUC has found no obvious trend regarding broadband investment in California.<sup>40</sup> Even if, however, there were evidence of any decline in broadband investment, the CPUC continues to question whether such decline is a result of Title II classification of BIAS. Charter cites, for example, to a recent study, and claims the study found that “foregone investment in 2015 and 2016,” the years during which internet access has been subject to Title II, has amounted to a staggering “\$5.6 billion.”<sup>41</sup> Beginning in 2014, again in 2015, and just last year in 2016, the telecommunications industry has undergone a major consolidation through a series of Mergers and Acquisitions (M&A). Some of these M&A did not receive regulatory approval (like Comcast’s attempted acquisition of TimeWarner) but a number of them

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<sup>37</sup> Charter Comments, at p. 3.

<sup>38</sup> See, <https://seekingalpha.com/article/3741746-ts-t-ceo-randall-stephenson-presents-ubs-global-media-communications-brokers-conference?page=2>.

<sup>39</sup> See <https://consumermediallc.files.wordpress.com/2016/12/comcasttranscript.pdf>.

<sup>40</sup> CPUC Comments, p. 31.

<sup>41</sup> Charter Comments, at p. 9.

were approved (including Charter/TimeWarner, Verizon/Frontier, and AT&T/Direct TV). Post-merger, companies typically focus on reorganizing themselves and carrying out integration activities, leading some to engage in cost cutting measures to save money, including cancelling or postponing build-out projects. If any decline in investment has surfaced, the FCC should examine *why* the decline occurred, instead of assuming it was because of the *2015 Open Internet Order*, and not a result of the consolidation that occurred during that same period since issuance of the *2015 Order*.

**D. The FCC should act in a manner that preserves the core functions of the States.**

In its July 15, 2017 Comments, the CPUC urged the FCC to act in a manner that preserves states’ ability to maximize the privacy rights of their citizens and establish pole attachment access and safety regulations for BIAS providers on a non-discriminatory basis, as well as to promote competition and advance universal service. As NARUC notes in its Opening Comments, however, the *NPRM* does not address the impact of reclassification on State authority more generally.<sup>42</sup> NARUC states that it has consistently endorsed a “functional focus” model of jurisdiction that allocates State and federal regulatory responsibilities based on their core competencies, noting for example that Congress clearly anticipated the States would play a crucial role with respect to broadband deployment.<sup>43</sup> NARUC accordingly urges the FCC to use a “functional focus-core competency” paradigm to analyze the federal-State jurisdictional issues this *NPRM* raises, and to avoid an unlawful and inefficient application of forbearance

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<sup>42</sup> NARUC Comments, at p. 4.

<sup>43</sup> NARUC Comments, at pp. 1 fn 2, 2.

authority to provisions that reserve State authority.<sup>44</sup> The CPUC agrees with NARUC. Similarly, California urges the FCC to assure that nothing prejudices authority reserved to the States and to act in a manner that enables the States, as well as the FCC, to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, as well as safeguard consumers' rights with respect to those services.

To that end, the CPUC agrees with comments that urge the FCC to retain Title II classification for BIAS, both fixed and mobile, as the surest way to preserve these central functions. For example, as NASUCA notes, the FCC's proposal to maintain support for broadband in the Lifeline program and the protections in the Open Internet Rules require Internet access providers to treat all consumers fairly and without discrimination.<sup>45</sup> These are common carrier obligations. As noted in our comments, states have certain irreducible duties to protect public safety interests in utility infrastructure. Nevertheless, absent a Title II common carriage classification, the Commission would have difficulty enacting key elements of its current policies, including the Open Internet Rules, maintaining broadband in the federal Lifeline program, and encouraging deployment through pole attachment reforms (as pole attachment rights accrue only to cable television systems and Title II telecommunications systems), and enforcing non-discrimination and interconnection obligations.

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<sup>44</sup> NARUC Comments, at p. 4.

<sup>45</sup> NASUCA Comments, at p. 4.

### III. CONCLUSION

The CPUC urges the FCC to retain the non-discriminatory rules adopted in the *2015 Open Internet Order*, as well as Title II classification for both fixed and mobile broadband. California maintains that this course is necessary to provide the legal underpinning for strong rules ensuring an Open Internet. As the States Attorneys General representing twelve states, including California, asserted, “[t]he Commission should not alter the telecommunications classification of internet access service adopted in” the *2015 Open Internet Order* and affirmed by the D.C. Circuit.<sup>46</sup> The CPUC further urges the FCC to act in a manner that preserves the States’ abilities to perform their central functions, including promoting competition and universal service in the telecommunications market and ensuring public health and safety.

Respectfully submitted,

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<sup>46</sup> Comments of States Attorneys General, p. 16.