Catherine J.K. Sandoval
Commissioner
California Public Utilities Commission
505 Van Ness Avenue, San Francisco, California, 94102
(415) 703-3700

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Notice of Ex Parte Communication: Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Services, GN Docket No. 10-127

On October 7, 2014, Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, and Member of the Federal-State Joint Conference on Advanced Telecommunications Services (the Section 706 Conference), met with Priscilla Delgado Argeris, Legal Advisor to Commissioner Jessica Rosenworcel. They discussed Commissioner Sandoval's concerns about the harms to public safety, sectors designated as Critical Infrastructure, common carriers, broadcasters, competition, consumers, and universal service resulting from the FCC's Open Internet Notice of Proposed Rulemaking (NPRM). Commissioner Sandoval testified about these concerns at a public forum on September 24, 2014, that Congresswoman Matsui held on the Open Internet, and an updated copy of Commissioner Sandoval's written testimony is attached. FCC Commissioner Clyburn, Commissioner Rosenworcel, Priscilla Delgado Argeris, and other FCC staff attended that forum. Commissioner Sandoval testified in her individual capacity as a CPUC Commissioner, and constitutional officer of the State of California. The CPUC acts through a decision of a majority vote of the commissioners so this testimony and these comments represent Commissioner Sandoval's views based on her analysis and experience as a regulator.

Commissioner Sandoval's testimony emphasized that Electric, Gas, Water, Telephone and other utilities have a statutory duty to provide safe, reliable service at just and reasonable rates. Through an Executive Order, President Obama designated these utilities, emergency services, health care, and other sectors as Critical Infrastructure

Sectors vital to the safety and economic vitality of the United States. Maintaining low barriers to Internet access is critical to safety, reliability, innovation, efficiencies, and cost effectiveness in these and other sectors of the American economy. Suggestions that Internet prioritization proposals may foster public safety ignore that what the FCC proposes is PAID prioritization, subject to the ISPs discretion to grant or not, and to the ISP's judgment about terms, price, and conditions. Subjecting public safety agencies, Critical Infrastructure, regulators, innovators, content creators, and consumers to individualized, discriminatory, ISP-controlled negotiations to obtain fast Internet access undermines public safety and universal service. It increases barriers to adopt Internet-based applications such as Internet-enabled demand response communications electric and gas utilities use to prevent power blackouts, forestall the need to build fossil-fueled power plants, promote environmental sustainability, and manage energy resources.

For Critical Infrastructure and those charged with a duty of care, such as health professionals and critical care organizations, ISP control of Internet access, mediated only by FCC post-facto "commercial reasonableness" review, will deter investment in Internet applications. Innovations such as internet-enabled "Smart beds" read a patient's vital signs, transmit that information to nurses and doctors, and send aggregated data on available beds to mass casualty and disaster planners who use this information to determine which hospital has an available bed in a burn unit. Neither the hospital, nor emergency services planners should have to ask the ISP's permission to deploy this application or pay a special Internet entrance price. The State of California supports telemedicine through the California Teleconnect Fund, and the California Telehealth network. These investments are critical, particularly while wild fires rage in California and several communities are under evacuation order. The FCC's proposal thwarts FCC, state, public, and private investments in health information technology, public safety, and public health.

The FCC's proposal does not even mention transaction costs, while dramatically increasing transaction costs and time to access fast Internet speeds. It introduces great uncertainty about how much speed and what terms the Internet user will be able to obtain from the ISP. The FCC's plan to *authorize discrimination* between similarly situated Internet users facilitates anti-competitive bargaining to raise rivals' costs or use closed negotiations to enter into exclusive deals for fast Internet speeds.

The FCC's Open Internet proposal does not consider its effect on common carriers, call completion, inter-carrier compensation, or universal service programs. The FCC proposes to sanction *ISP discrimination against common carriers* who have a duty of non-discrimination under 47 USC 201 and 202. More than 1,100 rural telephone companies operate as common carriers and provide telephone and voice service through universal

service high cost and Lifeline support they receive from the FCC and several states. Lifeline providers, and many others, including carriers of last resort, operate as common carriers. In 2013 the FCC prohibited practices that interfere with call completion, whether those practices were carried out by common carriers, VoIP providers, or their intermediaries. While some ISPs are affiliates of VoIP providers, they may contend they are not VoIP or common carrier "intermediaries" and are not covered by the FCC's call completion Order. The FCC's Open Internet NPRM strengthens this argument by allowing ISPs to demand additional payments for common carrier calls and transmissions to reach ISP subscribers. The FCC's proposal enables ISPs to frustrate call completion through demands for additional payments to ensure fast access. It obstructs end-user expectations that they can access the content of their choice, including to making and receiving calls interconnected to the public switched telephone network (PSTN). "Minimum speeds" and post-facto FCC evaluation are insufficient to ensure that calls are completed and common carrier transmissions transit in a non-discriminatory fashion. Only Title II, with appropriate forbearance and a light regulatory touch, in combination with Section 706, can prevent discrimination against common carriers and ISP frustration of universal service goals and the public purpose programs the FCC and states have spent billions to fund.

Neither did the FCC consider the impact of the Open Internet NPRM on Intercarrier-compensation (ICC). After more than a decade of debate and litigation about the FCC's bill and keep ICC mechanism, the FCC's proposal authorizes ISPs to undermine state and federal ICC mechanisms by demanding additional payments to ensure fast delivery of calls that transit Internet-protocol (IP) networks. Reciprocal compensation and rural terminating access fees are cost-based and subject to regulatory review. By contrast, the FCC would allow ISPs to demand access payments unrelated to costs. Neither would the FCC require ISPs to invest any payments from the tolls ISPs collect in network or capacity improvements or to expand deployment in exchange the burden this system places on Internet speakers.

Through the Rural Broadband Experiments (RBE) authorized in January 2014, the FCC budgeted $100 million to support deployment of broadband-capable voice and data networks by common carriers. This investment will transform economies and create new opportunities in areas that face high costs for Internet deployment. The CPUC voted to authorize a 10% match from the California Advanced Service Fund (CASF) to support winning bidders for California high cost areas at the FCC RBE auction. Winning bidders must be certified by states or the FCC as Eligible Telecommunications Carriers (ETCs) in order to receive universal service high cost and Lifeline funding per 47 USC 254. The FCC's Open Internet proposal adds unknown costs to operate broadband networks since non-common carrier ISPs, with whom they exchange traffic,

could demand higher prices to ensure fast delivery, or decide not to offer an RBE or other common carrier fast transit service. Meanwhile, the RBE carrier is bound by non-discrimination duties as a common carrier, and would have to raise rates to recover costs imposed by other ISPs. This proposal undercuts billions in federal, state, tribal, public, and private sector investment in broadband networks in high cost areas, and undermines universal service.

Similarly, the FCC's proposal raises costs for common carrier Lifeline providers, and for state LifeLine administrators who use Internet-enabled platforms to submit Lifeline applications and verify subscriber eligibility. California's state LifeLine fund was expanded in January 2014 to include mobile services, data, and text, and has added more than 1,000 new LifeLine subscribers a day since April 2014. California verifies each and every applicant through Internet-based platforms, relying on high-speed Internet communications between the CPUC's third party administrator and LifeLine carriers who operate as common carrier Eligible Telecommunications Carriers. These applications are large files with images of income or program eligibility documents. Substantial broadband resources are needed to support this volume of documentation and their speedy processing. ISPs would be authorized to raise the cost of rival common carrier Lifeline providers. ISPs could demand additional payments from the State of California to support the fast access needed to process more than 1,000 applications a day, and demand such payments from any governmental agency that sends content through the Internet. This proposal endangers public safety and universal service for eligible Americans who use Lifeline to make calls on the PSTN, and send and receive content through the Internet.

Neither does the FCC's NPRM consider the disincentives it creates for broadcasters to participate in the Broadcast Incentive Auctions Congress authorized. Facilities-based broadcasters who hold licenses under Title III of the Communications Act today use the Internet as a complementary outlet to increase their audience reach and create new ways to communicate and archive content. Many ISPs compete with broadcasters for video audiences and revenues through their affiliate cable or Internet video services, and intend to expand their video offerings. The FCC proposes to allow ISPs to determine whether a broadcaster or any other video, music, or other content provider gets fast Internet access. The ISP would be authorized to determine how much fast Internet access a rival content provider gets, and at what price and on what terms. Newly authorized ISP power to delineate the parameters of a broadcaster's or content provider's Internet access erects barriers to using the Internet as an extension of a broadcast channel, or as a communications outlet for other speakers. This creates huge disincentives to put broadcast licenses, or even portions of broadcast spectrum, up for auction since the Internet would become an unreliable means of reaching audiences,

mediated by ISP gatekeepers, with wildly unpredictable costs and unknown time frames to reach an access deal.

So called "minimum speeds" would be insufficient to guarantee an equal playing field among broadcasters, ISPs, or other video or content rivals. Fast Internet access is important to subscribers and speakers now, and will become even more important as high-resolution images, critical data, contour maps, and large GIS files are increasingly used. Fire fighters, for example, use GIS files with many data layers to track fire perimeters, wind and lightning, order helicopters and reinforcements, coordinate evacuations, and respond to other emergencies. The FCC proposal turns the Internet inside out, from a user-directed platform to an ISP-directed platform. Speakers and users at the Internet's edges will effectively be marginalized, facing commercial gates of varying heights, with FCC sanction, by ISPs.

Finally, the FCC's proposal raises constitutional concerns in that it establishes *speech by Internet content/edge providers* as *the trigger* for facing the ISP negotiation/FCC commercial reasonableness evaluation gauntlet. The FCC defines "edge providers" as those who provide content or devices or applications to enable access to content. *Content/edge providers are speakers* who use the Internet to transmit speech. The FCC proposes government-based speech regulation by forcing speakers who want Internet access above the FCC-determined minimum to negotiate with ISPs in closed sessions for discriminatory access, subject only to the FCC's post-facto judgment about the "commercial reasonableness" of such deals. Content-neutral speech regulation requires a showing of an important governmental interest, and means narrowly tailored to serve that interest that leave open ample alternative channels for communication of the information. Congress, under Section 706 of the Communications Act, 57 USC 1302, authorized both the FCC and the states to encourage Internet deployment and adoption, an important and statutorily-mandated goal. The FCC's proposals are not narrowly tailored to achieve that goal in light of the new burdens, costs and uncertainties it places on Internet content providers and all speakers' ability to access Internet content. Driving Internet speakers to alternative channels such as the mail or telephone to avoid new ISP-imposed barriers and costs, conflicts with the governmental objective of furthering Internet access and adoption. The FCC proposal fails the constitutional test, even under a content-neutral speech regulation standard.

Any proposal to limit the reach of the FCC's channeling of Internet speakers through ISP and FCC-mediated negotiations misses the point that public safety, the American economy, and American democracy depend on ALL speakers being able to communicate with each other. The Internet enables new and faster ways of communicating including many-to-many communication, difficult to replicate through

any other means. If the FCC were to narrow the category of speakers subject to the proposed Internet access process, strict constitutional scrutiny would be required for such a content-based regulation that selects certain speakers or types of speech for extra burdens to obtain fast Internet access. Content-based governmental speech regulation must serve a compelling state interest and be narrowly tailored to serve that interest, using the least restrictive alternative in light of the speech burdens the regulation imposes. The FCC's newly erected barriers to speedy Internet access cannot survive strict scrutiny in light of the burdens they impose on Internet speakers and the authority they give to ISPs to use their gateway to subscribers as a bottleneck and toll booth that would constrict subscriber and speaker Internet access.

To protect an Open Internet the FCC must use all the tools available to it under the Communications Act of 1934, as amended, which means reliance on *both* Section 706 and Title II. Section 706 of the Communications Act authorizes "in a manner consistent with the public interest, convenience, and necessity…regulatory forbearance and other measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Only Title II, applied with appropriate forbearance and a light regulatory touch, can protect common carriers, broadcasters and other FCC licensees, and Internet speakers from ISP discrimination and high Internet entry barriers. Title II and Section 706 are complementary and must be harmonized to promote Internet access and end-user ability to access content and deploy innovative application. Deploying both well-tailored Title II rules and Section 706, and rejecting the discriminatory negotiation process the FCC contemplated, is necessary to protect American democracy, universal service, public safety, and those who depend on common carriers, and the universal service programs the FCC and states have spent billions to fund.

I also recommended to Ms. Delgado Argeris and in my testimony that the FCC refer any proposal to protect the Open Internet to the 706 Joint Conference, the Federal-State Joint Board on Universal Service, and the Critical Infrastructure Security and Resilience Conference (CISRC), to evaluate the federal and state implications of the Open Internet proposals for universal service, Internet access, public safety, security, and Critical Infrastructure. My testimony also recommend that the FCC consult with the U.S. Department of Homeland Security, the U.S. Department of Energy, and the Federal Energy Regulatory Commission about its Open Internet proposals and their implications for security, cybersecurity, and energy safety, reliability and affordability. The FCC should make the results of those consultations public.

Thank you for consideration of these ex parte comments and the attached Written Testimony of Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission. Due to computer and Internet access problems, this ex parte is late filed.

Sincerely,

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Catherine J.K. Sandoval
Commissioner
California Public Utilities Commission

cc: FCC Chairman Wheeler
FCC Commissioner Clyburn
FCC Commissioner Rosenworcel
FCC Commissioner Pai
FCC Commissioner O'Rielly
Priscilla Delgado Argeris