

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

In the Matter of:

Preserving the Open Internet  
Broadband Industry Practices

GN No. 09-191

WC 07-52

**REPLY COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES  
COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA**

FRANK R. LINDH  
HELEN M. MICKIEWICZ  
GRETCHEN T. DUMAS  
505 Van Ness Avenue  
San Francisco, CA 94102  
Phone: (415) 703-1210  
Fax: (415) 703-4432

Attorneys for the California  
Public Utilities Commission and  
the People of the State of California

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The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these reply comments in response to the Federal Communications Commission’s (FCC or Commission) Notice of Proposed Rulemaking (NPRM) in its Open Internet and Broadband Industry Practices proceeding.<sup>1</sup> California’s interest in this proceeding derives from its statutory and constitutional role as a state consumer protection agency.

## **I. INTRODUCTION**

In its Open Internet NPRM, the FCC sought “public input on draft rules to preserve an open Internet.”<sup>2</sup> The FCC noted that it “has considered the issue of Internet openness in a wide variety of contexts and proceedings, including a unanimous policy statement, a notice of inquiry on broadband industry practices, public comment on several petitions for rulemaking, conditions associated with significant communications industry mergers, the rules for a major spectrum auction, and specific enforcement actions against particular parties.”<sup>3</sup>

The FCC further noted that “[t]hroughout this extensive process, one point has attracted nearly unanimous support: The Internet’s openness, and the transparency of its protocols, have been critical to its success.”<sup>4</sup>

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<sup>1</sup> Notice of Proposed Rulemaking, *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket 09-191, WC Docket 07-52, rel. October 22, 2009 (NPRM).

<sup>2</sup> *Id.* ¶ 2

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, at ¶ 3.

In 2005 the FCC proposed four general policy principles to guide interpretation of its responsibilities regarding advanced communications networks and Internet access. These four principles were stated as consumer entitlements at the time. In this new proceeding, the FCC proposes to shift the focus of the four principles from principles of consumer entitlement to obligatory rules for broadband Internet access service providers. The FCC expressed its belief that codifying the principles “as obligations of particular entities, rather than just as principles, would make clear precisely who must comply and in what way. Making these rules apply to particular entities will also provide certainty to all Internet participants as to what to expect and who bears responsibility for what types of actions.”<sup>5</sup>

However, while making note of this shift in emphasis, the FCC retains the earlier qualification of the principles in practice as “subject to reasonable network management.”<sup>6</sup> The FCC adds that “[t]he rules we propose today address users’ ability to *access* the Internet and are not intended to regulate the Internet itself or create a different Internet experience from the one that users have come to expect.”<sup>7</sup>

The six draft rules, which all providers of broadband Internet access service would be required to follow are as listed below, with the newly added rules in italics.

1. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet.

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<sup>5</sup> *Id.*, ¶ 90.

<sup>6</sup> *Id.*, ¶ 5;

<sup>7</sup> *Id.*, ¶ 14 (emphasis in original).

2. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user's choice.
3. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.
4. Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.
5. *Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.*
6. *Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.<sup>8</sup>*

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<sup>8</sup> See NPRM at ¶¶ 92, 104, 119. In March of 2006, the CPUC voiced support for the FCC's *Internet Policy Statement* in Comments filed in an FCC proceeding regarding "Consumer Protection in the Broadband Era."

In that filing, the CPUC observed:

Any consumer protections implemented by the FCC for broadband access should include policies supporting net neutrality consistent with the statement of principles articulated by the Commission in its August 5, 2005, Policy Statement. This policy statement outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. California believes that in addition to encouraging broadband deployment and preserving and promoting the open and interconnected nature of the public Internet, these policies represent important consumer protections.

Comments of the California Public Utilities Commission and the People of the State of California, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (CC Docket No. 02-33), *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337), *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements* (CC Dockets Nos. 95-20, 98-10), *Conditional Petition of Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises;*

The FCC notes that the fifth rule – the nondiscrimination rule – would mean “that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access provider. We propose that this rule would not prevent a broadband Internet access service provider from charging subscribers different prices for different services.”<sup>9</sup> The FCC, thus, distinguishes between *discriminatory access* and *managed services* within the context of Open Internet access service. The FCC states: “In defining the scope of this proposed fifth rule, we propose to focus on that portion of the connection between a broadband Internet access service subscriber and the Internet [access] for which the broadband Internet access service provider...may have the ability and the incentive to favor or disfavor traffic destined for its end-user customers.”<sup>10</sup>

As noted, the rules would be subject to reasonable network management. In the NPRM, the FCC proposes the following definition of reasonable network management:

- (a) reasonable practices employed by a provider of broadband Internet access service to:
  - (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns;
  - (ii) address traffic that is unwanted by users or harmful;
  - (iii) prevent the transfer of unlawful content; or
  - (iv) prevent the unlawful transfer of content; and

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*Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises, Consumer Protection in the Broadband Era* (WC Docket No. 05-271), March 1, 2006.

<sup>9</sup> NPRM ¶ 106.

<sup>10</sup> *Id.*, ¶ 107.

(b) other reasonable network management practices.<sup>11</sup>

Having reviewed the many pages of comments filed in response to the NPRM, the CPUC recommends that the FCC take the following steps:

- Codify the four principles that formed the basis of the 2005 Internet Policy Statement as rules, as revised by the FCC in the NPRM.<sup>12</sup>
- Codify the Transparency rule (the sixth rule), as drafted by the FCC.
- Codify a nondiscrimination rule in a form more narrowly drawn than the one proposed by the FCC (the fifth rule) in the NPRM.
- Should the FCC decide to apply the Open Internet rules to wireless broadband Internet access service providers, application of the rules should take into consideration the technological challenges facing wireless broadband customers and their providers.

## II. DISCUSSION

### A. The FCC Should Codify the Revised Original Four Principles as Obligatory Rules

The CPUC supports codification of the original principles as revised in the NPRM. We agree with the Center for Democracy & Technology that “sound policy and legal considerations demand a narrow focus on transmission facilities. As a practical matter, these facilities present the most likely bottlenecks that could be used to effectively limit consumer choice among content, applications, services, and devices.”<sup>13</sup>

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<sup>11</sup> *Id.*, Appendix A (“Definitions”).

<sup>12</sup> *Id.*, Appendix A, Sections 8.5 through 8.11. The FCC adopted the original four “Internet Policy Principles” in August 2005; *see* NPRM ¶ 5. In the NPRM, the FCC notes that “The *Internet Policy Statement* has helped preserve the openness of the Internet over the past four years, but the time has now come to build on past efforts and to provide greater clarity regarding the Commission’s approach to these issues through a notice-and-comment rulemaking. This rulemaking process is intended to provide greater predictability as well as to help address emerging challenges to the open Internet.” NPRM ¶ 6.

<sup>13</sup> Comments of the Center for Democracy & Technology, p. 20.

The Independent Film & Television Alliance (IFTA) also endorses codification. It specifically urges “the Commission to adopt a regulatory framework that protects the public’s interest in unfettered access to video programming that is created independently of the broadband platform providers or other vertically integrated entities.”<sup>14</sup>

Vonage Holdings Corporation (Vonage) adds that “[t]he uncertainty about the enforceability of the principles in the Internet Policy Statement dictate[s] that the Commission, at a minimum, adopt the principles as enforceable rules.”<sup>15</sup> Sprint Nextel Corporation (Sprint) likewise supports codification of the principles as obligatory rules, if accompanied, as they are, by an allowance for “appropriate network management” and rooted in what Sprint calls “consumer protection control”:

Sprint could support a rule granting consumers a right to access content and applications of their choice, provided appropriate network management and consumer protection control is retained. As it currently provides the open access the FCC is proposing, Sprint does not, in principle, oppose an obligation to provide such access.<sup>16</sup>

We agree with Sprint that the 2005 principles should be translated into provider obligations in the form of enforceable rules.

Similarly, we concur with the Computer & Communications Industry Association (CCIA), which concludes “that codifying an open Internet access regime is the best

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<sup>14</sup> Comments of Independent Film & Television Alliance, p. 3.

<sup>15</sup> Comments of Vonage Holdings Corp., p. 6.

<sup>16</sup> Comments of Sprint Nextel Corporation, p. 18.

solution for guiding existing market forces in a manner that encourages investment, innovation, and subscription.”<sup>17</sup>

**B. The Transparency Rule Should be Adopted as Written**

The Open Internet Coalition makes specific recommendations regarding transparency and disclosure on the grounds that “[n]etwork operators currently do not provide adequate disclosure to consumers or application providers to allow them to make informed decisions about where to allocate their resources and how to design their applications.”<sup>18</sup>

At a minimum, the Center for Democracy and Technology recommends that broadband Internet access providers should disclose with respect to each particular network management practice:

- what actions are taken;
- what legitimate purpose is served;
- the effect on subscribers’ use of the service;
- the criteria that trigger the action; and
- what redress process is available to users wrongfully targeted by the practice.<sup>19</sup>

Public Knowledge, looking to Canada, offers a comparable list of disclosure requirements and adds an additional recommendation that we also favor: that the disclosures be filed with the FCC and that it act as a “clearinghouse for such information,

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<sup>17</sup> Comments of the Computer & Communications Industry Association, p. 7.

<sup>18</sup> Comments of the Open Internet Coalition, p. 86.

<sup>19</sup> Center for Democracy & Technology, p. 33.

allowing consumers to compare network management practices and help facilitate best practices and collaborative solutions among all users of the Internet.”<sup>20</sup>

However, we also agree with Sprint’s caution: “Broadband providers certainly should not be required to provide so much detail about their network management practices that hackers could design systems to circumvent those practices or which would overwhelm consumers.”<sup>21</sup> Internet access providers should not be required to disclose technical details of what is being used to manage traffic if that information could provide a roadmap for countermeasures to avoid the management.

### **C. The Nondiscrimination Rule Needs Refocusing**

The CPUC supports a nondiscrimination rule that would prohibit “unjust or unreasonable” discrimination, and require only that the Internet access provider treat access to similar content in a similar manner. Thus the goal would not be to treat all content the same, but rather to require access providers to treat like content in a like manner, consistent with the disclosed limitations of the purchased end-user service.

Carriers should have the ability to price, shape, and manage their networks to facilitate reasonable Quality of Service. The goal should be to set reasonable terms and conditions on the access providers but not to micromanage their service(s). In that way, the FCC can maintain necessary and reasonable consumer protections but allow the access providers to reasonably respond to market demands.

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<sup>20</sup> Comments of Public Knowledge, p. 66.

<sup>21</sup> Sprint Nextel, p. 16.

Thus California agrees with National Cable and Telecommunications Association

(NCTA):

[T]he Chairman had it right when he suggested that if there is to be a nondiscrimination rule, it should be aimed at preventing a broadband ISP from “disfavoring an Internet service *just because it competes with a similar service offered by that broadband provider.*” Any nondiscrimination rule that extended beyond the no-blocking rule could be limited to discrimination that (a) targets a service that competes with a service offered by the ISP, (b) has no reasonable purpose other than to disfavor a competitor, and (c) harms consumers.<sup>22</sup>

The Rule should require broadband Internet access providers to treat similar content in a similar manner, and should prevent an ISP from favoring or giving preferential treatment to content that the ISP owns or in which it holds an interest

We also agree with the Center for Democracy and Technology that the nondiscrimination rule should not prohibit providers of broadband Internet access service from enabling *individual subscribers* to designate how their different inbound and outbound traffic streams should be prioritized.<sup>23</sup> For instance, the rules should not prevent an end-user customer who wants access to video conferences all day long from buying a higher tier of service to get the Quality of Service needed for quality transmission and to avoid any caps on the amount of data the customer can use each month. As the NPRM makes clear, the Open Internet Rules are intended, first and foremost, to protect consumers in their lawful use of the Internet. The goal would be to set reasonable terms and conditions on the access providers but not micromanage their

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<sup>22</sup> Comments of National Cable and Telecommunications Association, p. 34 [emphasis in original].

<sup>23</sup> Center for Democracy and Technology, pp. 26-27.

service. In this way, the FCC can maintain necessary and reasonable consumer protections but allow broadband access providers to respond reasonably to market demands.

The CPUC also agrees with comments stating that the nondiscrimination rule should be similar to the Title II nondiscrimination principle, *i.e.*, the rule should prohibit “unreasonable discrimination.” We agree specifically with Sprint Nextel Corporation’s statement:

An unjust or unreasonable discrimination standard would be far preferable, because such a standard contains the flexibility needed to distinguish socially beneficial discrimination from socially harmful discrimination. This is confirmed by the successful use of this standard for over 75 years in connection with telecommunications services.<sup>24</sup>

**D. The FCC Should Consider the Technology of Wireless Broadband Access Service Providers**

If the FCC decides to apply the proposed rules to wireless Internet access providers, the CPUC recommends that FCC take into consideration the technology of such providers.

Google quotes FCC Chairman Genachowski: “Even though each form of Internet access has unique technical characteristics, they are all different roads to the same place. It is essential that the Internet itself remain open, however users reach it.”<sup>25</sup> The Open

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<sup>24</sup> Sprint Nextel, p. 24, citing 47 U.S.C. § 202(a).

<sup>25</sup> Comments of Google, p. ii (Executive Summary); see also pp. 77ff.

Internet Coalition, of which Google is a member,<sup>26</sup> makes a point that we second should the FCC extend its Open Internet rules to wireless:

In keeping with its proposed approach of adopting broadly-framed rules with case-by-case enforcement, the Commission need not adopt specific rules that codify the differences between different platforms. Instead, the Commission's case-by-case application of the proposed rules should take into account the differences between wireless and wireline networks.<sup>27</sup>

And Sandvine adds another cautionary note, with which we agree:

Mobile networks are also the newest entrants in the market for broadband access so users' behavior is rapidly evolving. Consequently, the nature of data traffic traversing the mobile network is more dynamic than for any other access network class. More time is required to understand how users will consume the Internet over mobile devices and what network management policies may be appropriate.<sup>28</sup>

The FCC has made allowances for these considerations within and between broadband Internet access platforms in its qualification of each of the proposed rules with the phrase “[s]ubject to reasonable network management....” The very first of the points, made in the FCC definition of Reasonable Network Management, applies equally to wireless service providers: “reasonable practices employed by a provider of broadband Internet access service to: (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns....”<sup>29</sup>

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<sup>26</sup> Comments of Open Internet Coalition, p. 1. Members include Amazon, the American Library Association, Consumers Union, DISH Network, Earthlink, eBay, Media Access Project, Netflix, Skype, Sony, TiVo, and Twitter, among others.

<sup>27</sup> *Id.*, p. 37.

<sup>28</sup> Sandvine Comments, p. 27.

<sup>29</sup> NPRM Appendix A, § 8.3 Definitions.

**E. The Commission’s Authority Is Adequate to Its Purposes in the NPRM**

On April 6, 2010 the D.C. Circuit Court of Appeals in *Comcast v. FCC* rejected the authority on which the FCC relied in its *Internet Policy Statement* of 2005 and its 2008 *Comcast Order*.<sup>30</sup> The Court held that the “Commission has failed to make [the requisite] showing” that enforcement of the policies in its *Internet Policy Statement* was “reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.”<sup>31</sup> More particularly, the Court found that the Commission had failed to “link the cited policies to express delegations of regulatory authority.”<sup>32</sup> Given the legal nexus between the Court’s holding and this proceeding, the FCC extended the due date for reply comments to April 26, 2010.<sup>33</sup>

A number of parties, in their opening comments, support the FCC’s jurisdictional authority to act in this matter,<sup>34</sup> while others have called into question the FCC’s jurisdictional authority to set forth these rules and enforce them once they are in place.<sup>35</sup> After reviewing all of the comments, relevant case law, including the recently-decided *Comcast* decision, *supra*, and applicable FCC regulations relevant to this seminal jurisdictional question, the CPUC supports the legality of the FCC’s jurisdiction in this

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<sup>30</sup> April 6, 2010 decision in *Comcast v. FCC*, D.C. Circuit Appeal 08-1291 (available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>) (Slip Opinion), vacating the Commission’s Memorandum Opinion and Order in *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Application*, 23 FCC Rcd. 13028 (2008) (*Comcast Order*), in which the Commission enforced its *Internet Policy Statement, supra.*,

<sup>31</sup> Slip Opinion at 3, quoting *Am. Library Ass’n v. FCC*, 406 F3d 689, 692 (D.C. Cir. 2005).

<sup>32</sup> Slip Opinion at 24.

<sup>33</sup> NPRM, *supra*, rel. April 7, 2010.

<sup>34</sup> See Comments of Center for Democracy & Technology, pp. 20-22.

<sup>35</sup> See Comments of AT&T, p. 8; Comments of the Texas Office of Public Utility Counsel, pp 2 - 4.

proceeding. Specifically, the CPUC agrees with the Court in *Comcast* that the FCC’s reliance on Title I as a source of jurisdictional authority must be linked to an express delegation of regulatory authority. As an alternative source of jurisdiction, the CPUC agrees with the Center for Democracy & Technology that the FCC could assert jurisdiction under Title II.

If the Commission were to assert its jurisdiction under Title II, it should do so in a very limited manner, so as to ensure continued growth and development of both technology and content. Specifically, as the Center for Democracy & Technology observes, the FCC could establish “clear jurisdiction” if it:

. . . return[ed] broadband Internet access service to be regulated as a telecommunications service under Title II. As the Supreme Court has plainly said the FCC can do, the Commission could “change course” and bring Internet access back under Title II, **while at the same time forbearing from rate regulation and other unneeded aspects of that regime**. Such an approach would provide ample – but appropriately focused – authority for the FCC to issue its proposed neutrality rules.<sup>36</sup> (Emphasis added.)

Other parties, such as Public Knowledge, go even further, stating: “the Commission must take immediate action to preserve its power to protect consumers and the open Internet – including consideration of reclassification of facilities-based broadband access as a Title II service.”<sup>37</sup> Finally, Google in a March 22, 2010 ex parte stated “[i]n light of recent uncertainty surrounding the extent of the FCC’s broadband jurisdiction under the Communications Act, the FCC should take the steps necessary to build a complete legal

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<sup>36</sup> Comments of Center for Democracy & Technology, p. 22; footnote omitted.

<sup>37</sup> Public Knowledge, p. 4.

and evidentiary record to confirm the agency's oversight authority, whether under Title I, Title II, Title VI, or other pertinent provisions."

The CPUC emphasizes that reclassification need not involve all aspects of "common carrier regulation" that have applied to legacy telecommunications services providers. California notes, for example, that when the CPUC authorized competition for local telephone service in 1995, we exempted competitive local exchange carriers (CLECs) from rate regulation. Ultimately, we eliminated much rate regulation for the incumbent local exchange providers (ILECs) as well. At the same time, we subjected CLECs to our consumer protection rules, and those still apply to both CLECs and to ILECs. As this shows, different paradigms can apply to different categories of service providers.

Similarly, the FCC could forbear from imposing many aspects of traditional common carrier regulation on internet access providers. Section 160(a) of the 1934 Communications Act, as amended, expressly authorizes the Commission to forbear from "applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets...."<sup>38</sup> To do so, the FCC must make specified determinations as set forth in Sections 160(a)(1), (2), and (3). The FCC has made such determinations on a number of occasions, in other contexts and pertaining to other types of telecommunications services and service providers, and the Commission certainly could make such a determination relative to

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<sup>38</sup> 47 USC 160(a).

internet access service providers. To do so, the FCC may need to open a new docket to take additional comment.

### **III. CONCLUSION**

The State of California, home of Silicon Valley and Internet companies such as Apple, Google, and Cisco, can hardly be indifferent to the preservation of an Open Internet.<sup>39</sup> We therefore support, as discussed in these reply comments, codification as obligatory rules of the four principles that formed the basis of the FCC's 2005 Internet Policy, with the addition of a Transparency Rule and a modified Nondiscrimination Rule referencing unjust and unreasonable behavior. We also support application of these rules to wireless carriers, so long as the unique challenges of that platform are taken into account in the FCC's interpretation and application of the reasonable network management standard.

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<sup>39</sup> *Id.*, ¶ 2.

Respectfully submitted,

FRANK R. LINDH  
HELEN M. MICKIEWICZ  
GRETCHEN T. DUMAS

By: /s/     GRETCHEN T. DUMAS

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Gretchen T. Dumas

505 Van Ness Avenue  
San Francisco, CA 94102  
Phone: (415) 703-1210  
Fax: (415) 703-4432  
E-mail: [gtd@cpuc.ca.gov](mailto:gtd@cpuc.ca.gov)

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California Public Utilities Commission and the  
People of the State of California

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