State of California **Public Utilities Commission**
San Francisco

M E M O R A N D U M

Date : **September 4, 2014**

To : **The Commission**
(Meeting of October 2, 2014)

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Subject: **Filing of Reply Comments in Response to FCC's NPRM on the Open Internet**

RECOMMENDATION: The CPUC should file comments in response to the Federal Communications Commission's (FCC) *Notice of Proposed Rulemaking* (*NPRM*),[1] in which the FCC proposes a set of regulations intended to ensure that the Internet remains open.

BACKGROUND: On May 15, 2014, the FCC released a *Notice of Proposed Rulemaking* (*NPRM*), in which the FCC sought comment on the broad topic of "[w]hat is the right public policy to ensure that the Internet remains open?" Noting that a recent court decision left the FCC without a no-unreasonable-discrimination and a no-blocking rule, the FCC proposed a set of rules to govern an open Internet, or to achieve "net neutrality", as it is frequently called. The FCC issued the *Open Internet NPRM* after the Court of Appeals for the District of Columbia (D.C. Circuit) on January 28, 2014 vacated the FCC's net neutrality rules adopted in its 2010 *Open Internet Order*.[2] In so doing, the Court found that the FCC had ample statutory authority to regulate broadband service, and had done so previously. Although the D.C. Circuit found the justification for the 2010 rules to be reasonable and supported by substantial evidence, it also determined that the anti-blocking and anti-discrimination rules imposed *per se* common carrier obligations. The D.C. Circuit ruled that the FCC had wide latitude to act to promote competition and a level playing field in broadband, *up to* the point where the FCC's rules began to look like traditional common carriage rules – i.e., no discrimination among users, no blocking. The Court concluded that *because the FCC had classified broadband access service as an information service in 2002*, it could not impose these common carrier obligations.[3]

[1] *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, (FCC 14-61), rel. May 15, 2014. (*NRPM*).

[2] *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010) (*2010 Open Internet Order*).

[3] *Verizon v. FCC, et al.,* 740 F.3d 623, 2014 U.S. App. LEXIS 680 (2014) (*Verizon*), *slip op.*, pp. 29-30, 56. 60.

This FCC inquiry has a long history, and the CPUC has been active throughout its various chapters.

To appreciate the context of the FCC's inquiry, it is useful to understand the service at issue. Broadband access service[4] consists of two parts – the pipe that delivers traffic to the customer's premises, and the Internet content transmitted through that pipe, which (for easy understanding) can be represented by an icon on the computer desktop. Most customers have multiple icons on their desktops, such as Microsoft's Internet Explorer, Mozilla's Firefox, Safari, AOL, as well as LEXIS/NEXIS, Google, and Wikipedia, each representing different services or content available to the user. Internet users, however, generally have the possibility of two, but in some cases, as many as three or perhaps only one physical pipe delivering those services and content to the desktop.[5] Typically, one pipe would be from a cable services provider such as Comcast or Time Warner; the other pipe would be from the local traditional telephone service provider, such as AT&T and Verizon.[6] Except for Verizon's FIOS service, the cable pipe tends to have higher bandwidth and speed than the telecom pipe.[7]

For more than twenty years, the FCC imposed on Internet service providers (the owners of the pipe) regulations and restrictions that were founded in Title II of the Communications Act, that portion of the law which governs "common carriers."[8] Against that backdrop, Congress passed the 1996 Telecommunications Act, codifying the "information service" and "telecommunications service" distinctions the FCC had already carved out via a series of decisions in order to address evolving technologies.[9] After passage of the 1996 Act, the FCC continued to regulate Internet

[4] The D.C. Circuit Court of Appeals, in the *Verizon* decision, referred to this service as "broadband service". The older term, used in previous litigation, was "Internet access service". The FCC uses the term "broadband Internet access service." These terms are all interchangeable for purposes of this memo.

[5] The number of households offered broadband service by three state video franchise holders in California in 2012 was 1.17 million, while the number offered service by only one provider was 0.68 million. *See* Sixth Annual DIVCA Report, published June 2014 and covering calendar year 2012, p. 25, http://www.cpuc.ca.gov/NR/rdonlyres/344C211A-6B7C-400A-9381-B99F186A615D/0/6th_DIVCAReportJuly_31_2014.pdf.

[6] In addition, wireless service providers now offer broadband access, but using a different business model derived from the way in which wireless carriers offer their services more generally. Further, wireless broadband speeds are slower and capacity more limited, though continued technological evolution in time could produce wireless broadband service more on a par with wired broadband.

[7] *NPRM*, at ¶¶ 42, 47, 145; *see also* S. CRAWFORD, CAPTIVE AUDIENCE, *passim.*

[8] *Verizon v. FCC,* slip op. at 24, 740 F.3d at 638-39 ("when Congress passed section 706(a) in 1996, it did so against the backdrop of the commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet").

[9] *See* 47 U.S.C. 153(24) definition of information service", and 153(53) definition of "telecommunications service." In addition, § 153 (51) states that a "telecommunications carrier" is a "provider of telecommunications services", and "shall be treated as a common carrier . . . to the extent that it is engage in providing telecommunications services…"

access service as common carriage, but, then, in 2002, the FCC changed direction.[10] In its *Cable Modem Order* (or *Cable Broadband Order,* as the D.C. Circuit refers to it), the FCC concluded that because cable companies bundle access to the Internet pipeline with other services (email, for instance), instead of allowing customers to purchase the pipeline or transport services separate and apart from those other services, the combined or "bundled" offering, from a regulatory standpoint, should be treated as one service, which the FCC called "cable modem service" and classified as an "information service." Using the image of the desktop icon, what the FCC in effect did was to fuse together the pipe and the icon as one integrated offering.

The CPUC among others, challenged that decision, and argued the case through the 9th Circuit Court of Appeals, where the CPUC's view prevailed.[11] When the case then went to the U.S. Supreme Court, the CPUC was one of the parties challenging that decision. There, the CPUC and other state respondents argued that "the FCC's statutory interpretation thwarts the goal of universal service – nationwide, affordable telecommunications service – that is one of the central objectives of the 1996 Act."[12] The Supreme Court decided in favor of the FCC, however, deferring to the FCC's interpretation of the 1996 Telecommunications Act, and leaving in place the classification of bundled broadband access as an information service.[13]

Almost immediately after the Supreme Court's NCTA v. Brand X decision issued, the FCC expanded its Cable Modem/Broadband Order to DSL,[14] and on the same day adopted a set of

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[10] *Verizon v. FCC,* Slip Op. at 9, 24, 740 F.3d at 631, 638-39.

[11] *Brand X v. FCC,* 345 F.3d 1120 (9th Cir 2003) (concluding that cable broadband service included a separable transport or "telecommunications service"), *vacated sub nom. National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967 (2005).

[12] *NCTA v. Brand X*, Brief for the Respondents States and Consumer Groups in Opposition to Petitioners, p. 13.

[13] The FCC's decisions, and the Supreme Court's upholding of the FCC's determination, were not without controversy. Justice Antonin Scalia, in a famous and oft-quoted dissent from the majority opinion in *Brand X*, dismissed the FCC's interpretation of the 1996 Act as follows:

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage" … would prevent them from answering: "No, we do not offer delivery – but if you order a pizza from us, we'll bake if for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral' to its other capabilities.'"

Brand X, dissent, p. 4.

[14] *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* FCC No. 05-150, FCC Rcd 14853 (2005) (DSL modem not common carrier telecommunications service).

four "principles" for Internet best practices.[15] When a complaint was filed at the FCC about Comcast's apparent violation of these principles in blocking access to a content provider, the FCC attempted to enforce the principles.[16] The D.C. Circuit rejected this attempt on various grounds not relevant here, prompting the FCC to issue a set of binding net neutrality rules in 2010.[17] It was those 2010 Rules that the D.C. Circuit again rejected in its decision in January of this year. Subsequently, the FCC initiated the current *NPRM*, taking a third crack at adopting valid rules to govern broadband access and transport services.

DISCUSSION AND RECOMMENDATIONS:

In this latest attempt, the FCC notes that "[t]oday, there are no legally enforceable rules by which the Commission can stop broadband providers from limiting Internet openness."[18] In addition to asking for comment on its specific proposed rules, the FCC also seeks input on the legal authority for adopting its proposed rules.[19]

In its 2010 Open Internet Order, the FCC found that ISPs had three types of incentives to limit Internet openness:

- economic incentives to block or disadvantage a particular edge provider or class of edge providers;
- incentives to increase revenues by charging edge providers for access or prioritized access to the broadband provider's end users; and
- if providers could profitably charge edge providers, they would have an incentive "to degrade or decline to increase the quality of service they provide to non-prioritized traffic."[20]

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[15] *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* FCC 05-151, 20 FCC Rcd 14986 (2005), setting out four principles, later referred to as four freedoms:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.

[16] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 F.C.C.R. 13028 (Aug. 20, 2008).

[17] Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[18] *Id.*, ¶ 3.

[19] *Id.*, ¶ 4.

[20] *NPRM*, ¶ 6.

The CPUC should generally support the FCC's efforts to adopt meaningful and effective rules to ensure an open Internet, and should comment on some of the FCC's specific proposals.
The legal avenue for the FCC to achieve its intended goal presents two options:

1. Separate "broadband access service" into two components: the "pipe" or transport component, which would be classified as a "telecommunications" (or common carrier) service, and the digital "information" services that ride on top of that telecommunications transport layer.

2. Continue to treat broadband access service as a bundled "information" service.

As discussed below, for the restated 2010 rules to be viable, given the *Verizon* decision, the FCC would need to classify broadband transport and access services as telecommunications services.

The CPUC should be aware that in the past, it has supported option 1 – the separation of broadband access service into two components – and has taken that position in FCC proceedings which ultimately reached the 9th Circuit Court of Appeals, and then the U.S. Supreme Court. As a party to those proceedings through every stage of litigation, the CPUC urged some form of separation of broadband transport from broadband content or services, as a way to promote universal service, a level playing field, and affordable access to the Internet.

At the same time, the CPUC may choose this opportunity to change course, and support FCC continued treatment of broadband access as an information service. As is also discussed below, this path has some chance of success, and would mean a continued "lighter" regulatory hand, but also would limit the reach of the rules the FCC could adopt.

Staff notes that the states of Illinois, New York, Pennsylvania, and Washington, have filed comments in this docket supporting Option 1.[21] The City of Los Angeles also has filed in support of reclassification, but Orange County has filed in support of the FCC's proposal to rely solely on § 706. This memo addresses below the question of the FCC's legal authority to pursue option 1 or option 2.

In its 2010 *Open Internet Order*, the FCC adopted rules that would promote transparency, as well as prohibit blocking of content and discrimination against content providers. The transparency rule survived the court challenge, while the court vacated the No-Unreasonable Discrimination and No-Blocking rules. In the wake of the D.C. Circuit's decision, the FCC proposes to enhance its Transparency rule, and to revise its 2010 "No Blocking" rule and "No Unreasonable Discrimination" rule.

The legal path the FCC proposes would be to "exercise its authority under section 706 [of the Telecommunications Act of 1996], consistent with the D.C. Circuit's opinion in *Verizon v. FCC*,

[21] The Illinois/New York Comments are available here http://apps.fcc.gov/ecfs/document/view?id=7521480771. Washington State filed a letter supporting these Comments.

to adopt [the] proposed rules."[22] At the same time, the FCC also seeks comment on "the nature and the extent of the Commission's authority to adopt open Internet rules under Title II and other possible sources of authority, including Title III."[23] These questions are addressed in the section of this memo titled "Legal Authority."

The CPUC submitted comments twice in the docket that produced the FCC's 2010 *Open Internet Order*. The CPUC supported open Internet practices, and specifically supported adoption of the proposed transparency rule, the No Blocking rules and the No Unreasonable Discrimination rule. It is important to note that the rules the FCC is proposing *here* are significantly different from the rules the CPUC supported in 2010. As is discussed below, the FCC's 2010 rules contemplated no unreasonable discrimination and no blocking.[24] The current set of proposed rules would allow discrimination but subject to a revised standard, and some blocking, albeit subject to a standard the FCC proposes to set.

1. **<u>Transparency Rule</u>**

In its 2010 *Open Internet Order*, the FCC concluded that effective disclosure of broadband providers' network management practices, performance, and commercial terms of service would promote competition, innovation, investment, end-user choice, and broadband adoption.[25] To that end, the FCC adopted the following transparency rule:

> A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.[26]

The FCC also is seeking comment on best practices for displaying and formatting relevant disclosures for end users, including any potential costs and burdens to broadband providers.[27] Should the information be made available in a machine-readable format, such as XML, that might allow the Commission, industry associations, or other organizations to easily access and synthesize information for consumers?[28]

The FCC also asks whether participation in its Measuring Broadband America (MBA)

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[22] *NPRM*, ¶ 142.

[23] *Id.*

[24] The 2010 rules, in fact, would have allowed some discrimination in pricing under a "just and reasonable" standard, which is a qualitatively different standard from what the FCC proposes here.

[25] *NPRM* ¶ 63.

[26] *Id*.

[27] *NPRM*, ¶ 72.

[28] *Id*.

should continue to satisfy the requirement that actual speeds be disclosed.[29] Further, the FCC asks if there are areas of its MBA program that could be improved to provide more useful information to consumers.[30]

RECOMMENDATION 1: The CPUC would support a requirement that the ISPs specifically tailor disclosures to meet the need of the edge providers and consumers. The *Verizon* court upheld the FCC's Transparency Rule, and here, the FCC seeks to enhance that rule, first by requiring ISPs to tailor their disclosures so as to meet the informational needs of the affected parties.[31] The FCC notes, for example, that edge providers may benefit from descriptions that are more technically detailed than descriptions provided to consumers.

RECOMMENDATION 2: The CPUC would support the proposal of the Open Internet Advisory Committee (OIAC)[32] that the FCC require the industry to use a standardized label for Internet service. The OIAC suggests that the label should include basic information such as performance speed (i.e., upload and download speed), price (i.e., monthly fee averaged over three years), and usage restrictions (i.e., any points at which the applicable terms of service change, including data usage caps and any charges, speed reductions, or other penalties for exceeding a cap) that consumers can use to comparison shop for service.[33]

RECOMMENDATION 3: The CPUC would support the FCC's tentative conclusion "that broadband providers must disclose in a timely manner to consumers, edge providers, and the public (and, of course, the Commission) when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for priority arrangements [if allowed], or the parameters of default or 'best effort' service as distinct from any priority service."[34] This information should include detailed information on network congestion. As the FCC proposes, ISPs should be required "to disclose meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion."[35]

RECOMMENDATION 4: The CPUC would report to the FCC about the CalSPEED application that is used by consumers to measure broadband upload and download speeds. In addition the CPUC would share our experience with the application and how the CPUC has utilized the information for comparison of broadband availability in the State.

2. No-Blocking Rule

The FCC proposes continuing the "No-Blocking" rule it first adopted in the 2010 *Open Internet*

[29] *Id.*, ¶ 79.

[30] *Id.*

[31] *Id.*, ¶ 68.

[32] *See, e.g., NPRM* at ¶ 72.

[33] *Id.*, ¶ 72.

[34] *Id.,* ¶ 78.

[35] *Id.*, ¶ 83.

Order, which would prohibit ISPs from blocking subscribers' access to certain content:

> No-Blocking: A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.
>
> A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

A "block" is defined as "[t]he failure of a broadband Internet access service to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers."[36]

The FCC is now proposing to adopt the text of the 2010 No-Blocking rule while separately clarifying that it would not preclude broadband providers from negotiating individualized, differentiated arrangements with similarly situated edge providers, subject to a standard of "commercial reasonableness". The FCC envisions that, as long as broadband providers do not degrade lawful content or service to below a minimum level of access, they would not run afoul of the proposed rule.[37] The FCC further envisions that "the revived no-blocking rule should be interpreted as requiring broadband providers to furnish edge providers with a minimum level of access to their end-user subscribers."[38]

Though the language of this proposed rule is identical to the 2010 rule, the FCC is proposing here to change both its interpretation of and its rationale for the rule. In contrast to the 2010 rule, the FCC's new interpretation of the same rule would allow for paid prioritization or "fast lanes" and would give ISPs some opportunity to provide content providers (*e.g.*, Netflix, Amazon) enhanced, higher speed access to subscribers, potentially for a fee.[39] Further, it is unclear how the FCC's proposal would treat emergency services or public safety agencies, and whether ISPs would be allowed to require such agencies to pay for prioritized traffic.

Along with re-interpreting the same rule, the FCC also is seeking comment on what the "minimum level of access" should be to provide this robust, fast, and effectively usable access, and whether it should be defined from the perspective of end users, edge providers, or both. The

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[36] *NPRM*, Appendix A.

[37] *Id.*, ¶ 89.

[38] *Id.*, ¶ 97.

[39] A variation on this theme is seen in the arrangements certain wireless network operators have made with content providers like ESPN, whereby ESPN pays a fee to the wireless provider so that its programming is not subject to the data limits the wireless provider otherwise imposes on its customers.

NPRM describes three possible standards to use:

- *Best Effort* would require ISPs to apply their best efforts to deliver traffic to end users;
- *Minimum Quantitative Performance* would set a minimum level of access through specific technical parameters, such as minimum speed;
- *An Objective, Evolving "Reasonable Person" Standard* would define minimum level of service as the level that satisfies the reasonable expectations of a "typical" end user.[40]

The FCC's proposal to allow "fast lanes" may pass muster under § 706 (and the current classification of broadband Internet access service as information service). But the proposal is on less firm legal ground with respect to the "minimum level of access" that would be required for the rest of the traffic. The proposed rule defines blocking as the "minimum level of access" that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers.[41] This suggests that ISPs must offer some minimal level of speed necessary to deliver the traffic.[42] At the same time, this approach appears inconsistent with the D.C. Circuit's view that requiring access at a minimum speed, i.e., a "minimum level of service" would be a form of common carriage.

> [I]n requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.[43]

The FCC, thus, faces a choice. The D.C. Circuit held that imposing a minimum level of service requirement is a form of common carriage. To avoid imposing common carrier regulation, the FCC has to allow ISPs to discriminate in their dealings with edge providers.

At the same time, the proposal to allow discrimination among edge providers raises the specter of emergency services or public safety agencies being required to pay extra for their traffic to have priority. This prospect would create enormous obstacles to the ability of states, cities, and counties to provide comprehensive, timely information to the public in any crisis. Ideally, the FCC should allow for public safety and emergency services traffic to be carried on a priority basis, but public agencies should exempt from paying for prioritization. Based on the *Verizon* decision, such a rule could only be imposed under common carrier regulation.

RECOMMENDATION 5: The CPUC would support an effective No-Blocking rule, recognizing that in order for the FCC to adopt such a rule, it must classify broadband service as a common carrier service. Because the D.C. Circuit held that imposing a "minimum level of service" requirement constitutes "common carriage", the FCC cannot require a minimum level of

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[40] *NPRM*, at ¶¶ 101-104.

[41] *NPRM*, at ¶ 98, Appendix A (emphasis added).

[42] *See*, *NPRM*, at ¶¶ 101-104.

[43] *Verizon*, slip op. at 60, 740 F.3d at 658, citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, at 701 n. 9 (1979) (a carrier may "operate as a common carrier with respect to a portion of its service only").

service without reclassifying. In addition, the CPUC should support a rule that would allow for prioritization of traffic in order to achieve "reasonable network management," and at the same time, urge the FCC to establish parameters for what would constitute "reasonable network management." In supporting the No-Blocking Rule, the CPUC would urge the FCC to define the "minimum level of service," as *An Objective, Evolving "Reasonable Person" Standard* that satisfies the reasonable expectations of a "typical" end user.[44] In addition, the CPUC would urge the FCC to adopt procedures to monitor ISP compliance with that level of service.

ALTERNATIVE 5A: The CPUC would support the FCC's proposed No-Blocking rule, including the requirement that ISPs offer a "minimum level of service," which the CPUC would recommend should be "*An Objective, Evolving 'Reasonable Person' Standard*." This No-Blocking rule would operate in conjunction with the proposed No Commercially Unreasonable Practices rule, discussed below. This approach would allow ISPs to manage network traffic through arrangements that could include paid prioritization or "fast lanes" for heavy users. This approach focuses on consumers' demand for both increasingly faster service and for having less expensive options available in the marketplace.[45] The CPUC would also urge the FCC to prohibit ISPs from requiring public safety or emergency services agencies to pay for prioritization of their traffic. And, the CPUC would also endorse the FCC's setting a minimum benchmark in service quality to be required for any entity receiving a subsidy from the FCC, absent a waiver, as the CPUC does in its CASF program.

3. Treatment of Mobile Internet Access Service

The 2010 No-Blocking rule prohibited mobile broadband providers from blocking consumers from accessing lawful websites or blocking applications that compete with the provider's voice or video telephony services. The FCC seeks comment on whether it would serve the public interest to expand the No-Blocking rule's scope to include reasonable access to all applications that compete with the mobile broadband Internet access provider's other services, not just those that compete with voice or video telephony services, subject to reasonable network management practices.[46]

Again, however, because of a separate classification choice, for the FCC to impose its proposed rules on wireless carriers may require the FCC to change the classification of "mobile broadband" from a "private" service to a "Commercial Mobile Radio Service", which is how wireless voice traffic currently is classified. The *Verizon* court noted this particular problem:

> Likewise, because the Commission has classified mobile broadband service as a "private" mobile service, and not a "commercial" mobile service [cite omitted] treatment of mobile broadband providers as common carriers would violate section 332: "A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is

[44] *NPRM*, at ¶¶ 101-104.

[45] For example, CD staff has found that the speed of the lowest-priced broadband access service option has increased geometrically, as has the highest-priced option.

[46] *NPRM,* ¶106.

> so engaged, be treated as a common carrier for any purpose under this [Act]." 47 USC § 332(c) (2); § 332(c) (2)[47]

RECOMMENDATION 6: The CPUC would support FCC adoption of a No-Blocking rule for mobile broadband that would apply to all applications that compete with the mobile broadband Internet access provider's other services as well, unless doing so is technically infeasible or required for reasonable network management practices. Staff further recommends that the FCC establish parameters for both "technical infeasibility," and for "reasonable network management practices."

4. No "Commercially Unreasonable" Practices

In place of the ban on unreasonable discrimination that the D.C. Circuit vacated, the FCC is proposing in the *NPRM* to permit individualized arrangements with similarly situated edge providers, as long as such arrangements are "commercially reasonable."[48] Specifically, the proposed rule provides:

> No Commercially Unreasonable Practices: A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.[49]

The FCC is proposing a flexible framework, with providers having to provide a minimum level of service, but above that, the ISPs could negotiate arrangements that could contain different prices, terms and conditions, so long as the arrangements were "commercially reasonable." Further, the FCC envisions that this commercially reasonable standard would be separate from the No-Blocking rule. This means that ISP conduct that would be acceptable under the No-Blocking rule, could still be found to violate the commercially reasonable standard.

Again, this rule is distinctly different from the one the FCC adopted in 2010, which prohibited ISPs from engaging in activity that would be "unreasonable discrimination," including discrimination against content providers. The D.C. Circuit threw out that rule, saying that it constituted "common carrier" regulation. Indeed, the "unreasonable discrimination" rule derives directly from the common carrier standard developed in the common law, codified at 47 U.S.C. § 201-202, and traditionally applied to telecommunications carriers, which holds regulated entities to a "just and reasonable" standard of conduct, precisely because they are providing utility services to the public.

The court characterized the "commercially reasonable" standard as a lower bar against discriminatory conduct. The new proposal would allow ISPs to engage in individualized

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[47] *Verizon,* slip.op.at 46, 730 F. 3d at 650.

[48] *NPRM* at ¶¶110-141.

[49] *Id.*, Appendix A, §8.7.

bargaining practices i.e., discriminate between edge providers, so long as those agreements meet a "commercially reasonable" standard of review. The rule would not prevent anti-discriminatory Conduct or practices at the outset; rather, upon receiving a complaint *after the fact*, the FCC would have to review, on a case-by-case basis whether a provider's conduct was "commercially reasonable."[50]

The D.C. Circuit held that, in order for the FCC to just rely on § 706 authority in imposing open Internet rules, the rule must allow for some discrimination in the service terms the broadband access provider is offering to its edge provider customers. At the same time, even under the common carrier "just and reasonable" standard, service providers can also engage in some discrimination between customers. The difference is that under a common carrier standard, a service provider must charge two customers the same price if they are receiving service under identical terms and conditions. Charging different prices for the identical service would be "unjust and unreasonable." But under the FCC's proposed "commercially reasonable" standard, an ISP could charge two edge providers different rates for similar or identical terms and conditions if the ISP asserted that doing so was "commercially reasonable."[51] If the edge provider considered the arrangement discriminatory, it would have to appeal to the FCC for a review, and that review would occur after the deal had been cut and the service terms in effect.

The "after-the-fact" review process the FCC envisions creates additional risk: the FCC could well become mired in fact-finding unique to every case, with heavily litigated outcomes as was seen with review of interconnection agreements carriers negotiated pursuant to §§ 251 and 252 of the 1996 Act. Underscoring the uncertainty the "commercially reasonable" standard would create, less than two weeks after the *NPRM* issued, T-Mobile filed a Petition for Declaratory Ruling, asking the FCC for guidance about what constitutes "commercially reasonable" in the context of the FCC's data roaming rule, given the ambiguities of the rule, and the "unequal bargaining power between the parties."[52] T-Mobile claimed that, despite the FCC's adoption of the data roaming rule and its commercially reasonable standard, CMRS providers still encounter difficulties in getting data roaming agreements (primarily with the two largest providers, AT&T and Verizon) on "commercially reasonable" terms.

RECOMMENDATION 7: The commercially reasonable standard would allow ISPs to discriminate under an undefined and likely unenforceable standard. Accordingly, the CPUC would oppose FCC adoption of the proposed "commercially reasonable" standard, and argue instead for adoption of the "no unreasonable discrimination" standard rooted in Title II. It is

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[50] It is worth noting that some discrimination of terms and conditions, including pricing, would be allowed under common carriage. The difference is that the discrimination under a common carriage standard would appear in tariffed and/or generally accessible rate tiers, applied to everyone, as opposed to the *ad hoc* "commercially reasonable" discrimination the FCC contemplates with its proposed rules.

[51] *See* discussion in *Verizon*, *slip. op.*, p. 61. "[N]ot only could Verizon negotiate separate agreements with each individual edge provider regarding the level of service provided, but it could also charge similarly-situated edge providers completely different prices for the same service."

[52] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc. (filed May 27, 2014) (T-Mobile Petition).

unclear whether or how the FCC could craft a "commercially reasonable" standard that would be workable and, as the *Verizon* decision requires, would allow providers to discriminate among edge provider traffic. Further, a rule that achieved both of those goals likely could not simultaneously further the FCC's vision of protecting and promoting an "open Internet."[53]

ALTERNATIVE 7A: The CPUC would support the FCC's proposed No Commercially Unreasonable Practices rule. This approach would allow the ISPs flexibility to tailor agreements to the specific needs and/or preferences of customers. Service providers and edge providers would continue to resolve disputes through standard business means and to litigate under a "commercially reasonable" standard. Further, industry stakeholders assert that this approach is more likely to spur investment in broadband deployment.

5. Legal Authority

The trade media, and to some extent, the FCC itself, have characterized the choice between the prospect of separating broadband access service into two components or continuing to treat the service as a unified information service as a dichotomy, a choice *between* reliance only on § 706 of the Communications Act,[54] or on Title II of the same statute. But that representation is simply inaccurate. The FCC can and should rely on its authority pursuant to § 706 of the Communications Act, as that provision expressly directs the FCC to promote deployment of and competition in the provision of broadband services. Section 706 is a Congressional directive to both the FCC and the states to exercise their authority to promote competition in the provision of broadband.

> The Commission and each State commission with regulatory jurisdiction over telecommunications services *shall encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[55]

Yet, the FCC's reliance *solely* on § 706, and the current classification of broadband access service as an information service, is highly problematic in light of the D.C. Circuit's *Verizon* decision. In reviewing the FCC's reliance on § 706 in the 2010 *Open Internet Order*, the Court posed the following question: "Does the Commission's current understanding of section 706(a)

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[53] Reply Comments of the CPUC, at 9, GN Docket No. 09-191, WC 07-*52 In the Matter of Preserving the Open Internet Broadband Industry Practices* (filed April 26, 2010).

[54] 47 U.S.C. 151 *et seq*. Originally, the 1934 Communications Act as modified by the Federal Communications Act of 1996. For purposes of this memo, it is referred to here generally as the Communications Act, or the 1996 Act for references to provisions added in 1996.

[55] Codified as 47 U.S.C. § 1302, both the D.C. Circuit and the FCC refer to this statutory provision as "section 706". Emphasis added.

as a grant of regulatory authority represent a reasonable interpretation of an ambiguous statute? We believe it does."[56] The issue for the D.C. Circuit, as noted above, was not that the FCC lacked authority under the Communications Act to regulate broadband service, but rather that the FCC had curtailed its options by classifying the services as an "information service."

Section 706 remains a source of authority for the FCC to regulate broadband service. But for purposes of imposing viable, effective rules to preserve an open Internet, the *Verizon* decision casts serious doubt on the FCC's ability to rely only on that statutory provision in this third attempt at crafting rules. To put it simply, because the FCC has classified broadband service as an information service, it has limited the tools in its toolkit. To get full use of those tools, the FCC must reclassify the service as a telecommunications, or common carrier, service.

An FCC decision to reclassify the broadband pipe as a telecommunications service is not without its own risks, both in the courts and in the marketplace. Court challenges are inevitable either way; some parties will advocate that the FCC is foreclosed from reclassifying because it reached the opposite determination previously. To that, the D.C. Circuit stated "so long as an agency adequately explains the reasons for a reversal of policy,' its new interpretation of a statue cannot be rejected simply because it is new."[57] Were the FCC to treat the broadband pipe as a common carrier service, and assuming the determination survived anticipated court challenges, the FCC could then impose the type of rules it proposed in 2010, and which the CPUC fully supported.

6. Forbearance

The FCC acknowledges that, if it were to reclassify broadband access service as a telecommunications service, "such a service would then be subject to all of the requirements of the Act and Commission rules that would flow from the classification of a service as a telecommunications service or common carrier service."[58] The FCC recognizes that full common carrier regulation would not necessarily be appropriate regulatory treatment for broadband service. Accordingly, the FCC asks:

> Should the Commission take such an approach, we seek comment on the extent to which forbearance from certain provisions of the Act or our rules would be justified in order to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served.[59]

In previous comments, the CPUC has also stated that if the FCC uses its Title II authority to regulate broadband Internet access service, it should forbear from rate regulation and other

[56] *Verizon*, *slip op.*, p. 22.

[57] In this case, the FCC would not be reaching a "new" conclusion, but rather, would be returning to a conclusion it abandoned in 2002, after a lengthy experiment that presumably has not produced an entirely satisfactory outcome.

[58] *NPRM*, ¶ 153.

[59] *Id*.

aspects of that historical regulatory regime.[60] The CPUC stated that “this approach is legally supportable and that it represents a sound policy choice.

Finally, it is worth noting that the California Legislature enacted in 2012 codified in § 710 of the Public Utilities Code a prohibition on the CPUC’s regulation of Voice over Internet Protocol (VoIP) or Internet Protocol (IP)-enabled services. The same statute contains policy language, demonstrating the Legislature’s intent:

> (1) Preserve the future of the Internet by encouraging continued investment and technological advances and supporting continued consumer choice and access to innovative services that benefit California;
>
> (2) Ensure a vibrant and competitive open Internet that allows California’s technology businesses to continue to flourish and contribute to economic development throughout the state.

The FCC’s *NPRM* similarly proposes to promote rapid broadband deployment and competition, and to reduce barriers to infrastructure investment.

To achieve that goal, the Internet, now a vital component of the U.S. economy and society, must remain open. The FCC might, as a result of taking input in this docket, classify the transport component of broadband access service as a common carrier service. Should the FCC do so, the consequence would not be an automatic delegation of authority to the states to “regulate the Internet”. Indeed, treating broadband access service as a common carrier service would not constitute regulation of the “Internet,” but of the means by which traffic on the Internet moves. Further, the FCC could decide to treat broadband access service as a “purely interstate” service, which would exempt it from state regulation. In any event, the CPUC has advocated that the FCC forbear from imposing unnecessary regulations on ISPs, even if it were to reclassify the service, and staff recommends the same approach here. Accordingly, these proposed comments

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[60] Section 10(a) of the 1934 Communications Act provides that the FCC shall forbear from applying any regulation or provision of federal law to a telecommunications carrier or service, in any or some geographic markets, if enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; if enforcement is not necessary for the protection of consumers; and if forbearance is consistent with the public interest. A forbearance proceeding may encompass a wide range of services and provisions of Title II at once. It also may be sufficient to urge the FCC to forbear from “economic regulations” and not forbear from consumer protection and safety provisions of Title II. In its orders, the FCC has manifested its understanding that 'economic' or 'common carrier' regulation includes a readily identifiable list of certification, tariffing, interconnection, service quality, and other related requirements that are distinct from social policy and consumer protection rules. See, e.g., *In re: Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* 19 F.C.C.R. 22,404 (2004), IP-Enabled Services, 19 F.C.C.R. 4863 (proposed 2004), and Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798.

do not implicate § 710.

RECOMMENDATION 8: The CPUC would support FCC adoption of meaningful and effective open Internet rules. To accomplish this, the CPUC would advocate reliance on § 706 *and* Title II, i.e., reclassification of the transport component of broadband access service as a telecommunications service. The CPUC would restate its position that the FCC forbear from numerous common carrier regulations, yet maintain those that are most crucial. For example, the CPUC should note that important public health and safety functions of broadband can and should be prioritized, and that doing so can only be accomplished by treating broadband service as a common carrier service. More specifically, the CPUC should urge the FCC to prohibit broadband service providers from allowing public health and safety functions to be held hostage during interconnection or contract disputes.

ALTERNATIVE 8A: The CPUC would support the FCC's reliance *solely* on § 706 of the 1996 Telecommunications Act, and the current classification of broadband internet access service as an information service. The CPUC could decide that reclassification of broadband access service poses too much uncertainty for the ISPs and for the market, in which case there would be no need to forbear from Title II provisions because the CPUC would not be supporting common carrier treatment of broadband access service.

7. Conclusion

Staff seeks authority to file comments in the FCC's Open Internet Docket consistent with the recommendations set forth here. The FCC is acutely aware that nothing prevents providers from acting in small ways to limit Internet openness, and those small ways may go undetected.[61] Indeed, the FCC received a signed by more than 150 technology companies, stating that the FCC "should take the necessary steps to ensure that the Internet remains an open platform for speech and commerce so that American continues to lead the world in technology markets."[62]

Further, nothing prevents providers from acting in larger ways to discriminate against or even block some content. Given these concerns, the CPUC should urge the FCC to adopt meaningful and effective rules to protect an open Internet.

HMM/RD:nas

[61] *NPRM*, Statement of Commissioner Mignon Clyburn, p. 90.

[62] May 7, 2014 Letter to FCC Chairman Tom Wheeler and other commissioners, p. 2.