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

M E M O R A N D U M

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To : The Commission
(Meeting of July 13, 2017)

From : Kim Lippi
Public Utilities Counsel IV
Legal Division

Helen M. Mickiewicz
Assistant General Counsel
Legal Division

Thomas J. Glegola
Program and Project Supervisor
Policy Analysis Branch

Subject: **Filing of Comments in Response to FCC's NPRM on "Restoring Internet Freedom"**

RECOMMENDATION: The CPUC should file comments in response to the Federal Communications Commission's (FCC) *Notice of Proposed Rulemaking* (*NPRM*), in which the FCC proposes to reverse its 2015 decision to classify Broadband Internet Access Service (BIAS) (both fixed and mobile) as a telecommunications service.[1] Although the *NPRM* does not at this time propose to eliminate the Open Internet Rules it adopted in 2015, it does question the continuing need for such rules. Alternatively, it asks whether the Open Internet Rules should be modified to align with its proposal to return BIAS to information service status. It does, however, propose to eliminate a "catch-all" general conduct standard intended to prevent providers from exercising economic and technical means that may harm end users and edge providers.[2] Finally, the *NPRM* seeks comment on how the reversal would affect other regulatory constructs,

[1] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, (FCC 17-60), rel. May 23, 2017 (*NPRM*).

[2] "Edge providers" are those who, like Amazon or Google, provide content, services, and applications over the Internet.

including pole attachment rights, the Lifeline program, and privacy and consumer protection. Comments are due July 17, 2017, and reply comments are due August 16, 2017.

Staff notes that the California Assembly passed Assembly Joint Resolution No. 7 on May 22, 2017, declaring the Legislature's strong support for the continued protection of net neutrality, open Internet access, the federal Lifeline program and the federal E-rate program. Resolution AJR 7 also declared that the Legislature views these programs as high priorities for California and the country, and opposes any federal efforts to rescind or block them. Staff's recommendations here are in keeping with the thrust of Resolution AJR 7.

BACKGROUND: On May 23, 2017, the FCC released a *Notice of Proposed Rulemaking* (*NPRM*), in which the FCC proposed reversing course on its Open Internet rules adopted two years ago in its *2015 Open Internet Order*.[3] In the *2015 Open Internet Order*, the FCC reclassified broadband Internet access service (BIAS) from an "information service" to a common carrier "telecommunications service", reclassified mobile broadband Internet access service from a private mobile service to a commercial mobile service (thus bringing both fixed and mobile BIAS under Title II of the Communications Act,[4]) and adopted a set of "bright-line" rules (No Blocking, No Throttling, and No Paid Prioritization) to achieve "net neutrality", as it is frequently called. The *2015 Open Internet Order* also adopted an enhanced transparency rule, requiring providers to disclose information about rates, fees, data caps, network performance, and network practices, as well as a "catch-all" general conduct standard to prevent practices that may harm end users and edge providers. The FCC applied those same rules to both fixed and mobile BIAS.

In the *2015 Open Internet Order*, the FCC found that BIAS providers have the incentive and the tools to deceive customers, degrade content, or disfavor content they do not like.[5] The Open Internet Rules are grounded on the principle that no actor –government or private –should interfere with the full, lawful use of the Internet. The FCC further found record support for its proposition that the Internet's openness continues to enable a "virtuous [cycle] of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses."[6] An open Internet, the FCC concluded, promotes innovation,

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[3] *See*, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015)(*2015 Open Internet Order*).

[4] Title II governs "common carriers."

[5] *See e.g.*, *2015 Open Internet Order*, ¶¶ 75, 78-101.

[6] *Id*., ¶ 77.

competition, free expression, and infrastructure deployment, while blocking, throttling, and paid prioritization practices invariably harm the Open Internet, and so were banned.

A. The *2015 Open Internet Order's* Reclassification of BIAS to "Telecommunications Service"

In order to provide a strong legal foundation for these rules, the FCC in 2015 reclassified retail broadband Internet access service from an "information service" to a telecommunications service, and mobile broadband Internet access service from a private mobile service to a commercial mobile service, thus bringing them both under Title II of the Communications Act. The FCC had previously adopted open network management practices, including disclosure, anti-discrimination and anti-blocking requirements in its 2010 order, *In re Preserving the Open Internet* (*2010 Open Internet Order*).[7] In *Verizon v. FCC*, issued in 2014, the D.C. Circuit Court of Appeals struck down the anti-discrimination and anti-blocking rules.[8]

The *Verizon* Court upheld the FCC's finding that Internet openness drives a "virtuous cycle" in which "innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge."[9] The Court further found that Section 706 of the 1996 Telecommunications Act (Act) furnished the FCC with the requisite affirmative authority to adopt the regulations. At the same time, the Court held that because the FCC has classified broadband service as an "information service," it could not impose common carrier *per se* obligations, such as the anti-blocking and anti-discrimination rules, on providers not treated as common carriers.[10] Accordingly, the Court struck down most of the FCC's rules, keeping intact only the rule pertaining to carrier transparency.

The FCC's response was the *2015 Open Internet Order*, discussed above, in which the FCC reclassified retail broadband Internet access service as a telecommunications service, grounding its Open Internet rules in multiple sources of legal authority, including both Section 706 and Title II of the Communications Act. The FCC also exercised its authority to forbear from 30 provisions contained in Title II, but did not forbear from sections it deemed necessary to ensure consumer protection, to promote competition, and to advance universal service.

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

[8] *Verizon v. FCC, et al.*, 740 F.3d 623, 2014 U.S. App. LEXIS 680 (2014).

[9] *2015 Open Internet Order* at ¶ 7, citing *Verizon*, 740 F.3d at 659.

[10] *Verizon*, 740 F.3d at 650. This means, in essence, that the FCC cannot treat a service as a "common carrier" service unless it has *classified* the service as a common carrier service.

B. The 2017 *NPRM* Proposal

In its 2017 *NPRM*, the FCC proposes to reverse its 2015 action, and return mobile and fixed BIAS back to "information services" classification under Title I of the Communications Act. The *NPRM* asserts that the *2015 Open Internet Order* "has put at risk online investment and innovation, threatening the very open Internet it purported to preserve."[11] It further asserts that infrastructure investment has declined due to increased regulatory burdens and uncertainty, as Internet service providers (ISPs) have pulled back on plans to deploy new and upgraded infrastructure, particularly smaller rural providers, and the 2015 order has weakened online privacy by assuming jurisdiction from the Federal Trade Commission.[12] The *NPRM* relies on several studies as evidence, asserting that reduced expenditures are a "direct and unavoidable" result of Title II reclassification.[13]

The *NPRM* also asserts that the structure of Title II appears to be a poor fit for BIAS, as exemplified by the FCC's multiple forbearance decisions.[14] The *NPRM* seeks comment on returning BIAS to an "information services" classification, by essentially treating as one service the "pipe" that transports Internet traffic to a consumer's premises and the consumer's ability to access content and applications on the computer desktop.[15]

The 2017 *NPRM* further proposes to eliminate the "catch-all" Internet conduct standard. Though the NPRM does not propose vacating the "bright line" rules or the transparency rule, it does question whether such rules are necessary to protect and maintain Internet freedom. The *NPRM* also asks whether and how such rules could be modified so they align with the proposed legal classification of BIAS as an information service, and the legal foundation for such rules.

Finally, the *NPRM* seeks comment on how the reclassification of BIAS as an "information service" would affect other areas of communications regulation, such as privacy, support for low-income individuals, and broadband deployment (the *NPRM* proposes to shift privacy enforcement to the Federal Trade Commission, to continue supporting broadband subsidies for low-income individuals through the Lifeline program, and asks how the proposed reclassification to information services would affect pole attachment rights).

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[11] *NPRM*, ¶ 4.

[12] *NPRM*, ¶¶ 4, 44.

[13] *NPRM*, ¶ 45.

[14] *NPRM*, ¶ 33.

[15] The FCC had taken this exact approach in its *Cable Modem* decision in 2002, which was the decision the FCC ultimately abandoned in its *2015 Open Internet Order*.

This memo discusses and provides recommendations regarding the impact the FCC's proposals would have on the ability of the CPUC and the FCC to perform their central functions, including consequences for the Lifeline program, BIAS providers' access to utility poles, and access to the Internet by persons with disabilities. Additionally, we discuss concerns regarding whether the FCC should reverse its finding that Section 706 of the Telecommunications Act constitutes a delegation of regulatory authority, and whether Section 230 of the Act gives the FCC the authority to retain any rules that were adopted in the *2015 Open Internet Order.*

DISCUSSION AND RECOMMENDATIONS:

A. The CPUC Should Support Retaining the Open Internet Rules

The CPUC has previously submitted comments to the FCC supporting a free and open Internet, and specifically supported adoption of the transparency rule, the No-Blocking rule, and the No-Unreasonable Discrimination rule.[16] Although the *NPRM* at this time does not propose eliminating these "bright line" Open Internet Rules, it does question whether these rules are still necessary. The FCC has not identified significant changed circumstances since it adopted these rules in 2015 that would support eliminating or modifying the rules. Further, as the *2015 Open Internet Order* acknowledges, the absence of strong anti-discriminatory rules could undermine critical infrastructure and public safety.[17] For example, providers of emergency services or public safety agencies might have to pay extra for their traffic to have priority. If states, cities, and counties were required to pay for priority access, their ability to provide comprehensive, timely information to the public in a crisis could be profoundly impaired.

Further, eliminating or modifying the rules so that review of discriminatory conduct occurs through after-the-fact complaints would create additional risk: the FCC could 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 Sections 251 and 252 of the 1996 Act. Eliminating the rules or lowering the bar against

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[16] Reply Comments of the CPUC, GN Docket No. 09-191, WC 07-*52 In the Matter of Preserving the Open Internet Broadband Industry Practices* (filed April 26, 2010); Comments and Reply Comments of the CPUC, GN Docket No. 10-127 *In the Matter of Framework for Broadband Internet Service* (filed July 15, 2010 and August 12, 2010, respectively). Although the CPUC did not speak specifically to the "General Conduct" standard, it should support retention of this rule as a necessary tool to prevent practices that may harm the Open Internet. Carriers' assert that the standard is "vague"; however, the 2015 Open Internet Order provides ample discussion on the purpose of the rule –to prevent the exercise of gatekeeper power through a variety of economic and technical means that may harm end users and edge providers –and sets out numerous factors regarding application of the rule, such that carriers can reasonably discern whether certain practices would violate the rule.

[17] *See, e.g.*, *2015 Open Internet Order*, at ¶¶ 114, 126, 150.

discriminatory conduct could inject uncertainty in the market and create unequal bargaining power between parties.

In the *NPRM*, the FCC did not identify any proposed modifications to the Open Internet Rules. Accordingly, Staff is not able to provide any analysis pertaining to possible replacements. Finally, modifying or eliminating the Open Internet Rules would invite a challenge that the FCC's action would be arbitrary and capricious.

Recommendation: Staff recommends that the Commission support retaining the current Open Internet Rules, including the General Conduct Standard, for the reasons set forth above.

B. Legal Support for the Open Internet Rules

1. Effect of Classifying BIAS as an "Information Service" on the Existing Open Internet Rules

Given the D.C. Circuit's *Verizon* decision, for the current Open Internet Rules to remain viable, the FCC would need to retain the "telecommunications services" classification for BIAS, providing Title II as a legal foundation for the rules. In striking down the FCC's *2010 Open Internet Order*, the D.C. Circuit noted that the issue was not that the FCC lacked authority under the Communications Act to regulate broadband service, but that the FCC had curtailed its options by classifying the services as an "information service."[18] The FCC's proposal to reverse its 2015 Order and reclassify BIAS back to an information service would undermine legal authority and support for the current Open Internet Rules.

Advocating support for classifying BIAS as a "telecommunications service" is consistent with previous CPUC comments to the FCC, where the CPUC stated that "the continued reliance on Title I as a legal framework for broadband Internet service is legally precarious, especially given the significant limitations imposed by the *Comcast* decision on the FCC."[19] Before that, the CPUC had supported the separation of broadband access service into two components – the 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. The CPUC has taken that position in FCC proceedings, and argued the same position in court challenges which

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[18] *Verizon*, 740 F.3d at 637, 649-650.

[19] CPUC Reply Comments, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, at p. 7 (filed Aug. 12, 2010). The reference to the *Comcast* decision is *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), in which the D.C. Circuit struck down an attempt by the FCC to enforce open Internet principles against Comcast, stating that the FCC's reliance on Title I as a source of jurisdictional authority for broadband Internet service is not securely linked to an express delegation of regulatory authority.

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.

Impact on the Open Internet Rules aside, an FCC decision to reverse its 2015 decision and reclassify the broadband pipe back to an information service is not without its own risks, both in the courts and in the marketplace. Court challenges are inevitable either way. First, the FCC would have to explain its decision, just two years after issuing a very thorough and well-reasoned order, upheld by the D.C. Circuit Court of Appeals, to return BIAS to a Title I classification after having reclassifying it in 2015 as a telecommunications service.

For example, in the *2015 Open Internet Order* the FCC resolved the question as to whether a service provider offering BIAS is offering a stand-alone service or a single integrated service. The FCC did so by examining consumer perception of what broadband providers offer, and, relying on nearly 4 million public comments, concluded that a provider supplies a telecommunications service when it makes a stand-alone offering of telecommunications, i.e., *from the users' perspective*. The current *NPRM* indicates that it may abandon the consumer perception approach. A reviewing court may find this abrupt course change to be "arbitrary and capricious", in part because the *2015 Open Internet Order* was so thorough and well-reasoned, the rules have been in place such a short time, and the only obvious reason for revisiting the rules is a change of administration.

To the extent alleged declining investment is the impetus for the FCC to reverse its 2015 decision, CD Staff has found no obvious trend regarding broadband investment in California. Staff notes conflicting analysis by respectable economists both as to the impact, if any, on broadband investment and whether such impact could be attributed to Title II treatment of BIAS. Indeed, it may be too soon to make determinations regarding investment, or to attribute any purported decline solely to the reclassification. Further, the FCC previously found that prior versions of its cited studies contained several substantial analytical flaws, calling their conclusions into question.

Recommendation: Staff recommends the Commission comment that in order for the existing Open Internet Rules to remain viable, the FCC would need to retain the "telecommunications services" classification for BIAS, providing Title II as a legal foundation for the rules. Staff further recommends that the CPUC submit comments raising concerns that the FCC may have difficulty explaining its proposal to reverse BIAS classification back to Title I as the 2015 order has only been in place a short time and the FCC has provided scant evidence that either the Title II classification or the Open Internet Rules are not working. At a minimum, the FCC should wait to develop a sufficient record in order to evaluate the full effects of Title II on investment.

2. Continued Use of Section 706 As Legal Support for the Open Internet Rules

In addition to Title II, the *2015 Open Internet Order* relied on Section 706 of the Telecommunications Act to establish no-blocking and no-unreasonable-discrimination rules as well as the transparency rule.[20] The current *NPRM* now asks whether the FCC should reverse its finding that Section 706 constitutes a delegation of regulatory authority (and instead interpret that section as a hortatory). The *NPRM* also seeks comment on a novel legal theory, whether Section 230[21] of the Act gives the FCC the authority to retain any rules that were adopted in the *2015 Open Internet Order*.

The reclassification issue aside, the CPUC should support continued use of Section 706 as a grant of authority to the FCC and the states, as recognized by the D.C. Circuit in the *Verizon* case. The D.C. Circuit found that Section 706 vests both the FCC and the states with expansive authority to "promote competition in the local telecommunications market" and to "remove barriers to infrastructure investment." It ultimately found that the FCC had "reasonably interpreted Section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic."[22] Reinterpreting Section 706, as the FCC now suggests, would remove a tool for the FCC as well as for state commissions to track and encourage the deployment of advanced telecommunications, including broadband. This could complicate, among other items, the review of applications for mergers, acquisitions and license transfers involving telecommunications service providers with BIAS affiliates.

Reliance on Section 230 as a source of authority for the Open Internet Rules, poses several potential impediments. First, there is the matter of whether Section 230(b)

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[20] Section 706 reads in relevant part: "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."

[21] Section 230 is entitled, "Protection for private blocking and screening of offensive material", and grants civil immunity for such blocking to providers of interactive computer services. As an initial matter, although not entirely clear from the *NPRM*, it appears that the FCC would rely on Section 230(b). Setting forth the policies underlying this protection, Section 230(b) states, in relevant part, that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services" and "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet." The remainder of 230 grants civil immunity to providers of interactive computer services for blocking obscene material, so it is unclear how that could provide legal authority preventing entities from blocking content.

[22] *Verizon v. FCC*, at 628. See also*, USTA v. FCC*, 825 F.3d 674, 733-734 (2016)(upholding the FCC's *2015 Open Internet Order*).

constitutes a delegation of regulatory authority. The FCC attempted to utilize the policy statements of Section 230(b) in the Comcast/BitTorrent case, wherein the FCC found that Comcast's network management practices frustrated the objectives of the statute. However, the D.C. Circuit rejected that attempt, finding that the FCC conceded that Section 230(b) is a statement of policy that itself delegates no regulatory authority.[23] It may be possible for the FCC to revisit its interpretation of Section 230(b); but it remains to be seen whether a court would affirm reliance on Section 230(b).

Second, and perhaps more importantly, reliance solely on Section 230(b) while reclassifying BIAS as an information service presents the same problem the FCC encountered in relying exclusively on Section 706. The D.C. Circuit found, as noted above, that the FCC had curtailed its options by classifying the service as an "information service." The FCC cannot impose common carrier obligations, such as the no blocking and no paid prioritization rules, upon BIAS providers absent a common carrier classification.

Recommendation: Staff recommends that the Commission support retaining the current interpretation of Section 706 as a grant of authority and use of Section 706 as additional legal authority for the Open Internet Rules. The Commission should further point out that reliance on Section 230, along with a reclassification of BIAS as information service, would not provide proper legal support for the Open Internet Rules.

C. Impact of Proposed Information Services Classification on California Programs and Other Communications Regulatory Constructs

1. Effect of Reclassification on Pole Access

The FCC currently extends attachment rights to mass market BIAS providers using Section 224 of the Communications Act, which is under Title II. The *NPRM* asks how the FCC should take into account the impact of its proposed reclassification of BIAS as an information service with respect to pole attachments.[24] This proposed reclassification may impact the pole attachment rights of Internet service providers that only have access rights under federal law due to the telecommunications service classification, and would not have access under State law without possessing a certificate of public convenience and necessity (CPCN).

In this *NPRM*, the FCC does not propose new rules regarding pole attachment rights nor regarding access to any other utility support structures, and thus Staff cannot discern how the FCC would extend pole attachment rights currently provided for under Section 224 if

[23] *Comcast v. FCC*, 600 F.3d 642, 654 (2010).

[24] *NPRM*, ¶ 69.

BIAS is not a "telecommunications service."[25] Section 224 provides a "utility shall provide a cable television system *or any telecommunications carrier* with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it") (emphasis added); *see also* 47 U.S.C. § 153(51). The FCC's finding that BIAS is a telecommunications service has afforded BIAS providers a right to attach to poles and utilize conduit under Section 224 of the Act.

Further, the CPUC should note that it has just opened a comprehensive proceeding on right-of-way access, including the implementation of nondiscriminatory pole attachment rights for BIAS providers pursuant to the CPUC's reverse preemption. The CPUC should inform the FCC of the CPUC's intention to craft a non-discriminatory regime that ensures that all telecommunications providers, including BIAS providers, have nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by utilities under Section 224.[26] A reclassification to Title I without a successful alternative for pole attachment rights would impact that proceeding, and possibly delay or harm BIAS deployment and therefore impact competition in California.

In its investigation of competition in the California telecommunications market, the CPUC found that competitive bottlenecks and barriers to entry limit new network entrants and may raise prices for some telecommunications services above efficiently competitive levels. One particular bottleneck is access to utility support structures.[27] Relying on that finding, Staff recommends that the CPUC submit comments asserting that BIAS providers must receive access to utility support structures, including poles and conduits, at nondiscriminatory rates, terms and conditions. Given that the statutory language in Section 224 restricts pole attachments to cable providers and "telecommunications carriers", the FCC would have difficulty guaranteeing this right if it returns BIAS to an "information service" classification.

Recommendation: Staff recommends the Commission submit comments reminding the FCC of the pole access proceeding here, asserting that BIAS providers must receive access to utility support structures, including poles and conduits, at nondiscriminatory rates, terms and conditions, and recognizing that the FCC remains bound by the statutory language in Section 224 restricting pole attachments to cable providers and Title II "telecommunications carriers".

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[25] The FCC might be able to construct an argument to allow BIAS providers on utility poles under Section 706, which of course, it could not do if it reinterpreted Section 706 so that it no longer was a grant of regulatory authority. This also raises implications for State commissions that have reverse-preempted the FCC with regard to pole access. If BIAS providers were reclassified as information services, for example, they may not be subject to California's safety regulations.

[26] In comments submitted in two other FCC dockets on June 15, 2017, the CPUC apprised the FCC of this CPUC proceeding.

[27] Decision 16-12-025, Finding of Fact No. 24, p. 189.

2. Effect of Reclassification on the Federal Lifeline Program

The *NPRM* seeks comment on a proposal to maintain support for broadband in the federal Lifeline program after reclassification, while also expanding federal Lifeline subsidies to support broadband infrastructure deployment:

> We propose to maintain support for broadband in the Lifeline program after reclassification. In the Universal Service Transformation Order, the Commission recognized that "[s]ection 254 grants the Commission the authority to support not only voice telephony service but also the facilities over which it is offered" and "allows us to... require carriers receiving federal universal service support to invest in modern broadband-capable networks." Accordingly, as the Commission did in the Universal Service Transformation Order, we propose requiring Lifeline carriers to use Lifeline support "for the provision, maintenance, and upgrading" of broadband services and facilities capable of providing supported services. We seek comment on this proposal. We also seek comment on any rule changes necessary to effectuate this change in our underlying authority to support broadband for low income individuals and families.[28]

The CPUC, in previous comments,[29] agreed with the FCC that it is critical for low-income households to have access to BIAS to meaningfully participate in our society. The CPUC also stated that adding BIAS as a federal Lifeline supported component of universal service would expand the California LifeLine Program's service offerings.[30] Access to broadband service is a necessity in this day and age.

The FCC added BIAS into the federal Lifeline program after it classified the service as a telecommunications service in 2015. However, given that Section 254 requires federal Lifeline subsidies to go to telecommunications services and facilities supporting those services, if broadband returns to Title I, it is questionable whether the FCC would have the legal authority to subsidize "BIAS-only" Lifeline service offerings as the current rules envision. Based on the existing federal Lifeline rules, the FCC will subsidize only BIAS

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[28] *NPRM* at ¶ 68.

[29] *See* Comments of the California Public Utilities Commission in Response to Second Further Notice of Proposed Rulemaking in Lifeline and Link-Up Reform Proceeding; FCC 15-71 (rel. June 22, 2015), at p. 64, filed September 24, 2015.

[30] *Id*. at p. 65.

beginning on December 1, 2021 and voice service will no longer be supported.[31]

The *NPRM* also proposes to use federal Lifeline subsidies to support broadband infrastructure deployment. Currently, the federal Lifeline subsidy only supports the actual federal Lifeline "service"; support is not specifically used for provision, maintenance and upgrading of facilities. The FCC administers other programs which provide high cost support for infrastructure deployment. The FCC oversees three other main federal universal service programs (High-Cost Support, Schools & Libraries, and Rural Health Care).

Unfortunately, the *NPRM* provides neither concrete information nor details for its proposal to subsidize broadband infrastructure, which raises several questions in terms of its impact on universal service in general, and for the California LifeLine Program. Absent clarification from the FCC, the *NPRM* leaves stakeholders uncertain of what the FCC's proposal actually entails.

Among the questions the FCC's proposal to use federal Lifeline support for the provision, maintenance, and upgrading of facilities raises are these:

- Will (and to what extent will) the proposal shift the low-income universal service program away from low-income households and instead towards the corporations for the benefit of those corporations and of people living in rural areas be they low-income or not?
- Will the definition of a low-income household differ based on whether the household is located in a rural or urban area?
- Will only facilities-based providers receive the federal Low-Income Support? If yes, will current federal Lifeline participants of resellers be able to transfer their discounts to another provider?
- How will the FCC apportion the federal Lifeline support between services and facilities?
- What will happen to wireless "resellers" that do not own their own facilities?
- How would this proposal affect the other universal service programs?
- Will there be any requirements, standards, and conditions for receiving federal Low-Income Support for infrastructure deployment?
- How will the FCC measure the effectiveness of diverting the federal Low-Income Support for infrastructure deployment?

Recommendation: 1) Consistent with the CPUC's previously submitted comments to the

[31] There is an exception to this rule, which is the situation whereby there is only one Eligible Telecommunications Carrier (ETC) in a census block.

FCC in support of the federal Lifeline broadband pilot and of adding BIAS[32] into the federal Lifeline program, the CPUC should continue to support including BIAS in the federal Lifeline program while pointing out that Title II classification of broadband provides appropriate legal authority to do so; 2) Consistent with our prior comments to the FCC, the CPUC should reiterate its opposition to substituting funding for telephone service for BIAS or to allowing federal Lifeline providers to offer only BIAS to federal Lifeline participants; 3) The CPUC should discuss California's experience and requirements, and provide quantifiable data, as applicable; (4) Staff further recommends noting that the FCC's proposal to use federal Lifeline support for broadband facilities is unclear and raises the questions listed above.

3. Effect of Reclassification on Privacy Rules

In the *2015 Open Internet Order*, the FCC cited to Section 222 of the Act, which imposes a duty on every telecommunications carrier to protect the confidentiality of its customers' private information, and imposes restrictions on carriers' ability to use, disclose, or permit access to customers' proprietary network information without their consent. The FCC decided, however, not to apply these privacy rules to BIAS providers, pending the adoption of rules better suited to BIAS providers.

Subsequently, in October 2016, the FCC did adopt consumer privacy rules for customers of telecommunications services, including broadband. The rules require carriers to obtain customers' opt-in approval for use and sharing of sensitive customer proprietary information, provide meaningful notice of privacy policies, take reasonable measures to protect consumer privacy, and established notification requirements for data breaches. The FCC further found that take-it-or-leave-it offerings of broadband service contingent on surrendering privacy rights were contrary to the requirements of Sections 222 and 201 of the Act, and therefore prohibited that practice. The FCC also announced its intent to continue to preempt state privacy laws, including data security and data breach laws, *only to the extent that they are inconsistent* with any rules adopted by the FCC.

On April 4, 2017, before the rules could take effect, President Donald Trump signed a congressional resolution that rescinded the FCC's privacy rules. Part of the rationale was that the rules created an unfair advantage for Internet providers who compete against interactive business such as Google and Facebook. On June 19, 2017, California Assemblyman Ed Chau introduced Assembly Bill (A.B.) 375 to require ISPs such as Verizon Communications Inc., Comcast Corp., and AT&T Inc., to get permission from consumers before using, disclosing, selling, or allowing access to customer information. Notwithstanding the repeal of the FCC's privacy rules, reclassifying BIAS back to an information service would remove the application of Section 222 privacy protections for

[32] *See In the Matter of Lifeline and Link Up Reform and Modernization et al.*, WC Docket Nos.11-42, 09-0197, and 10-90, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, (rel. June 22, 2015).

customers of BIAS service. It also may be problematic for California's attempt to introduce broadband privacy rules.

On the other hand, reclassification to information services would make some of the companies subject to Federal Trade Commission privacy rules again. This may be problematic because, while the FCC's rules would have protected consumers before they were harmed, the FTC can only act *after* harm has already occurred.

Recommendation: Staff recommends that the CPUC support strong preventive measures to protect consumers' privacy rights, and oppose any action that may hinder states' efforts to implement their own strong privacy protections for their citizens.

4. Effect of Reclassification on Persons with Disabilities Access to the Internet

In the *2015 Open Internet Order*, the FCC did not forbear from Sections 225, 255, and 251(a)(2), enabling individuals with disabilities to realize the benefits of Internet service by preventing barriers to access. These sections mandate the availability of interstate and intrastate Telecommunications Relay Services to the extent possible and in the most efficient manner to individuals in the United States who are deaf, hard-of-hearing, deaf-blind, and who have speech disabilities, and require telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable. People who are blind, hard of hearing, deaf-blind, and who have speech disabilities increasingly rely upon Internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language and to use video relay service. Section 225 maintains the FCC's ability to ensure that individuals who are deaf, hard-of-hearing, deaf-blind, and who have speech disabilities can engage in service that is functionally equivalent to the ability of a hearing individuals who do not have speech disabilities to use voice communication services. Reclassifying BIAS to an information service would remove BIAS providers from obligations specific to Sections 225, 255, and 251(a)(2).

Further, the CPUC's Telecommunications Advisory Committee for the Deaf and Disabled (TADDAC) has submitted to the Director of the Communications Division, a letter urging the CPUC to oppose returning BIAS to information service status. A copy of the letter is attached to this memo.

Recommendation: The CPUC should support retaining these protections for persons with disabilities; removing BIAS from common carrier status could create uncertainty about the FCC's ability to enforce compliance with federal requirements to provide services to the disabled.

ATTACHMENT

To Item 24 (15818) – Commission Meeting of July 13, 2017

TADDAC Comments Re FCC Proposed Rulemaking dated 6/27/2017

www.CaliforniaPhones.org
Programs of the California Public Utilities Commission
Deaf and Disabled Telecommunications Program
Telecommunications Access for the Deaf and Disabled Administrative Committee
1333 Broadway, Suite 500
Oakland, CA 94612
Tommy Leung, Committee Chair

June 27, 2017

Mr. Jonathan Lakritz
Communications Division
California Public Utilities Commission
505 Van Ness Avenue, 3rd Floor
San Francisco, CA 94102

Re: FCC's Notice of Proposed Rulemaking to undo the 2015 Decision to Regulate Internet Services from Common Carrier to Information Services

Dear Jonathan,

At the last meeting on June 23rd, the Telecommunications Access for the Deaf and Disabled Administrative Committee (TADDAC) voted to submit the following Comments regarding the FCC's notice of proposed rulemaking to undo the 2015 decision to regulate internet providers as utilities.

1) The proposed change would adversely impact TADDAC's mission to provide functionally equivalent telecommunication services to vulnerable customers, including disabled individuals and senior citizens.

2) In so doing, the proposed change would violate the ADA. For example, in rural areas there is no substitute or functional equivalent for copper wires which carry 911, closed captioning and TTY services.

Sincerely,

Tommy Leung

Tommy Leung
Chair
Telecommunications Access for the Deaf and Disabled Administrative Committee

cc: Alan Solomon, Barry Saudan, Helen Mickiewicz, Reina Vazquez