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New England Cable & Telecommunications Association, Inc.

August 3, 2018

VIA ELECTRONIC FILING AND HAND DELIVERY

R.I. Department of Administration
Division of Legal Services
One Capitol Hill, 4th Floor
Providence, RI 02908
ATTN: Daniel W. Majcher

**RE: Public Comments:
Proposed Notice of Proposed Rulemaking (220-RICR-30-00-1)**

Dear Mr. Majcher:

On behalf of The New England Cable & Telecommunications Association, Inc. (NECTA)¹ we provide the Department with our comments in regards to the Department's June 29, 2018 Notice of Proposed Rulemaking in this matter.

The Notice sought comment on, among other things, a proposed addition to the State of Rhode Island's Procurement Regulations, to add an entire new section, designed to implement a series of "Internet Neutrality Principles" as a requirement for any entity seeking a State contract. The Department proposed the addition pursuant to the Rhode Island Governor's Executive Order 18-02 – Internet Neutrality and State Procurement ("EO-18-02"), which instructed it to amend the procurement rules and regulations "as necessary and appropriate to comply with this directive."

NECTA has a keen interest in ensuring reasonable commercial standards are maintained pursuant to R.I. Gen. Laws § 37-2-1, et seq. (the "State Purchases Act") and 220-RICR-30-00-1 so that the State of Rhode Island can operate a modern but fair, responsible, and cost-effective procurement process for all parties involved. Because of this, NECTA supports the comments filed by the Cellular Telecommunications Industry Association ("CTIA") regarding the issues and concerns raised by the language in the Department's proposed new section 1.9 (Internet Neutrality Principles). While NECTA members support and practice strong, legally enforceable net neutrality protections that ensure an open Internet for their customers, regulating the Internet

¹ NECTA is a nonprofit organization and regional trade association that represents the interests of most cable television and cable-based telecommunications providers in the New England region in legislative and regulatory proceedings.

through a disruptive patchwork of state regulations will only harm consumers in Rhode Island and across New England and discourage future investment.

NECTA and its members are also concerned that the proposed amendments exceed the scope of the EO and thus fall outside the Department's discretion in this matter and believe it would be inconsistent with both state and federal law. In particular, NECTA agrees with the concerns expressed by CTIA in its comments that individual state regulation of Internet services is preempted by federal law and violates the Commerce Clause of the United States Constitution. However, we understand that review of the legality of state regulation generally and the EO itself are not at issue in this rulemaking, and therefore focus our comments on issues presented by the proposed amendments themselves.

NECTA would like to emphasize the following specific concerns that were also outlined by CTIA's comments. We agree that portions of the proposed amendments either impermissibly conflict with the EO or extend beyond the scope of the authority granted by the EO. The following correspond to CTIA's list of concerns:

- ***Proposed Section 1.9(B)(3)***. The EO bars "paid prioritization" as defined consistent with the EO, but also broadly expands the EO by including a brand new prohibition of any "require[ment] that end users pay different or higher rates to access specific types of content or applications." NECTA agrees such an expansion over the EO is ill-advised and also believes it could deny RI consumers the benefits of future innovative offerings if providers decide they do not want to risk the uncertainty created by the amendment. The Department should resist expanding the language of the EO.
- ***Proposed Section 1.9(G)(2)***. As CTIA notes, the EO provides that the Director of the Department may find that "a waiver would serve a legitimate and significant interest of the State" whereas Section 1.9(G)(2) imposes a *second* requirement, allowing a waiver only if the Director finds that it "is in the State's best interest" and also that it "serves a legitimate and significant public purpose." NECTA agrees that regulations adopted to implement the EO should not change the substantive requirement for waiver set out in the EO itself. If the Department does change it, the regulation should be revised to allow the Director to grant a waiver based on legitimate business purposes as well, which may also serve a legitimate and significant interest of the State.
- ***Proposed Section 1.9(D)***. NECTA agrees that this proposed section's expansion of the definition of BIAS so that it "includes, but is not limited to" functional equivalents or services used to evade net neutrality requirements would leave open the possibility that other, unnamed services might also qualify as BIAS.

This would introduce uncertainty on which services are covered by the rules. At a minimum, there should be a proposal and opportunity for comment. NECTA agrees that nothing in the EO contemplates this broad and potentially unlimited expansion of the kinds of services that might be subject to the regulation's requirements.

- ***Proposed Section 1.9(G)(1)***. The EO provides that the Director of the Department may waive the EO's requirements "upon receipt of a written justification from a State Agency" As CTIA comments explain, Section 1.9.(G)(1) would also add another layer of bureaucracy to the waiver procedure, by directing the Division of Public Utilities and Carriers, the Emergency Management Agency, and the Division of Information Technology to make recommendations on waiver requests before the Director makes a decision. NECTA agrees with the comment of CTIA that while the EO does not expressly prohibit the Department from receiving recommendations from other state agencies this modification nevertheless adds an unnecessary administrative hurdle that will make it more difficult for BIAS providers to obtain waivers and ultimately more difficult for the State to obtain, and providers to offer, BIAS in Rhode Island. NECTA agrees the Department should not impose this requirement.

Finally, in addition to exceeding the authority granted by the EO, NECTA would like to point out that the proposed expansion of the EO in 1.9(B)(3) of the proposed amendments to prohibit "different or higher rates to access specific types of content or applications" also could violate RI's Broadband Deployment and Investment Act by attempting to regulate rates on IP services. Chapter 39 Section 28-3, Regulation, states that "[n]otwithstanding any general or public law, to the contrary and with the exception of the provisions of subsection 39-28-4, no department, agency, commission or political subdivision of Rhode Island shall enact, adopt or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the entry, rates, terms or conditions of VoIP Service or IP-enabled service." This is yet another reason the Department should not impose this requirement.

NECTA appreciates that the Department is tasked with promulgating rules that are appropriate and necessary and that comply with the EO. However, NECTA's position is that the proposed implementing regulations do not do so as set forth herein. Further they are inconsistent with state and federal law. Accordingly, NECTA joins with CTIA in their analysis and offers these comments with the goal of assisting the Department in establishing compliant rules.

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Thank you for considering NECTA's comments and please do not hesitate to contact me if you have any questions.

Sincerely,

Paul R. Cianelli

Paul R. Cianelli, President & CEO
New England Cable &
Telecommunications Assn. Inc. (NECTA)