CenturyLink™

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Via Email to Daniel.Majcher@doa.ri.gov

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

RE: Rule Identifier 220-RICR-30-00-1
CenturyLink's Comments Regarding Proposed Rule

Dear Mr. Majcher:

CenturyLink[1] submits these comments in response to the July 29, 2018 Public Notice issued by the Rhode Island Department of Administration (hereafter "Department"), Division of Purchases (hereafter "Public Notice").[2]

The Public Notice seeks comment regarding certain proposed additions to Part 1 of the Rhode Island Procurement Regulations to comply with Executive Order 18-02 (hereafter "EO 18-02").[3]

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[1] CenturyLink Communications, Inc. is the parent company to the following providers authorized by the Rhode Island Public Utilities Commission to provide service: CenturyLink Communications, LLC, CenturyLink Public Communications, Inc., Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Level 3 Communications, LLC, Level 3 Telecom Data Services, LLC and WilTel Communications, LLC.

[2] Rhode Island Government Register, Public Notice of Proposed Rulemaking, ERLID Number: 10074, Department of Administration, Division of Purchases, Rule 220-RICR-30-00-1 (Public Notice Date 6/29/2018)).

[3] Executive Order 18-02. Internet Neutrality and State Procurement ("EO 18-02") available at: http://www.governor.ri.gov/documents/orders/ExecOrder18-02.pdf. The Public Notice also proposes certain non-substantive changes to the Regulations that are not relevant to this filing.

As the Public Notice explains, adoption of the proposed amendments to the Regulations "means that as a condition to receive a State contract, vendors must certify compliance and abide with the net neutrality principles stated in EO 18-02, or otherwise receive a waiver from the State."[4]

CenturyLink highly values its relationship with the state of Rhode Island and currently provides a variety of services to the state. CenturyLink has always adhered to core Net Neutrality (NN) principles and will continue to do so.

However, it is widely believed that EO 18-02, like other, similar initiatives in other states, is vulnerable to legal challenge on federal preemption and other grounds. For this reason, CenturyLink encourages Rhode Island to reconsider this ill-conceived path which is likely to lead to an overturning of EO 18-02 and the proposed amendments – while wasting a lot of taxpayer dollars along the way as the state seeks to defend its requirements.

Alternatively, should it adopt amendments to the Regulations to implement EO 18-02, CenturyLink proposes that the amendments make clear that EO 18-02 cannot be interpreted as imposing NN obligations exceeding those imposed by the Federal Communications Commission (FCC) under its recently repealed 2015 Title-II based Open Internet regulations.

Even if it were to adopt the clarification that the obligations do not exceed those in the 2015 Title-II based Open Internet regulations, the requirements imposed by EO 18-02 would carry with them significant uncertainty and vagueness as to the scope of the requirements. Because of this, CenturyLink also proposes additional amendments to the Regulations that would establish an appropriate dispute resolution process for parties to work toward a reasonable understanding of the scope of the requirements and to resolve any disputes about their scope. These requirements would also establish that, at the end of the day, the state's sole remedy for any purported violations of the NN requirements would be termination of the relevant contract.

A. EO 18-02 Is Unlawful As It Is Preempted By Federal Law

In 2015, the FCC adopted the Open Internet Order (*FCC 2015 Open Internet Order*) that established three bright-line rule prohibitions and an Internet Conduct standard along the lines of the NN requirements contained in EO 18-02.[5]

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[4] See SUMMARY OF PROPOSED RULE, Rhode Island Government Register, Public Notice of Proposed Rulemaking, ERLID Number: 10074, Department of Administration, Division of Purchases, Rule 220-RICR-30-00-1 (Public Notice Date 6/29/2018)).

[5] *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015), *aff'd sub nom.*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied*, 2017 U.S. App. LEXIS 7712 (D.C. Cir. May 1, 2017) (Nos. 15-1063, *et al.*), *petitions for cert. pending* (filed Sep. 27, 2017) (Nos. 17-498, *et al.*) ("*FCC 2015 Open Internet Order*").

In 2017, the FCC adopted the Restoring Internet Freedom Order (*FCC 2017 RIF Order*) in which those rules established by the *FCC 2015 Open Internet Order* were repealed.[6] The *FCC 2017 RIF Order*, like the *FCC 2015 Open Internet Order,* broadly preempt state NN regulation. Specifically, it stated that:

> We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of *de*regulation is entitled to the same preemptive effect as a federal policy of regulation.[] In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.[] Just as the *Title II Order* promised to "exercise our preemption authority to preclude states from imposing regulations on broadband service that are inconsistent" with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.[]…We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.[] Among other things, we thereby preempt any so-called "economic" or "public utility-type" regulations,[] including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.[][7]

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[6] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018), *appeals pending sub nom., Mozilla Corp., et al. v. FCC*, Nos. 18-1051, *et al.* (D.C. Cir. pet. for rev. filed Feb. 22, 2018) ("*FCC 2017 RIF Order*").

[7] *FCC 2017 RIF Order*, 33 FCC Rcd at 426-28 ¶¶ 194-95 (emphasis in original; footnotes omitted).

The NN requirements imposed by EO 18-02 constitute an attempt by Rhode Island to impose regulations essentially equivalent to those imposed by the now-repealed *FCC 2015 Open Internet Order*. As such, they are preempted by federal law.

Nor are the Rhode Island NN requirements valid based on the market participant doctrine, as some have wrongly suggested. The United States Supreme Court (USSC) has found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action may not constitute regulation subject to preemption.[8] At the same time, the USSC, and lower courts enforcing its precedents, have also been careful to delineate other contexts where state agencies are essentially acting as regulators rather than as market participants – contexts, where states are clearly preempted. In doing so, courts typically apply the following test:

> … when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption. When, however, a state attempts to use its spending power in a manner "tantamount to regulation," such behavior is still subject to preemption.[9]

Applying these principles/precedents, it is clear that the recent net neutrality executive orders have as their manifest purpose and inevitable effect to establish net neutrality regulation of broadband Internet Access ("BIA") service. These initiatives are clearly not narrow and focused activities based on legitimate market participant incentives, but rather are "tantamount to regulation." Thus, such executive orders, including EO 18-02 here, are clearly unlawful.[10]

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[8] *See e.g., Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993)(state conduct not preempted where state agency was acting as a market participant - i.e. just as a private entity would - to address legitimate needs - ensuring efficiency - of a single project); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (Massachusetts municipality's requirement that fifty percent of workers on City-funded construction project be residents of City not preempted).

[9] *Cardinal Towing & Auto Repair, Inc. v. City of Bedford,* 180 F.3d 686, 692 (5th Cir. 1999).

[10] *See e.g., Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 291 (1986)(Wisconsin state law prohibiting state procurement agents from purchasing "any product known to be manufactured or sold by any person or firm included on the list of labor law violators" not permissible under market participant doctrine – since "manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA"); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1339, (D.C.Cir. 1996)(executive order barring contracts with companies that permanently replaced striking workers was preempted by the NLRA because it "[sought] to set a broad policy governing the behavior of thousands of

EO 18-02 and similar initiatives are also unwise as a policy matter. BIA services are interstate services that, by their very nature, rely upon supporting network topographies and traffic flows that extend across state boundaries. The FCC concluded, in both the *FCC 2017 RIF Order* and the *FCC 2015 Open Internet Order* before it, that any net neutrality regulation should be governed by a uniform set of federal regulations and not through a patchwork of different and conflicting state and local requirements. Allowing such a patchwork of state requirements, like those reflected in EO 18-02 would unduly burden BIA service, inevitably lead to inconsistency and confusion, and ultimately harm consumers. For those reasons state net neutrality regulation like the Rhode Island NN Requirements are clearly harmful as a policy matter – in addition to being unlawful.

B. The Amendments to the Regulations Should Include Language Limiting The State's Ultimate Remedy In The Event of a Dispute About the NN Requirements.

The NN requirements imposed by EO 18-02 would carry with them significant uncertainty and vagueness as to the scope of the requirements. Indeed, the NN requirements reflect language largely borrowed from the requirement imposed by the *FCC 2015 Open Internet Order.* By design, those requirements were crafted to be high level principles to be applied over time on a case-by-case basis.

While CenturyLink is hopeful that no disputes would arise under the Rhode Island NN principles, there is some potential for good faith disagreements to arise.

American companies and affecting millions of American workers"); *Van-Go Transport Co., Inc. v. New York City Bd. of Education*, 53 F.Supp.2d 278, 288 (E.D.N.Y. 1999)(state policy of refusing to conditionally certify replacement workers applied to all of a state agency's student transport contracts preempted under the NLRA); *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950, 956 (N.D. Cal. 2001)(card check rule applying to all employers at an airport effectively operated as a licensing scheme and was preempted by NLRA and other federal statutes); *Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006)(statute prohibiting use of state funds for purposes of encouraging or discouraging union organization was regulatory and preempted by NLRA); *Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73, 81 (D.R.I. 2000)(City's grant of favorable tax treatment in exchange for use of a project labor agreement was regulatory and preempted by NLRA): *Ohio State Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cnty. Bd. of Commissioners*, 98 Ohio St. 3d 214, 2002 Ohio 7213, 781 N.E.2d 951 (Ohio 2002)(Ohio statute prohibiting public authorities from entering into or enforcing project labor agreements on public construction projects was regulatory and preempted by the NLRA).

Because of this concern, CenturyLink proposes an amendment to the Regulations that would establish an appropriate dispute resolution process for parties to work toward a reasonable understanding of the scope of the requirements and to resolve any disputes about their scope. These requirements would also establish that, at the end of the day, the state's sole remedy for any purported violations of the NN requirements would be termination of the relevant contract. Accordingly, the Department should adopt, as part of any amendments to the Regulations to implement EO 18-02, CenturyLink's proposed dispute resolution language in Appendix A hereto.

We appreciate the opportunity to comment on the Proposed Rulemaking and would be pleased to offer more explanation or detail on any of the proposed changes.

If you have any questions, please do not hesitate to contact me at (317)713-8977.

Sincerely,

Pamela H. Hollick

Enc: Redline of Proposed Rule