August 3, 2018

SENT VIA ELECTRONIC MAIL
Department of Administration
Division of Legal Services
One Capitol Hill, 4th Floor
Providence, RI 02908
Attn: Daniel W. Majcher
Daniel.Majcher@doa.ri.gov

Dear Mr. Majcher:

CTIA thanks the Department of Administration (the "Department") for the opportunity to comment on proposed amendments to Part I of Rhode Island's Procurement Regulations in response to Executive Order 18-02 – Internet Neutrality and State Procurement (EO 18-02) (the "EO"). CTIA supports an open internet, and is committed to a sensible uniform framework that promotes investment and enhanced opportunities for all participants in the broadband ecosystem. CTIA has expressed elsewhere the concern of its members with state efforts, such as the EO and the proposed regulations, to regulate interstate Internet access service and the resulting patchwork quilt of inconsistent and unworkable directives. We have also made clear that such regulation is preempted by federal law and violates the Commerce Clause of the United States Constitution. *See Restoring Internet Freedom Order*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, ¶ 195 (2018) (preempting "*any* state or local measures that would effectively impose rules or requirements that [the FCC had] repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for *any aspect* of broadband service" addressed in the decision); *Chamber of Commerce v. Brown*, 554 U.S. 60, 69 (2008) (when a state cannot "directly regulate" activity that is preempted by federal law, "[i]t is equally clear that [it] may not indirectly regulate such conduct by imposing restrictions on the use of state funds"); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989) ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."). For the purposes of this letter, however, we limit these comments to the other infirmities of the proposed regulations.

CTIA and its members are concerned regarding the proposed regulations to the extent they (1) exceed the scope of the EO and thus fall outside the Department's discretion in this matter and (2) would be inconsistent with federal law.

First, in several respects, the proposed regulations either conflict with the EO or extend beyond the scope of the authority granted by the EO. Specifically:

- *Proposed Section 1.9(B)(3).* The EO bars "paid prioritization," defining that practice to involve preferential treatment of traffic either (1) in exchange for consideration from "a third party" or (2) to the benefit an affiliated party, but specifically excluding "the provision of tiered internet access service or offerings to a retail end user." Section 1.9(B)(3) of the proposed regulations bars such paid prioritization, but goes further, also purporting to prohibit any "require[ment] that end users pay different or higher rates to access specific types of content or applications." The addition of this restriction not only injects internal conflict and ambiguity into the regulation, it threatens to limit myriad customer benefits which are permitted by the EO. For example, the EO allows a broadband internet access service ("BIAS") provider to offer "free data" (also known as "zero rating"), thereby exempting a category of service, such as streaming video, from the subscriber's data cap, while the proposed rule could be interpreted to call such an offering into question. Such a prohibition would exceed and be inconsistent with the scope of the EO.

- *Proposed Section 1.9(G)(2).* The EO permits a waiver so long as the Director of the Department finds that "a waiver would serve a legitimate and significant interest of the State." Section 1.9(G)(2) would impose 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" (emphasis added). Regulations adopted to implement the EO should not change the substantive requirement for waiver set out in the EO itself.

- *Proposed Section 1.9(D).* In defining "broadband internet access service" – the service subject to its requirements – the EO provides that BIAS "encompasses any service that the FCC finds to be providing a functional equivalent of the service described in the previous sentence [*i.e.*, the sentence providing the core BIAS

definition], or that is used to evade the protections set forth in [the EO]." Section 1.9(D) would expand that definition by providing that BIAS "includes, but is not limited to" functional equivalents or services used to evade net neutrality requirements. This modification would leave open the possibility that other, unnamed services might also qualify as BIAS. Nothing in the EO contemplates this broad and potentially unlimited expansion of the kinds of services that might be subject to the EO'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 …." Section 1.9.(G)(1) would 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. CTIA recognizes that the EO does not expressly prohibit the Department from receiving recommendations from other state agencies. Nevertheless, this modification 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. The Department should not impose this requirement for multiple reviews and recommendations.

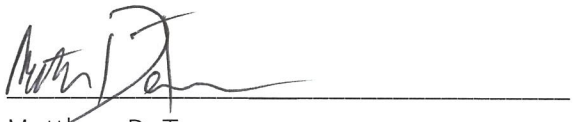
In addition to exceeding the authority granted by the EO, proposed Section 1.9(B)(3) violates Section 332(c)(3) of the federal Communications Act, 47 U.S.C. § 332(c)(3). That section provides that "no State or local government shall have any authority to regulate … the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3). The FCC has held that mobile broadband internet access is a private mobile service. Rhode Island is thus barred from regulating the rates charged by mobile broadband providers. That is precisely what proposed section 1.9(B)(3) purports to do, however, in prohibiting BIAS providers from charging end users "different or higher rates to access specific types of content or applications."

CTIA recognizes that the Department is required to promulgate rules to implement the provisions of the EO. The EO and any implementing regulations, however, are inconsistent with and preempted by federal law. CTIA hopes that its comments *supra*

will assist the Department in crafting rules that are free of the additional flaws described above.

Thank you for considering CTIA's views.

Sincerely,



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