Summary of Comments and Responses – Net Neutrality (220-RICR-30-00-1)

I. CTIA

a. CTIA believes regulation is preempted by Federal Law and violates the commerce clause.

RESPONSE: The State is not preempted or in violation of the commerce clause. As a purchaser of services, the State of Rhode Island ("State") may set conditions on vendors doing business with the State. Any vendor who does not wish to abide by those conditions can simply choose not to provide services to the State. Therefore, the State is acting as a consumer and not as a regulator. Thus, this comment is not accepted.

b. The regulation exceeds the scope of the Executive Order.

RESPONSE: The proposed regulations fall within the scope of the Executive Order. Additionally, based on specific comments received by the Department of Administration ("Department") and described herein, the Department further revised the proposed regulations.

c. The regulation is inconsistent with Federal Law.

RESPONSE: See response to I(a) above. This comment is not accepted.

d. Specific Comments:

i. 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(6)(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.

RESPONSE: The Department has deleted the phrase "require[ment] that end users pay different or higher rates to access specific types of content or applications" from the proposed regulations. Comment accepted.

ii. 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.

RESPONSE: This comment is accepted and the language in Section 1.9(G) is amended to mirror the language in the Executive Order.

iii. Proposed Section 1.9(D) – Definition of "Broadband internet access service" or ("BIAS"). Proposed Section 1.9(0). 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 l .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.

RESPONSE: The Department accepts the comment and removes the phrase "but is not limited to" from the final regulations in section 1.9(D).

iv. Proposed Section 1.9(G)(l). 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)(l) 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.

RESPONSE: The Net Neutrality EO provides:

As soon as practicable, the Division of Purchases, with input from the Division of Public Utilities Commission (DPUC), the Emergency Management Administration (EMA), and the Division of Information Technology (DOIT), shall amend the State's procurement rules and regulations as necessary and appropriate to comply with this directive, and issue such policies and other guidance, and take such other steps as are determined to be necessary and

appropriate, to ensure that this Order is appropriately implemented and enforced.

The language of Section 1.9(G)(l) mirrors this language in the EO. The Department is entitled to seek recommendations from other agencies. This language allows flexibility and the ability for the Department to seek guidance. The comment is not accepted.

v. In addition to exceeding the authority granted by the EO, proposed Section l.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 l .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."

RESPONSE: The Department has deleted the phrase "require that end users pay different or higher rates to access specific types of content or applications" from the proposed regulations. Otherwise, the Department hereby responds to this comment by adopting and incorporating the response to I(a) above. This comment is accepted in part and denied in part.

II. NECTA

a. Supports comments from CTIA

RESPONSE: See above responses to comments from CTIA.

b. Regulations are preempted and violate the commerce clause.

RESPONSE: See response to I(a) above.

c. Specific comments:

i. 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.

RESPONSE: This phrase was deleted from the proposed regulations. See response to I(d)(i) above.

ii. 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.

RESPONSE: See response to I(d)(ii) above.

iii. 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.

RESPONSE: This phrase was deleted. See response to I(d)(iii) above.

iv. Proposed Section l.9(G)(l). 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)(l) 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.

RESPONSE: See response to I(d)(iv).

v. 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 l .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, terns or conditions of VoIP Service or IP-enabled service." This is yet another reason the Department should not impose this requirement.

RESPONSE: See response to I(a) above.

III. CenturyLink

a. EO 18-02 Is Unlawful as It Is Preempted By Federal Law

RESPONSE: See response to I(a) above.

b. The Amendments to the regulations should Include language limiting the State's ultimate remedy in the event of a dispute about the Net Neutrality requirements. 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 as follows:

1.5 (*A)"Contract dispute means a circumstance whereby a contractor and the state user agency are unable to arrive at a mutual interpretation of the requirements, limitations, or compensation for the performance of a contract. Sections B through F expressly do not apply to contract disputes relating to the Internet neutrality principles described in Section 1.9 below, which are governed solely by Section G.*

1.5(G)-- Actions in Event of Contract Disputes Regarding Internet Neutrality Principles. In the event of any disagreement, dispute, claim or controversy arising out of or relating to the Internet Neutrality principles in Section 1.9 below or Executive Order No. 18-02, including but not limited to the perceived violation, threatened breach or actual breach thereof (collectively, an "Internet Neutrality Dispute"), the following procedures shall apply. In the event of an Internet Neutrality Dispute, the parties will attempt to resolve the Internet Neutrality Dispute through good faith negotiations conducted by the representatives designated by each party. The party asserting the Internet Neutrality Dispute will give prompt written notice to the other party describing the Internet Neutrality Dispute in reasonable detail. If the designated representatives are unable to resolve the Internet Neutrality Dispute within 45 business day(s) (or such other period

agreed upon by the parties), the parties shall refer the Internet Neutrality Dispute to their respective senior management. If senior management is unable to resolve the Internet Neutrality Dispute within the subsequent 45 business days (or such other period agreed upon by the parties), then either party may terminate the Contract without liability, except for obligations unrelated to the Internet Neutrality Requirements in Section 1.9 or Executive Order No. 18-02 and arising prior to the date of termination. For the avoidance of doubt, termination of the Contract shall be the parties' sole and exclusive remedy for an Internet Neutrality Dispute.

RESPONSE: The Department already has existing contractual dispute provisions in 220-RICR-30-00-1.5 and protest resolution provisions in 220-RICR-30-00-1.6 . Any additional dispute provisions and processes would be redundant. Therefore, this comment is not accepted.

IV. US Telecom

a. State efforts to regulate the internet that are inconsistent with federal policies will also be preempted by federal law.

RESPONSE: See response to I(a) above.

b. More specifically:
    i. Paragraph 2(c) of the Executive Order says that adherence to net neutrality principles means a provider shall not "Engage in paid prioritization unless the State waives the ban . . .." Proposed section 1.9(B)(3) of the regulations appears to go further by adding the language in bold: "Engage in paid prioritization or require that end users pay different or higher rates to access specific types of content or applications unless the State . . . ." That language does not appear in the definition of paid prioritization contained in paragraph 5 of the Executive Order; it is vague, potentially anti-consumer and should be stricken.

RESPONSE: See response to I(d)(i) above.

    ii. The proposed regulations would add a level of bureaucracy to the waiver process. The Executive Order says that the Director can grant a waiver "only upon receipt of a written justification from a State Agency …." However, proposed Section 1.9(G)(1) of the regulations would also require that the PUC, the Emergency Management Agency and the Division of Information Technology evaluate all waiver requests and make recommendations to the Director. To the extent the waiver process is workable, the additional layers of review and delay do not match to the speed and nature of developments in the internet and may render the waiver process a dead letter.

RESPONSE: See response to I(d)(iv).

iii. The proposed regulations would apply a different substantive standard to a waiver request. The Executive Order at paragraph 9 says a waiver may be granted if the Director finds that it "would serve a legitimate and significant interest of the State." In contrast, proposed Section 1.9(G)(2) adds the following language in bold that proposes that the Director shall determine if the waiver "is in the State's best interest and serves a legitimate and significant public interest," thereby imposing two different standards that presumably must be met. This additional language should be stricken.

RESPONSE: See response to I(d)(ii) above.

The proposed definition of broadband internet access service (BIAS) in section 1.9(D) of the rule also varies from the language in the Executive Order and is arguably broader than the definition in the Executive Order. Paragraph 3 of the Executive Order provides that BIAS "also encompasses" any service that the FCC finds is functionally equivalent to the defined service. The proposed regulation provides that BIAS "includes, but is not limited to" such equivalent services, leaving open the possibility that the Department or others may sweep additional internet or data services into the definition of BIAS, improperly broadening the scope of the Executive Order. The definition of BIAS in the regulations should be conformed to that in the Executive Order.

RESPONSE: See response to I(d)(iii) above.

V. ACLU

a. On 1.9(D), ACLU suggests revising the second sentence to read as follows:

The term broadband internet access service also includes, but is not limited to, any service that the Federal Communications Commission determines to be providing a functional equivalent of the service described in the preceding sentence or which is used to evade the protections set forth in this regulation.

ACLU Comment: The goal of this minor amendment is merely to make very clear that any FCC determinations are supplementary to the Department's determinations. This will avoid any possible pre-emption arguments and further recognizes that the current FCC is unlikely to be helpful in any event in this regard.

RESPONSE: The Department has revised this sentence in 1.9(D) to read as follows: "The term 'Broadband Internet Access Service' also includes any service that the Federal Communications Commission determines to be providing a functional equivalent of the service described in the preceding sentence or which is used to evade the protections set forth in this regulation."

b. ACLU would suggest revising the first sentence of 1.9(G) as follows:

Waivers to the within internet neutrality principles may be granted by the Director of Administration/Chief Purchasing Officer if the specific practice is in the public interest,

promotes public safety, or is not otherwise inconsistent with the purpose of this Order, and only upon written request from a State agency director.

ACLU Comment: This clarifying amendment would simply make the provision consistent with the language in section 1.9(B)(3) and as expressed in the executive order.

RESPONSE: The Department has revised the language of section 1.9(G)(2) to mirror the language of the Executive Order.