Before the
OREGON PUBLIC UTILITY COMMISSION

Disclosures and Procedures for Broadband Internet Access Service Providers Contracting with Public Bodies.	)))	Docket No. AR 618

COMMENTS OF CTIA

CTIA[1] respectfully submits its comments in response to the Oregon Public Utility Commission's ("Commission's") Notice of Proposed Rulemaking ("Notice") filed September 21, 2018 in the above-captioned docket.

I. INTRODUCTION AND SUMMARY

CTIA and its members remain fully committed to an open Internet. This commitment is reflected in the enforceable public disclosures CTIA's members have made regarding their Internet practices. That said, as CTIA noted during the workshop process and the recent hearing in this proceeding, there are substantial issues with net neutrality regulations for Oregon.

Most significantly, Oregon is preempted from imposing state net neutrality regulations because Broadband Internet Access Service ("BIAS") is an interstate information service, and state regulation of such is preempted. Along those lines, because the proposed Consumer Proprietary Network Information ("CPNI") rules pertain to intrastate telecommunications services only and BIAS is definitionally an interstate information service, those rules would not apply.

[1] CTIA – The Wireless Association ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

State net neutrality rules could also have a negative impact on contracting with Oregon governmental entities by creating significant uncertainty surrounding compliance. Additionally, state net neutrality rules would contravene Congress' goal of a light-touch, national regulatory framework, which helps ensure that the industry is not subject to a "patchwork quilt" of inconsistent state regulations which in turn decrease efficiency and raise costs of service.

The current regulatory regime of transparency and disclosure already protects Internet openness. CTIA's members have made public commitments to preserve core principles of Internet openness, and those commitments are fully enforceable by the Federal Trade Commission ("FTC") and state attorneys general, provided that state enforcement is consistent with federal law. Failure to make required disclosures is subject to the Federal Communications Commission's ("FCC's") enforcement authority. Anticompetitive conduct remains subject to antitrust laws, such as the Sherman Act, that are enforceable by the Department of Justice ("DOJ") and other state and federal agencies with antitrust enforcement powers.

CTIA recognizes and understands that the Commission is a creature of the Legislature, and that the Legislature has required the Commission to take certain actions with regard to net neutrality. CTIA thanks the Commission and its staff for their efforts to draft rules within the confines of the duties and responsibilities clearly delineated under HB 4155, and for reaching out to stakeholders for workshops and comments.

II. HB 4155 IS PREEMPTED BY FEDERAL LAW

As previously noted by CTIA in the workshops and hearing in this proceeding, HB 4155 is federally preempted because it applies to BIAS, an interstate information service. CTIA recognizes that the Commission is required to perform those tasks required of it under HB 4155, so CTIA does not here provide a full recitation of the manner in which the HB 4155 violates

federal law. Nevertheless, as explained at the hearing, there are a number of developments in other states that CTIA wishes to highlight for the Commission.

First, the Commission should note that the United States and the broadband industry are challenging in federal courts other states' net neutrality laws that are similar to Oregon's. In California, the DOJ sued to enjoin the state's net neutrality statute from being enforced or given effect, and to have it declared preempted by federal law and in violation of the U.S. Constitution.[2] CTIA and other industry associations jointly brought a lawsuit seeking the same relief.[3] And in Vermont, CTIA and other industry associations also jointly sued the state to have its net neutrality law and Executive Order enjoined from being enforced or given effect, and to have them declared preempted by federal law and in violation of the U.S. Constitution.[4]

California has now entered into a stipulation, which was approved by the U.S. District Court, agreeing to stay the litigation and not enforce its statute until a final decision is issued on the appeal of the FCC's *Restoring Internet Freedom Order*[5] by the D.C. Circuit or the Supreme Court (if further review is sought by either party).[6] The stipulation entered into regarding the California litigation relies in part on the Hobbs Act, which requires (and the Ninth Circuit's precedent recognizes) that a federal district court must presume the validity of a final FCC order until its validity has been finally determined by a federal appeals court or the Supreme Court.[7] As such, should the Oregon statute and/or Commission's rules be challenged in federal district

[2] *See United States v. State of Cal. et al.*, No. 2:18-at-01539 (E.D. Cal. filed Sept. 30, 2018).
[3] *See Am. Cable Ass'n et al. v. Becerra*, No. 2:18-cv-02684 (E.D. Cal. filed Sept. 30, 2018).
[4] *See Am. Cable Ass'n et al. v. Scott et al.*, No. 2:18-cv-00167 (D. Vt. Filed Oct. 18, 2018).
[5] Fed. Comms. Comm'n, *Restoring Internet Freedom Order*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) ("*Restoring Internet Freedom Order*").
[6] *See* Order Granting the United States of America's Motion to Stay Proceedings Pending Appeal, *U.S. v. State of Cal*., No. 2:18-at-01539 (E.D. Cal. filed Oct. 18, 2018); Stipulation Regarding Temporary Stay of Litigation and Agreement Not to Enforce Senate Bill 811, *Am. Cable Ass'n et al. v. Becerra*, No. 2:18-cv-02684 (E.D. Cal. filed Oct. 26, 2018).
[7] 47 U.S.C. §402(a), 28 U.S.C. §2342(1); *see also Wilson v. A.H. Belo Corp.,* 83 F.3d 393 (9th Cir. 1996) *and United States v. Dunifer,* 219 F.3d 1004 (9th Cir. 2004).

court, the Hobbs Act would likewise require that court to accept the validity of the FCC's *Restoring Internet Freedom Order* and the federal preemption it reaffirms.

The arguments raised in the complaints filed in Vermont and California are equally applicable to HB 4155. The FCC affirmed in the *Restoring Internet Freedom Order* that states are preempted from imposing net neutrality regulations.[8] And in Vermont, CTIA argued that any procurement requirements are also invalid as preempted indirect regulation, as held by the Supreme Court.[9] While a state generally is free to specify the characteristics of the products and services it purchases for its own use, Supreme Court precedent draws a controlling distinction between the role of the state as "market participant" and as regulator. Specifically, the Supreme Court's cases instruct that the market participant exception does not apply where the challenged action, "for all practical purposes . . . is tantamount to regulation."[10] A state acts as a regulator, and not as a market participant, when the state measure at issue "is neither 'specifically tailored to one particular job' nor a 'legitimate response to state procurement constraints or to local economic needs.'"[11] That is the case here where HB 4155's strictures apply not merely to services provided directly to Oregon governmental entities, but to service providers' offerings to all customers in Oregon.

In Vermont and California, CTIA also argued that because the proposed rules would have a significant negative impact on interstate commerce, they would violate the Commerce Clause

[8] *Restoring Internet Freedom Order* at para. 195 (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).
[9] *See 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.")
[10] *Wisconsin Dep't of Indus. v. Gould, Inc.,* 475 U.S. 282, 289 (1986).
[11] *Brown*, 554 U.S. at 70.

of the U.S. Constitution as well.[12] Under the dormant" or "negative" Commerce Clause, a state may not "discriminate against or burden the interstate flow of articles of commerce,"[13] or "erect barriers against interstate trade."[14] As the FCC has long recognized, and as courts have confirmed, Internet access service is inherently interstate, and it is impossible or impracticable to separate Internet service into intrastate and interstate activities. Thus, "it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States."[15]

Again, CTIA recognizes that the Commission is just doing what the Legislature has ordered it to do. The above overview of preemption arguments raised in lawsuits in California and Vermont is provided so the Commission is aware of the legal issues inherent in HB 4155.

III. THE PROPOSED RULES ON CPNI ARE INAPPLICABLE AND UNNECESSARY

The Commission should reject its proposed rule regarding CPNI, because it fails to protect BIAS consumers' personal/proprietary information, which appears to be the Commission's intent, and because it was not required by HB 4155. As explained below, the Commission's proposed rule regarding CPNI indicates that the rules promulgated pursuant to HB 4155 do not relieve carriers of their obligations under OAR 860-032-0510. However, because OAR 860-032-0510 applies only to intrastate telecommunications services[16] and the rules promulgated pursuant to HB 4155 are only relevant to BIAS, an *interstate information* service, OAR 860-032-0510 is inapplicable.

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[12] *See 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.")
[13] *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994).
[14] *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980).
[15] *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (invalidating a Vermont statute regulating the Internet because the "[I]nternet's geographic reach . . . makes state regulation impracticable").
[16] *See* OAR 860-032-0510(2) ("This rule applies to all telecommunications carriers providing *intrastate telecommunications service* in Oregon...") (emphasis added).

While CTIA is not privy to the concerns that prompted the Commission to propose a rule that was not required by HB 4155, CTIA urges the Commission to recognize that the privacy of consumers' personal/proprietary information is safeguarded by existing state and federal privacy regimes, as well as established and disclosed carrier privacy practices. At the federal level, wireless customers' privacy is protected by a comprehensive set of standards, including the FCC's CPNI rules (for telecommunications services like voice) and the FTC Act (for broadband and other services). Other federal statutes also protect consumer privacy, including the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and others. The FTC, FCC, and Oregon's consumer protection agencies have statutory tools and enforcement authority to protect the privacy of broadband customers.

In addition to Oregon's and federal privacy protections, the wireless industry is committed to protecting consumer privacy, and CTIA's Consumer Code for Wireless Service ("Consumer Code") includes a provision for signatories to abide by a specific set of practices for the protection of customer privacy, including complying with applicable federal and state laws, and to make publicly available their privacy policies.[17] The Consumer Code also incorporates CTIA's Best Practices and Guidelines for Location-Based Services.[18] Additionally, in 2017, CTIA and many member wireless carriers, and many other ISPs, committed to a robust set of ISP Privacy Principles, which are based on and consistent with the FTC's privacy framework.[19] Because the signatories publicly stated their adherence to these principles, they are

[17] *Available at* https://www.ctia.org/the-wireless-industry/industry-commitments/consumer-code-for-wireless-service.
[18] *Available at* https://www.ctia.org/the-wireless-industry/industry-commitments/best-practices-and-guidelines-for-location-based-services.
[19] *See* https://prodnet.www.neca.org/publicationsdocs/wwpdf/12717ctia.pdf (January 27, 2017).

independently enforceable by the FTC and state attorneys general, all of whom have authority to enforce against deceptive practices.

Regardless of these safeguards, the Commission's existing CPNI rule pertains only to *intrastate, telecommunications* services.[20] The *Restoring Internet Freedom Order* reclassified BIAS as an information service, mutually exclusive from a telecommunications service. And, even independent of whether BIAS is an information service, the FCC's longstanding precedent holds "that [BIAS] is jurisdictionally interstate for regulatory purposes."[21] Accordingly, the Commission's (and FCC's) rules regarding CPNI, cannot apply to BIAS, by their own terms. Therefore, the proposed rule's declaration that the rules promulgated pursuant to HB 4155, all of which apply to BIAS, do not relieve carriers of their obligations under the Commission's and the FCC's CPNI rules serves no purpose.

Accordingly, the Commission should amend its proposed rules to remove the proposed rule regarding CPNI.

IV. THE PROPOSED RULES WOULD NEGATIVELY IMPACT CONTRACTING WITH OREGON GOVERNMENTAL ENTITIES

Even though HB 4155 is preempted by federal law, CTIA's members are interested in ensuring that contracting with Oregon governmental entities is not rendered inefficient by promulgation of the proposed rules. Companies, and indeed the state itself, need certainty in order for the contract bidding process to proceed properly and efficiently. For instance, HB 4155 creates uncertainty whether a BIAS provider that prevents operation on its network of a device that is in fact harmful to its network may contract with Oregon governmental entities without a

[20] *See* OAR 860-032-0510(2) ("This rule applies to all telecommunications carriers providing intrastate *telecommunications service* in Oregon...") (emphasis added).
[21] Fed. Comms. Comm'n, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC Rcd 5601, at para 431, fn. 1275 (emphasis added).

determination from the Commission confirming the device is harmful and that excluding its operation is reasonable under HB 4155. Similarly, if a non-profit educational advancement organization compensates a BIAS provider to exempt from data caps access to certain websites that economically disadvantaged Oregon students use to complete homework assignments, the BIAS provider may be uncertain whether it can contract with Oregon governmental entities without a determination from the Commission that the practice provides a significant public interest benefit.[22] With the uncertainties that arise under HB 4155, it will be difficult for the contracting process to proceed fairly and efficiently if potential bidders have differing interpretations of the law or how to establish compliance.

CTIA understands that the Commission intends to consider methods to ensure that contracting with Oregon governmental entities is not rendered inefficient by the Commission's proposed rules. In the Commission's staff's report in this docket, they recognized the need for further work in this area, and CTIA agrees with staff that further work is required.[23] If no further rules will be proposed, CTIA asks that parties be afforded the opportunity to offer supplemental comments on the topic.

Without some such process in place to ensure certainty regarding compliance, the contract bidding processes could lead to anti-competitive results, as companies would essentially be bidding "blind" without knowledge of whether they will be able to meet the legal requirements for the procurement they are bidding on.

[22] These fictitious examples are provided purely for illustrative purposes. CTIA makes no representation as to whether determinations from the Commission are in fact needed in these or any other circumstances.
[23] *See* Public Utility Commission of Oregon, *Request to Initiate a Rulemaking to Adopt Proposed Rules Related to Oregon Laws 2018, Chapter 88 (HB 4155)*, Staff Recommendation, at p. 9 (available at https://edocs.puc.state.or.us/efdocs/HAU/ar618hau143748.pdf).

V. CONCLUSION

In addition to having a significant negative impact on contracts with Oregon governmental entities, the proposed rules would negatively impact Oregon consumers by creating an inefficient and unnecessary "patchwork quilt" of state regulation. CTIA's members, either on their own or through their associations, have made public commitments to preserve core principles of Internet openness, and the *Restoring Internet Freedom Order* protects Internet openness with a regime of transparency and disclosure rather than heavy-handed regulations. CTIA's members' commitments, as the FCC has explained, are fully enforceable by the FTC and state attorneys general under federal and state unfair and deceptive trade practices laws (provided they enforce such commitments in a manner consistent with federal law).[24] And the Internet has remained free and open since the adoption of the *Restoring Internet Freedom Order*, just as it was under the longstanding light-touch approach that applied for most of the Internet's history.

As that order noted, disparate state and local requirements could "significantly disrupt the balance" struck by federal law and "impair the provision of [BIAS] by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all the different jurisdictions in which it operates."[25] Rather than benefit consumers, HB 4155 will increase compliance costs and the cost of doing business in Oregon, dissuading investment and creating consumer confusion over which set of rules applies inside and outside the state.

HB 4155 is preempted by federal law, but CTIA recognizes that the Commission is compelled to follow the Legislature's mandate and promulgate rules. CTIA appreciates the Commission's efforts to craft rules confined to the duties and responsibilities defined in HB 4155, even though HB 4155 ultimately violates federal law. Although beyond the Commission's

[24] *See Restoring Internet Freedom Order* at para. 141.
[25] *Restoring Internet Freedom Order* at para. 194.

authority, Oregon should support the two-pronged approach of state and federal enforcement of the federal regulatory regime coupled with carriers' voluntary commitments, which has proven successful and will not lead to disparate, inefficient, and confusing regimes for net neutrality.

Respectfully submitted,

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